NORTH CAROLINA COURT OF APPEALS REPORTS

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173 N.C. APP.

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

Judges

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

Emergency Recalled Judges

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

Former Chief Judges

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

Former Judges

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

Administrative Counsel
FRANCIS E. DAIL

Clerk
JOHN H. CONNELL

OFFICE OF STAFF COUNSEL

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Leslie Hollowell Davis

Assistant Director
Daniel M. Horne, Jr.

Staff Attorneys
John L. Kelly
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Bryan A. Meer
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Kathleen Naggs Bolton

ADMINISTRATIVE OFFICE OF THE COURTS

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Ralph A. White, Jr.

ASSISTANT APPELLATE DIVISION REPORTERS
H. James Hutcheson
Kimberly Woodell Sieredzki

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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

DISTRICT	JUDGES	ADDRESS
15B	Carl Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill
	Fourth Division	
11A	Franklin F. Lanier	Buies Creek
11B	Thomas H. Lock[4]	Smithfield
12	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
	Jack A. Thompson	Fayetteville
	James F. Ammons, Jr.	Fayetteville
13	William C. Gore, Jr.	Whiteville
	Ola M. Lewis	Southport
16A	richard T. Brown[5]	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	Gary L. Locklear	Pembroke
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	Wentworth
17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Catherine C. Eagles	Greensboro
	Henry E. Frye, Jr.	Greensboro
	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	Greensboro
	R. Stuart Albright	Greensboro
19B	Vance Bradford Long	Asheboro
21	Judson D. DeRamus, Jr.	Winston-Salem
	William Z. Wood, Jr.	Winston-Salem
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
23	Edgar B. Gregory[6]	North Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	John L. Holshouser, Jr.[7]	Salisbury
19D	James M. Webb	Whispering Pines
20A	Michael Earle Beale	Wadesboro
20B	Susan C. Taylor	Monroe
	W. David Lee	Monroe
22	Mark E. Klass	Lexington
	Kimberly S. Taylor	Hiddenite
	Christopher Collier	Mooresville
	Seventh Division	
25A	Beverly T. Beal	Lenoir
	Robert C. Ervin	Morganton
25B	Timothy S. Kincaid	Hickory
	Nathaniel J. Poovey	Hickory
26	Robert P. Johnston	Charlotte

DISTRICT	JUDGES	ADDRESS
	W. Robert Bell	Charlotte
	Richard D. Boner	Charlotte
	J. Gentry Caudill	Charlotte
	David S. Cayer	Charlotte
	Yvonne Evans	Charlotte
	Linwood O. Foust	Charlotte
27A	Jesse B. Caldwell III	Gastonia
	Timothy L. Patti	Gastonia
27B	Forrest Donald Bridges	Shelby
	James W. Morgan	Shelby
	Eighth Division	
24	James L. Baker, Jr.	Marshall
	Charles Phillip Ginn	Marshall
28	Dennis Jay Winner	Asheville
	Ronald K. Payne	Asheville
29A	Laura J. Bridges	Marion
29B	Mark E. Powell[8]	Rutherfordton
30A	James U. Downs	Franklin
30B	Janet Marlene Hyatt	Waynesville

SPECIAL JUDGES

Karl Adkins	Charlotte
Steve A. Balog	Burlington
Albert Diaz	Charlotte
Richard L. Doughton	Sparta
Thomas D. Haigwood	Greenville
James E. Hardin, Jr.	Durham
D. Jack Hooks, Jr.	Whiteville
Jack W. Jenkins	Morehead City
John R. Jolly, Jr.	Raleigh
Ripley Eagles Rand[9]	Raleigh
John W. Smith	Wilmington
Ben F. Tennille	Greensboro
Gary E. Trawick, Jr.	Burgaw

EMERGENCY JUDGES

W. Douglas Albright	Greensboro
Henry V. Barnette, Jr.	Raleigh
Anthony M. Brannon	Durham
Stafford G. Bullock	Raleigh
Narley L. Cashwell[10]	Raleigh
C. Preston Cornelius	Mooresville
B. Craig Ellis[11]	Laurinburg
Larry G. Ford[12]	Salisbury
Ernest B. Fullwood[13]	Wilmington
Howard R. Greeson, Jr.	High Point

JUDGES	ADDRESS
ZORO J. GUICE, JR.[14]	Rutherfordton
MICHAEL E. HELMS[15]	North Wilkesboro
CLARENCE E. HORTON, JR.	Kannapolis
DONALD M. JACOBS	Raleigh
JOSEPH R. JOHN, SR.	Raleigh
CHARLES C. LAMM, JR.	Boone
JAMES E. LANNING	Charlotte
JOHN B. LEWIS, JR.	Farmville
JERRY CASH MARTIN	King
PETER M. MCHUGH[16]	Reidsville
JAMES E. RAGAN III	Oriental
DONALD L. SMITH	Raleigh
GEORGE L. WAINWRIGHT[17]	Morehead City
RUSSELL G. WALKER, JR.[18]	Asheboro

RETIRED/RECALLED JUDGES

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

1. Retired 31 December 2006.
2. Elected and sworn in 2 January 2007.
3. Elected and sworn in 1 January 2007 to replace Narley L. Cashwell who retired 31 December 2006.
4. Elected and sworn in 2 January 2007 to replace Knox V. Jenkins, Jr. who retired 31 December 2006.
5. Appointed and sworn in 10 January 2007 to replace B. Craig Ellis who retired 31 December 2006.
6. Elected and sworn in 1 January 2007 to replace Michael E. Helms who retired 31 December 2006.
7. Elected and sworn in 2 January 2007 to replace Larry G. Ford who retired 31 December 2006.
8. Elected and sworn in 1 January 2007 to replace Zoro J. Guice, Jr. who retired 31 December 2006.
9. Appointed and sworn in 29 December 2006.
10. Appointed and sworn in 8 January 2007.
11. Appointed and sworn in 1 January 2007.
12. Appointed and sworn in 2 January 2007.
13. Appointed and sworn in 2 January 2007.
14. Appointed and sworn in 5 January 2007.
15. Appointed and sworn in 1 January 2007.
16. Resigned 6 December 2006.
17. Appointed and sworn in 29 January 2007.
18. Resigned 6 December 2006.

DISTRICT COURT DIVISION

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

DISTRICT	JUDGES	ADDRESS
	David B. Brantley	Goldsboro
	Lonnie W. Carraway	Goldsboro
	R. Leslie Turner	Kinston
	Timothy I. Finan[7]	Goldsboro
	Elizabeth A. Heath	Kinston
9	Charles W. Wilkinson, Jr. (Chief)	Oxford
	H. Weldon Lloyd, Jr.	Henderson
	Daniel Frederick Finch	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
	Randolph Baskerville	Warrenton
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Joyce A. Hamilton (Chief)	Raleigh
	James R. Fullwood	Raleigh
	Anne B. Salisbury	Raleigh
	Robert Blackwell Rader	Raleigh
	Paul G. Gessner	Raleigh
	Kristin H. Ruth	Raleigh
	Craig Croom	Raleigh
	Jennifer M. Green	Raleigh
	Monica M. Bousman	Raleigh
	Jane Powell Gray	Raleigh
	Shelly H. Desvouges	Raleigh
	Jennifer Jane Knox	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Vinston M. Rozier, Jr.	Raleigh
	Lori G. Christian[8]	Raleigh
	Christine M. Walczyk[9]	Raleigh
11	Albert A. Corbett, Jr. (Chief)	Smithfield
	Jacquelyn L. Lee	Sanford
	Jimmy L. Love, Jr.	Sanford
	Addie M. Harris-Rawls	Clayton
	George R. Murphy	Lillington
	Resson O. Faircloth II	Lillington
	James B. Ethridge	Smithfield
	Robert W. Bryant, Jr.	Lillington
	R. Dale Stubbs[10]	Lillington
12	A. Elizabeth Keever (Chief)	Fayetteville
	Robert J. Stiehl III	Fayetteville
	Edward A. Pone	Fayetteville
	Kimbrell Kelly Tucker	Fayetteville
	John W. Dickson	Fayetteville
	Cheri Beasley	Fayetteville
	Talmadge Baggett[11]	Fayetteville
	George J. Franks[12]	Fayetteville
	David H. Hasty[13]	Fayetteville
13	Jerry A. Jolly (Chief)	Tabor City
	Napoleon B. Barefoot, Jr.	Supply
	Thomas V. Aldridge, Jr.	Whiteville
	Nancy C. Phillips	Elizabethtown
	Douglas B. Sasser	Whiteville
	Marion R. Warren	Exum

DISTRICT	JUDGES	ADDRESS
14	Elaine M. Bushfan (Chief)	Durham
	Craig B. Brown	Durham
	Ann E. McKown	Durham
	Marcia H. Morey	Durham
	James T. Hill	Durham
	Nancy E. Gordon[14]	Durham
	William Andrew Marsh III[15]	Durham
15A	James K. Roberson (Chief)	Graham
	Ernest J. Harviel	Graham
	Bradley Reid Allen, Sr.	Graham
	G. Wayne Abernathy	Graham
15B	Joseph M. Buckner (Chief)	Hillsborough
	Alonzo Brown Coleman, Jr.	Hillsborough
	Charles T. L. Anderson	Hillsborough
	M. Patricia DeVine	Hillsborough
	Beverly A. Scarlett[16]	Hillsborough
16A	William G. McIlwain (Chief)[17]	Wagram
	Regina M. Joe[18]	Raeford
	John H. Horne, Jr.[19]	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
	John B. Carter, Jr.	Lumberton
	William Jeffrey Moore	Pembroke
	James Gregory Bell	Lumberton
17A	Fredrick B. Wilkins, Jr. (Chief)	Wentworth
	Stanley L. Allen	Wentworth
	James A. Grogan[20]	Wentworth
17B	Charles Mitchell Neaves, Jr. (Chief)[21]	Elkin
	Spencer Gray Key, Jr.	Elkin
	Mark Hauser Badget	Elkin
	Angela B. Puckett[22]	Elkin
18	Joseph E. Turner (Chief)	Greensboro
	Lawrence McSwain	Greensboro
	Wendy M. Enochs	Greensboro
	Susan Elizabeth Bray	Greensboro
	Patrice A. Hinnant	Greensboro
	A. Robinson Hassell	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	Greensboro
	Theresa H. Vincent	Greensboro
	William K. Hunter	Greensboro
	Linda Valerie Lee Falls	Greensboro
	Sherry Fowler Alloway	Greensboro
	Polly D. Sizemore[23]	Greensboro
19A	William G. Hamby, Jr. (Chief)	Concord
	Donna G. Hedgepeth Johnson	Concord
	Martin B. McGee	Concord
	Michael Knox	Concord
19B	William M. Neely (Chief)	Asheboro
	Michael A. Sabiston	Troy
	Jayrene Russell Maness	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro

DISTRICT	JUDGES	ADDRESS
	James P. Hill, Jr.	Asheboro
	Donald W. Creed, Jr.[24]	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	William C. Kluttz, Jr.	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.[25]	Salisbury
20A	Tanya T. Wallace (Chief)	Albemarle
	Kevin M. Bridges	Albemarle
	Lisa D. Thacker	Wadesboro
	Scott T. Brewer	Monroe
20B	Christopher W. Bragg (Chief)	Monroe
	Joseph J. Williams	Monroe
	Hunt Gwyn	Monroe
	William F. Helms[26]	Monroe
21	William B. Reingold (Chief)	Winston-Salem
	Chester C. Davis	Winston-Salem
	William Thomas Graham, Jr.	Winston-Salem
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lisa V. L. Menefee	Winston-Salem
	Lawrence J. Fine	Winston-Salem
	Denise S. Hartsfield	Winston-Salem
	George Bedsworth	Winston-Salem
22	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Mocksville
	L. Dale Graham	Taylorsville
	Julia Shuping Gullett	Statesville
	Theodore S. Royster, Jr.	Lexington
	April C. Wood	Statesville
	Mary F. Covington	Mocksville
	H. Thomas Church	Statesville
	Carlton Terry[27]	Lexington
23	Mitchell L. McLean (Chief)[28]	Wilkesboro
	David V. Byrd	Wilkesboro
	Jeanie Reavis Houston	Wilkesboro
	Michael D. Duncan[29]	Wilkesboro
24	Alexander Lyerly (Chief)	Banner Elk
	William A. Leavell III	Bakersville
	Kyle D. Austin	Pineola
	R. Gregory Horne	Newland
25	Robert M. Brady (Chief)	Lenoir
	Gregory R. Hayes	Hickory
	L. Suzanne Owsley	Hickory
	C. Thomas Edwards	Morganton
	Buford A. Cherry	Hickory
	Sherrie Watson Elliott	Newton
	John R. Mull	Morganton
	Amy R. Sigmon	Newton
26	Fritz Y. Mercer, Jr. (Chief)	Charlotte
	H. William Constangy	Charlotte
	Phillip F. Howerton, Jr.	Charlotte
	Rickye McKoy-Mitchell	Charlotte

DISTRICT	JUDGES	ADDRESS
	Lisa C. Bell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Nancy Black Norelli	Charlotte
	Hugh B. Lewis	Charlotte
	Nathaniel P. Proctor	Charlotte
	Becky Thorne Tin	Charlotte
	Ben S. Thalheimer	Charlotte
	Hugh B. Campbell, Jr.	Charlotte
	Thomas Moore, Jr.	Charlotte
	N. Todd Owens	Charlotte
	Christy Townley Mann	Charlotte
	Timothy M. Smith[30]	Charlotte
	Ronald C. Chapman[31]	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)[32]	Gastonia
	Angela G. Hoyle	Gastonia
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Thomas Gregory Taylor	Belmont
	Michael K. Lands[33]	Gastonia
	Richard Abernethy[34]	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	Anna F. Foster	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford[35]	Shelby
28	Gary S. Cash (Chief)	Asheville
	Shirley H. Brown	Asheville
	Rebecca B. Knight	Asheville
	Marvin P. Pope, Jr.	Asheville
	Patricia Kaufmann Young	Asheville
	Sharon Tracey Barrett	Asheville
	J. Calvin Hill[36]	Asheville
29A	C. Randy Pool (Chief)	Marion
	Athena F. Brooks	Cedar Mountain
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis	Rutherfordton
29B	Robert S. Cilley (Chief)	Pisgah Forest
	Mark E. Powell	Hendersonville
	David Kennedy Fox	Hendersonville
30	Danny E. Davis (Chief)	Waynesville
	Steven J. Bryant	Bryson City
	Richlyn D. Holt	Waynesville
	Bradley B. Letts	Sylva
	Monica Hayes Leslie	Waynesville
	Richard K. Walker[37]	Waynesville

EMERGENCY DISTRICT COURT JUDGES

Philip W. Allen	Reidsville
E. Burt Aycock, Jr.	Greenville

DISTRICT	JUDGES	ADDRESS
	SARAH P. BAILEY	Rocky Mount
	GRAFTON G. BEAMAN[38]	Elizabeth City
	RONALD E. BOGLE	Raleigh
	DONALD L. BOONE	High Point
	JAMES THOMAS BOWEN III	Lincolnton
	NARLEY L. CASHWELL[39]	Raleigh
	SAMUEL CATHEY	Charlotte
	RICHARD G. CHANEY[40]	Durham
	WILLIAM A. CHRISTIAN	Sanford
	J. PATRICK EXUM	Kinston
	J. KEATON FONVIELLE	Shelby
	THOMAS G. FOSTER, JR.	Greensboro
	EARL J. FOWLER, JR.	Asheville
	RODNEY R. GOODMAN	Kinston
	LAWRENCE HAMMOND, JR.	Asheboro
	JAMES W. HARDISON[41]	Williamston
	JANE V. HARPER[42]	Charlotte
	JAMES A. HARRILL, JR.	Winston-Salem
	RESA HARRIS	Charlotte
	ROBERT E. HODGES	Morganton
	JAMES M. HONEYCUTT[43]	Lexington
	ROBERT W. JOHNSON	Statesville
	WILLIAM G. JONES	Charlotte
	LILLIAN B. JORDAN	Asheboro
	ROBERT K. KEIGER	Winston-Salem
	DAVID Q. LABARRE	Durham
	WILLIAM C. LAWTON	Raleigh
	C. JEROME LEONARD, JR.	Charlotte
	JAMES E. MARTIN	Ayden
	EDWARD H. MCCORMICK	Lillington
	OTIS M. OLIVER[44]	Dobson
	DONALD W. OVERBY	Raleigh
	WARREN L. PATE[45]	Raeford
	DENNIS J. REDWING[46]	Gastonia
	J. LARRY SENTER	Raleigh
	MARGARET L. SHARPE	Winston-Salem
	RUSSELL SHERRILL III	Raleigh
	CATHERINE C. STEVENS	Gastonia
	J. KENT WASHBURN	Graham

RETIRED/RECALLED JUDGES

CLAUDE W. ALLEN, JR.	Oxford
JOYCE A. BROWN	Otto
DAPHENE L. CANTRELL	Charlotte
SOL G. CHERRY	Boone
WILLIAM A. CREECH	Raleigh
T. YATES DOBSON, JR.	Smithfield
SPENCER B. ENNIS	Graham
ROBERT T. GASH	Brevard
HARLEY B. GASTON, JR.	Gastonia

DISTRICT	JUDGES	ADDRESS
	ROLAND H. HAYES	Gastonia
	WALTER P. HENDERSON	Trenton
	CHARLES A. HORN, SR.	Shelby
	JACK E. KLASS	Lexington
	EDMUND LOWE	High Point
	J. BRUCE MORTON	Greensboro
	STANLEY PEELE	Hillsborough
	SAMUEL M. TATE	Morganton
	JOHN L. WHITLEY	Wilson

1. Appointed Chief Judge effective 1 January 2007.
2. Elected and sworn in 2 January 2007 to replace Grafton G. Beaman who retired 31 December 2006.
3. Appointed Chief Judge effective 1 October 2006.
4. Appointed and sworn in 19 December 2006 to replace James W. Hardison who retired 1 October 2006.
5. Appointed and sworn in 23 February 2007.
6. Appointed and sworn in 29 January 2007.
7. Appointed and sworn in 23 February 2007 to replace Rose Vaughn Williams who retired 31 December 2006.
8. Appointed and sworn in 5 February 2007.
9. Appointed and sworn in 19 February 2007 to replace Donna S. Stround who was elected to the Court of Appeals.
10. Appointed and sworn in 15 February 2007.
11. Elected and sworn in 1 January 2007 to replace Dougald Clark, Jr. who retired 31 December 2006.
12. Elected and sworn in 1 January 2007.
13. Elected and sworn in 1 January 2007.
14. Elected and sworn in 2 January 2007 to replace Richard G. Chaney who retired 31 December 2006.
15. Appointed and sworn in 14 February 2007.
16. Appointed and sworn in 8 February 2007.
17. Appointed Chief Judge effective 6 January 2007.
18. Elected and sworn in 1 January 2007 to replace Warren L. Pate who retired 31 December 2006.
19. Appointed and sworn in 16 March 2007 to replace Richard T. Brown who was appointed to the Superior Court.
20. Appointed and sworn in 26 January 2007.
21. Appointed Chief Judge effective 1 January 2007.
22. Elected and sworn in 2 January 2007 to replace Otis M. Oliver who retired 31 December 2006.
23. Appointed and sworn in 30 March 2007.
24. Appointed and sworn in 8 February 2007.
25. Appointed and sworn in 1 February 2007.
26. Appointed and sworn in 1 February 2007.
27. Elected and sworn in 1 January 2007 to replace James M. Honeycutt who retired 31 December 2006.
28. Appointed Chief Judge effective 1 January 2007.
29. Elected and sworn in 1 January 2007 to replace Edgar B. Gregory who was elected to the Superior Court.
30. Elected and sworn in 1 January 2007 to replace Jane V. Harper who retired 31 December 2007.
31. Appointed and sworn in 31 January 2007.
32. Appointed Chief Judge effective 1 January 2007.
33. Elected and sworn in 1 January 2007.
34. Appointed and sworn in 23 February 2007.
35. Appointed and sworn in 23 February 2007.
36. Appointed and sworn in 9 February 2007.
37. Appointed and sworn in 2 February 2007.
38. Appointed and sworn in 2 January 2007.
39. Appointed and sworn in 8 January 2007.
40. Appointed and sworn in 4 January 2007.
41. Appointed and sworn in 3 October 2006.
42. Appointed and sworn in 2 February 2007.
43. Appointed and sworn in 2 January 2007.
44. Appointed and sworn in 4 January 2007.
45. Appointed and sworn in 6 January 2007.
46. Appointed and sworn in 16 February 2007.

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Attorney General
ROY COOPER

Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

General Counsel
J. B. KELLY

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JULIA WHITE

Chief Deputy Attorney General
GRAYSON G. KELLEY

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CHRIS BROWNING, JR.

Senior Deputy Attorneys General

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JOSHUA H. STEIN
REGINALD L. WATKINS

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JOHN F. MADDREY

Special Deputy Attorneys General

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DAVID J. ADINOLFI II
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CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

UNITED STATES CONSTITUTION CITED

NORTH CAROLINA CONSTITUTION CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF: P.L.P.

No. COA04-1150

(Filed 6 September 2005)

1. Process and Service— termination of parental rights— date action commenced

The trial court did not lack jurisdiction in a termination of parental rights case even though respondent mother contends she did not receive proper notice of the Department of Social Services' motion to terminate her parental rights when service could only have been achieved in the instant case by meeting the requirements of N.C.G.S. § 1A-1, Rule 4, because: (1) respondent concedes that service was proper under N.C.G.S. § 1A-1, Rule 5; (2) although an action was commenced when the neglect petition was filed in 1999, the case was later closed in December 2000 when the minor child was returned to her mother's care and custody; (3) after the first case was closed in 2000, another action was not commenced until 9 May 2002 when DSS filed a petition alleging neglect, making 9 May 2002 the date of the original action in this case; and (4) 9 May 2002 was within two years of the motion for termination of parental rights as required for service in accordance with N.C.G.S. § 1A-1, Rule 5.

2. Termination of Parental Rights— order entered more than thirty days after hearing—failure to show prejudice

The trial court's order in a termination of parental rights case does not require reversal even though the order was en-

tered more than thirty days after the termination hearing was completed, because: (1) respondent mother does not argue any prejudice resulted from the late entry of the order and the Court of Appeals did not find any; and (2) although respondent asks the Court of Appeals to adopt a per se reversible error rule and remand for a new hearing, the Court of Appeals has already held that prejudice is the proper consideration when examining whether the delayed entry of an order constitutes reversible error.

3. Termination of Parental Rights— conclusions of law— clear, cogent, and convincing evidence

Clear, cogent, and convincing evidence supported the trial court's conclusions of law that grounds existed to termination respondents' parental rights, because: (1) respondent mother failed to articulate an argument or provide citations of authority in support of her assignments of errors addressed to the trial court's conclusions that she neglected the minor child under N.C.G.S. § 7B-1111(a)(1) or willfully abandoned the minor child under N.C.G.S. § 7B-1111(a)(7), thus making these grounds conclusively established without the need of addressing her arguments concerning the other grounds for termination found by the trial court; (2) the trial court properly found that respondent father neglected the child where the father had been continuously incarcerated since 1998 and would be incarcerated for approximately ten more years at which time the child will have reached the age of majority, the father did not obtain a substance abuse assessment and follow-up treatment, the child cannot be placed with her father during his incarceration, the child had nightmares after visiting her father in prison, and the father was not significantly involved in the child's life before or after his incarceration in 1998; (3) the trial court appropriately and permissibly relied in part on respondent father's past and current incarceration in passing on this motion to terminate parental rights; and (4) it is the duty of the trial court to consider and weigh all of the evidence and determine the credibility of witnesses, and the trial court did not find that respondent father wrote letters to the child before 2003 which was contrary to the father's testimony.

Judge TYSON concurring in part and dissenting in part.

IN RE P.L.P.

[173 N.C. App. 1 (2005)]

Appeal by respondents father and mother from order entered 23 March 2004 by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals 21 April 2005.

Charlotte W. Nallan and Kavita Uppal, for petitioner Buncombe County Department of Social Services.

Judy N. Rudolph, for Guardian ad Litem.

M. Victoria Jayne, for respondent father.

Charlotte Gail Blake, for respondent mother.

LEVINSON, Judge.

Mother and father appeal the trial court's termination of their parental rights over P.L.P. We affirm.

P.L.P. was born on 25 March 1995. In the months preceding her birth, mother attempted to commit suicide by drug overdose. In response, the Buncombe County Department of Social Services (DSS) offered mother parenting classes and substance abuse treatment.

In the summer and fall of 1999, DSS received reports that P.L.P. was subject to "inconsistent parenting" and domestic abuse, that mother was taking drugs, and that mother had left P.L.P. and her step-sister with mother's brother "for the night and had not returned for a few weeks." Mother's brother was given protective supervision of P.L.P. and her step-sister while mother received treatment for substance abuse and domestic violence. On one occasion, P.L.P. reported feeling sick and urinating blood, and explained that her "mama pulled the seatbelt really hard and hurt my belly."

On 5 November 1999, DSS filed a petition alleging P.L.P. was neglected, on the grounds that she did "not receive proper care, supervision, or discipline from [her] parent, guardian, custodian, or caretaker." The trial court adjudicated P.L.P. neglected, and ordered mother to complete parenting classes, domestic violence programs, and substance abuse treatment. Mother successfully completed the requirements, and by order entered 19 January 2001, the trial court ordered that (1) custody shall remain with mother, and that (2) DSS, the GAL, and their respective attorneys were "released from further responsibility in this matter and this juvenile file is hereby closed."

In November 1999, when DSS filed its first petition, father was in Buncombe County Jail. He was subsequently convicted of at-

tempted first degree murder and sentenced to an active term of fourteen to eighteen years. At the termination hearing, father admitted that, while fighting in "a barroom brawl," he had "stabb[ed] a guy with a small pocketknife[.]"

On 9 May 2002, DSS filed a second petition alleging P.L.P. and her step-sister were neglected juveniles, on the grounds that P.L.P. did "not receive proper care, supervision, or discipline from [her] parent, guardian, custodian, or caretaker" and that she lived "in an environment injurious to [her] welfare." The petition alleged that mother left her children at her brother's house for days at a time, had relapsed into substance abuse, and had been hospitalized for an overdose of drugs. Following a hearing on this petition, the trial court adjudicated P.L.P. to be neglected. The court placed P.L.P.'s custody with Buncombe County DSS, and approved her placement in the home of a caregiver.

Six months later, in December 2002, the trial court conducted a permanency planning and review hearing. The trial court found that the conditions that had required P.L.P.'s removal from her home still existed, and directed that the permanent plan of care for P.L.P. include adoption. At the next permanency planning review several months later, the trial court found that mother's situation remained unchanged. The court directed that the permanent plan for P.L.P. be adoption or guardianship with a relative.

During the summer of 2003, while the child was residing with a guardian, DSS filed another petition alleging P.L.P. was neglected. The allegations in this petition focused on domestic violence between the guardian and his girlfriend, and on the guardian's alcohol abuse. At a hearing the trial court adjudicated P.L.P. neglected, continued her custody with DSS, and changed the permanent plan for P.L.P. to adoption.

On 17 September 2003, DSS filed a motion to terminate respondents' parental rights. At the hearing on this motion, father was present in court, but mother did not appear. In its order, the trial court made findings concerning the history of adjudications, dispositions, review hearings, and permanency planning hearings for the child; the court also found that, notwithstanding his incarceration, father had been present at many of these court proceedings. The court also set out the history of P.L.P.'s placements since P.L.P. first came under the jurisdiction of the court in 1995, and made findings on mother's lack of progress in improving her parenting skills or elim-

inating her drug dependency. The court also made the following findings concerning father:

. . . .

48. That the Respondent Father has been incarcerated since 1998 and is currently serving a 14 to 18 year sentence for attempted murder. That the Respondent Father made no efforts to provide anything for the minor child at any time, and has not provided any love, nurturance [sic] or support for the minor child. That it is reasonable to assume that the Respondent Father would continue to neglect the minor child if the child was placed in his care, custody, or control as he has shown no interest in the welfare of the minor child.

. . . .

54. That the Buncombe County Department of Social Services testified, and the court will find as facts, that reunification with the Respondent Father cannot take place as Respondent Father will be incarcerated until the minor child reaches majority. That the minor child needs permanency. That the visits with the minor child were blocked but that Respondent Father could have written. Respondent Father did not obtain a substance abuse assessment and treatment, he did not cooperate with the Buncombe County Department of Social Services and he had no involvement with the minor child before his incarceration.

The trial court concluded that both parents had: (1) neglected P.L.P., under G.S. § 7B-1111(a)(1), and (2) willfully left P.L.P. in foster care for more than twelve months without showing that reasonable progress had been made to correct the conditions that led to P.L.P.'s removal, under G.S. § 7B-1111(a)(2). In addition, the court found that mother had failed to pay a reasonable portion of P.L.P.'s costs of care for a continuous six month period, under G.S. § 7B-1111(a)(3), and had willfully abandoned P.L.P. for more than six months immediately preceding the filing of the petition, under G.S. § 7B-1111(a)(7).

Upon these and other findings and conclusions, the trial court concluded that termination of respondents' parental rights was in P.L.P.'s best interests. The court's order of termination was rendered in court on 23 January 2004, and entered on 23 March 2004. From this order respondents timely appealed. On appeal, respondents each contend the termination order should be reversed because the grounds

found by the trial court are not supported by sufficient evidence. In addition, mother argues that the court lacked subject matter jurisdiction because she did not receive proper notice of the motion to terminate, and that the order on termination must be reversed because it was not timely entered.

---

[1] Mother first argues that the court lacked jurisdiction to terminate her parental rights, on the grounds that she did not receive proper notice of DSS's motion to terminate her parental rights. She concedes that service was proper under N.C.G.S. § 1A-1, Rule 5. Mother contends, however, that service could only have been achieved in the instant case by meeting the requirements of N.C.G.S. § 1A-1, Rule 4. We disagree.

N.C.G.S. § 7B-1106.1 (2003) states, in pertinent part, that: "Upon the filing of a motion [to terminate parental rights] pursuant to G.S. § 7B-1102, the movant shall prepare a notice directed to . . . [t]he parents of the juvenile." N.C.G.S. § 7B-1102 (2003), in turn, provides that the service of the motion for termination of parental rights "required by G.S. 7B-1106.1 shall be served in accordance with G.S. 1A-1, Rule 5(b)[.]" However, where "[t]wo years has elapsed since the date of the original action[,]" service "must be in accordance with . . . Rule 4[.]" G.S. § 7B-1102(b)(1)c.

Mother argues that the "original action" was in 1999, when P.L.P. first came under the jurisdiction of the juvenile court. Mother posits that, because 1999 is outside the two-year period next preceding the date of the motion to terminate parental rights, service under Rule 4 was required. She contends that, because the Buncombe County Clerk of Court's office first opened a file concerning this juvenile in 1999, and assigned her case a "99 J" file number, this must be the "date of the original action" as provided in G.S. § 7B-1102(b)(1)c. We disagree.

Under N.C.G.S. § 7B-405 (2003), an "action is commenced by the filing of a petition in the clerk's office[.]" Thus, an action was commenced when the neglect petition was filed in 1999. However, as the trial court correctly observed, the case was later "closed" in December 2000, when P.L.P. was returned to mother's care and custody. Indeed, the trial court ceased exercising jurisdiction over the juvenile at that time. *See* N.C.G.S. § 7B-201 (2003) ("When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court[.]"); *In re Dexter*, 147 N.C. App. 110,

553 S.E.2d 922 (2001) (court's jurisdiction over the minor child terminated on a date certain as provided in the court order).

In the instant case, after the first case was closed in 2000, another action was not commenced until 9 May 2002, when DSS filed a petition alleging neglect. We conclude that, because jurisdiction had been terminated by the trial court's order to "close" the case, that 9 May 2002 is the date of the "original action" in the case. Because this date is within two years of the motion for termination of parental rights, service under Rule 5 was adequate. This assignment of error is overruled.

[2] Mother next argues that the order on termination must be reversed because it was entered more than thirty days after the termination hearing was completed. We disagree.

Under N.C.G.S. § 7B-1109(e) (2003), "[t]he adjudicatory order shall be . . . entered no later than 30 days following the completion of the termination of parental rights hearing." There is a similar requirement for the entry of an order concerning the disposition, or best interests determination, of a motion to terminate parental rights. *See* N.C.G.S. § 7B-1110(a) (2003). It has not been an uncommon practice for our trial courts to delay the entry of orders on termination in violation of these time standards. In such circumstances, our appellate courts have uniformly applied a "prejudicial error" analysis to determine whether the subject order must be reversed. *See*, *e.g.*, *In re L.E.B. & K.T.B.*, 169 N.C. App. 375, 378-79, 610 S.E.2d 424, 426 (2005) ("This Court has previously stated that absent a showing of prejudice, the trial court's failure to reduce to writing, sign, and enter a termination order beyond the thirty day time window may be harmless error."). This Court has not held termination orders *per se* reversible where the time standards are not met.

In the instant case, both stages of the termination hearing, adjudication and disposition, were held on 23 January 2004. The order should have been entered within thirty days thereafter. However, the order was not entered until 23 March 2004. Mother does not argue any prejudice resulted from the late entry of the order, and we discern none. Mother nevertheless urges this Court to adopt a *per se* reversible error rule and remand for a new hearing. However, we are bound by this Court's decisions, which hold that prejudice is the proper consideration when examining whether the delayed entry of an order constitutes reversible error. *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.") (citation omitted).

We note that, in addressing this assignment of error, mother addresses the delayed entry of previous permanency planning orders and custody review orders for this juvenile. However, these orders are not the subject of this appeal and have no bearing on whether the order on termination of parental rights should be reversed. As discussed herein, the relevant statutes for an argument concerning the delayed entry of an order on termination of parental rights are G.S. § 7B-1109(e) and G.S. § 7B-1110(a).

The relevant assignments of error are overruled.

[3] We next address the contention of both mother and father that clear, cogent and convincing evidence does not support the trial court's conclusions of law that grounds existed to terminate their parental rights.

"On appeal, the standard of review from a trial court's decision in a parental termination case is whether there existed clear, cogent, and convincing evidence of the existence of grounds to terminate respondent's parental rights." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). The trial court's findings in this regard are binding on appeal "even though there may be evidence to the contrary." *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988) (citation omitted). Further, where the trial court finds multiple grounds on which to base a termination of parental rights, and "an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds." *In re Clark*, 159 N.C. App. 75, 78 n3, 582 S.E.2d 657, 659 n3 (2003) (citing *In re Greene*, 152 N.C. App. 410, 416, 568 S.E.2d 634, 638 (2002)).

"Once the petitioner has proven th[e] ground [for termination] by this standard, it has met its burden within the statutory scheme[.] . . . [T]he court then moves on to the disposition stage, where the court's decision to terminate parental rights is discretionary." *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the dispositional stage, "the best interests of the child are considered. There, the court shall issue an order terminating the parental rights unless it further determines that the best interests of the child require other-

wise." *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001); *see also* G.S. § 7B-1110(a). The fact that "the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected. . . . 'The welfare or best interest of the child is always to be treated as the paramount consideration to which even parental love must yield.' " *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252 (quoting *Wilson v. Wilson*, 269 N.C. 676, 678, 153 S.E.2d 349, 351 (1967)).

In the instant case, the trial court terminated mother's parental rights under G.S. §§ 7B-1111(a)(1) (neglect), 7B-1111(a)(2) (failure to make reasonable progress), 7B-1111(a)(3) (willful failure to pay reasonable portion of cost of care), and 7B-1111(a)(7) (abandonment).

Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure provides in part, "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(6); *see also*, *e.g.*, *In re Leftwich*, 135 N.C. App. 67, 70, 518 S.E.2d 799, 802 (1999) (where respondents failed to argue or assert authority in support of certain assignments of error on appeal from termination proceeding, those assignments held to be abandoned under Rule 28(b)(6)).

Mother has neither articulated an argument, nor provided citations of authority in support of, her assignment of errors addressed to the trial court's conclusions that she neglected P.L.P. under G.S. § 7B-1111(a)(1), or willfully abandoned P.L.P. under G.S. § 7B-1111(a)(7). Mother's cursory argument concerning neglect and abandonment is predicated upon not receiving proper notice of the motion to terminate parental rights, an argument we rejected in our above discussion. The assignments of error concerning G.S. §§ 7B-1111(a)(1) and 7B-1111(a)(7) are deemed abandoned under Rule 28(b)(6). Because these grounds are therefore conclusively established, we need not address mother's arguments concerning the other grounds for termination found by the trial court. The assignments of error pertinent to this discussion are overruled.

The trial court terminated father's parental rights under G.S. §§ 7B-1111(a)(1) (neglect), and 7B-1111(a)(2) (reasonable progress). We first address the court's conclusion that father neglected P.L.P. Father contends that because the trial court's findings of fact are not supported by clear, cogent and convincing evidence, its conclusion of law that he neglected the child cannot be sustained. We disagree.

According to N.C.G.S. § 7B-1111(a)(1) (2003), a court may terminate one's parental rights where:

> The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

"Neglect" is statutorily defined, in pertinent part, as follows:

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

N.C.G.S. § 7B-101(15) (2003).

"Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (2003). "The key to a valid termination of parental rights on neglect grounds where a prior adjudication of neglect is considered is that the court must make an *independent* determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing." *In re McDonald*, 72 N.C. App. 234, 241, 324 S.E.2d 847, 851 (1984). Where "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect[,] . . . because requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

In the instant case, the trial court found, *inter alia*, that father (1) "could have written" but did not do so; (2) "made no efforts to provide anything for the minor child"; (3) "has not provided any love, nurtur[ing] or support for the minor child"; and (4) "would continue to neglect the minor child if the child was placed in his

care[.]" These findings are supported by clear, cogent and convincing evidence in the record.

As a preliminary matter, we note that the uncontradicted evidence of record demonstrated that father had been continuously incarcerated since 1998; that father would be incarcerated for approximately ten more years, at which time P.L.P. will have reached the age of majority; that father did not obtain a substance abuse assessment and follow-up treatment; and that the child cannot be placed with father during his incarceration. In addition, although P.L.P. visited father "several" times after his incarceration in 1998, these visits were ceased by the trial court, over father's objection, for reasons adequately explained in finding of fact number 23:

> [T]he [paternal grandmother] had taken [the juvenile] to see her father in prison and [P.L.P.] . . . has been waking up screaming with nightmares about the prison bars ever since. That based on this, visits with the Respondent Father were ceased.

We next review additional pertinent evidence in the record to determine whether the trial court's findings are supported by sufficient evidence.

At the termination hearing, father admitted that before his incarceration on the attempted murder offense, he "liv[ed] the life of a criminal." Between 1995, when the child was born, and 1998, when the father was jailed on the attempted murder offense, father was in and out of jail—including one time for 120 days on misdemeanor larceny. Although father testified that he was the caretaker for the child before his incarceration, he also testified that, *e.g.*, "[a]ctually she was living with me at my mother's house[.]" Father further acknowledged that he, at times, "was at a friend's house. . . . [I]f you've ever been around two women eating a bunch of pills and cussing [sic] you 24-7, I had pretty much got run off." The testimony of Ms. Hoffart, who worked for Buncombe County DSS, indicates that father was not significantly involved in the child's life before or after his incarceration in 1998:

> A: [The father] was available until 1998, before he was incarcerated. But according to the record, he did not participate in any kind of support.
>
> Q: So he hasn't participated, since 1995, in anything that the Department has a record of, as far as care of this child or concern for her welfare?

A: No.

Q: Has he ever provided birthday cards or letters, or anything, for this child, that you're aware of?

A: Not to my knowledge.

. . . .

Q: Are you aware or have any information that [P.L.P.] has ever had [father] involved in her life in any sort of significant way?

A: The child has reported to me that she had involvement with him very early in her life, but not in many years.

Hoffart continued, when questioned by counsel for DSS:

Q: [F]easibly, he could have written to this child?

A: Yes.

Q: Did he ever once, while he was incarcerated, write to [P.L.P.]?

A: No.

When asked by counsel whether father was "involved in any way, shape or form with [P.L.P.]" during the period of time associated with the May 2002 petition alleging neglect, Hoffart answered "no." She also answered "no" when asked by counsel whether there had been any "contact or involvement by father" in July 2003, when P.L.P. was adjudicated neglected. Hoffart also testified:

Q: How many years would you say that's been that he's had no involvement with [P.L.P.]?

A: I would say approximately five.

. . .

Q: Do you have concerns about this child being in the custody of [father]?

A: Yes.

Q: What are those concerns?

A: My concerns would be that she has not maintained a stable relationship with [father].

. . . .

Q: Since you've been involved in this case since May of last year . . . has the father called you to ask about this child or made any suggestions as to who could care for her?

A: He has not contacted me directly, no.

Father testified that he had written to P.L.P. from jail, but had stopped in 2003. In addition, he stated that he spoke with P.L.P. approximately five times in 2003. According to father, he sent letters to mother "up until the time Social Services took custody" and that "[mother] probably has every one of them." Thereafter, father continued, DSS offered to give address information to him for his letters but did not do so. He did not send any letters to DSS or call DSS on his own even though he had the contact information for Social Services, "because every time I'm in court, they spend most of their time trying to keep me away from [P.L.P.], instead of trying to reunite me with her in any way." A social worker testified that, in cases involving other incarcerated parents, she forwards mail from them to their children. Furthermore, according to the record of DSS, father initiated no independent efforts to send letters to the child, and made no efforts to stay in contact with the assigned DSS worker. In fact, he had "never spoken with," written, or contacted "in any way" social worker Hoffart, who had been assigned to the case since May 2003.

We conclude that the trial court's findings of fact are supported by clear, cogent and convincing evidence, and that these findings, in turn, support its conclusion of law that father neglected the child pursuant to G.S. § 7B-1111(a)(1). Since we have concluded that the trial court did not err by concluding that father neglected P.L.P., we need not address father's further arguments regarding termination pursuant to G.S. § 7B-1111(a)(2) (failure to make reasonable progress).

We cannot disagree with the dissent's observation that the trial court relied, in part, on father's past and current incarceration in passing on this motion to terminate father's parental rights. This, of course, was appropriate and permissible. Father's incarceration, together with the balance of the record evidence and findings by the trial court, amply support this termination by the requisite standards. We respectfully disagree with the dissent's observation that father has "consistently and continually done all he can do to maintain ongoing contact with P.L.P." and therefore communicate expressions of care and concern to her. Indeed, father's own testimony—and the trial court's findings—reveal his lackluster efforts to do so. At best, the evidence would only support an inference that father sent letters

until the last time P.L.P. was removed from mother's care. Moreover, father's testimony on this issue was contradicted to some degree by the testimony of DSS employees, and "it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citation omitted). Significantly, after evaluating the witnesses' testimony, the trial court did not find that, *e.g.*, father wrote letters to the child before 2003; nor does father argue on appeal that the court was compelled to do so.

Assignments of error pertinent to this discussion are overruled. In addition, we conclude the remaining arguments by respondents are without merit.

According to social worker Hoffart, P.L.P. "could possibly for the first time in her life have some permanence." This, after at least eight (8) placements since coming into the custody of DSS.

Affirmed.

Chief Judge MARTIN concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part, dissenting in part.

I concur to affirm the trial court's order terminating mother's parental rights. I respectfully dissent from the majority's opinion affirming the trial court's order terminating father's parental rights.

I. Notice

N.C. Gen. Stat. § 7B-1102 (2003) provides in part:

> (a) When the district court is exercising jurisdiction over a juvenile and the juvenile's parents in an abuse, neglect, or dependency proceeding, a person or agency specified in G.S. 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile.
>
> (b) A motion pursuant to subsection (a) of this section and the notice requirement by G.S. 7B-1106.1 shall be served in accordance with G.S. 1A-1, Rule 5(b), except:
>
> (1) Service must be in accordance with G.S. 1A-1, Rule 4, if one of the following applies:
>
> . . . .

c. Two years has elapsed since the date of the original action.

N.C. Gen. Stat. § 7B-1106.1 (2003) states in part:

(a) Upon the filing of a motion pursuant to G.S. 7B-1102, the movant shall prepare a notice directed to each of the following persons or agency, not otherwise a movant:

(1) The parents of the juvenile.

N.C. Gen. Stat. § 1A-1, Rule 5(b) (2003) provides:

Service—How made.—A pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on the party's attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party personally is ordered by the court, upon the party's attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to the party or by mailing it to the party at the party's last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party, leaving it at the attorney's office with a partner or employee, or by sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. Eastern Time on a regular business day, as evidenced by a telefacsimile receipt confirmation. If receipt of delivery by telefacsimile is after 5:00 P.M., service will be deemed to have been completed on the next business day. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Mother asserts the "original action," as stated in N.C. Gen. Stat. § 7B-1102(b)(1)(c), began in November 1999. However, as the trial court noted during the termination hearing, that file and matter was "closed" in December 2000 and P.L.P. was returned to mother's care and custody. DSS filed a motion alleging P.L.P. to be neglected on 9 May 2002. The matter before us began in May 2002 and is a separate

and distinct action from the closed action which occurred during the Summer and Fall of 1999.

DSS properly served notice of its motion to terminate respondents' parental rights upon respondents' counsel on 17 September 2003, within two years of the initial action in May 2002. Respondents received proper service and notice of DSS's motion.

II. Findings of Fact and Conclusions of Law

Respondents assert competent evidence did not exist to support the trial court's conclusions of law and subsequent order terminating their parental rights. I concur to affirm regarding mother, but vote to reverse the trial court's order regarding father's appeal.

A. Standard of Review

"On appeal, 'our standard of review for the termination of parental rights is whether the court's 'findings of fact are based upon clear, cogent and convincing evidence' and whether the 'findings support the conclusions of law.' " *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (quoting *In re Pope*, 144 N.C. App. 32, 40, 547 S.E.2d 153, 158 (2000), *aff'd*, 354 N.C. 359, 554 S.E.2d 644 (2001)).

> There is a two-step process in a termination of parental rights proceeding. In the adjudicatory stage, the trial court must find that at least one ground for the termination of parental rights listed in N.C. Gen. Stat. § 7A-289.32 (now codified as section 7B-1111) exists. In this stage, the court's decision must be supported by clear, cogent and convincing evidence with the burden of proof on the petitioner . . . . Once one or more of the grounds for termination are established, the trial court must proceed to the dispositional stage where the best interests of the child are considered. There, the court shall issue an order terminating the parental rights unless it further determines that the best interests of the child require otherwise.

In re Blackburn, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001) (internal quotations and citations omitted).

B. Analysis

1. Father

The trial court terminated father's parental rights under N.C. Gen. Stat. §§ 7B-1111(a)(1)-(2) (2003), which provide:

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

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

(2) The parent has *willfully* left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

(Emphasis supplied).

N.C. Gen. Stat. § 7B-101(15) (2003) defines a neglected juvenile as a:

> juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare . . . .

"Neglect may be manifested in ways less tangible than failure to provide physical necessities[,] . . . the trial judge may [also] consider . . . a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship." *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982). A showing of personal contact, parental love, and affection negates neglect.

Where a respondent has been and continues to be incarcerated, our courts have prohibited termination of parental rights solely on that factor. *Compare with In re Shermer*, 156 N.C. App. 281, 290-91, 576 S.E.2d 403, 409-10 (2003) (willfulness not shown under N.C. Gen. Stat. § 7B-1111(a)(2) where the respondent was incarcerated but wrote letters and informed DSS that he did not want his parental rights terminated); *In re Clark*, 151 N.C. App. 286, 565 S.E.2d 245 (ter-

mination of parental rights reversed where the father was incarcerated and evidence was insufficient to find that he was unable to care for his child), *disc. rev. denied*, 356 N.C. 302, 570 S.E.2d 501 (2002); *In re Yocum*, 158 N.C. App. 198, 204, 580 S.E.2d 399, 403 (the respondent was incarcerated but also did nothing to emotionally or financially support and benefit his children), *aff'd*, 357 N.C. 568, 597 S.E.2d 674 (2003); *In re Williams*, 149 N.C. App. 951, 563 S.E.2d 202 (2002) (a father's parental rights terminated because he was incarcerated *and* he failed to show filial affection for his child).

A review of the transcript and record indicates the primary reason for terminating father's parental rights under both statutory grounds results from his incarceration. Father was charged with and convicted of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury and was sentenced to an active term of imprisonment of fourteen to eighteen years. Neither of these charges involved P.L.P. or her mother. As of the date of the termination hearing, his remaining sentence was approximately ten years. DSS proffered evidence asserting father did not make efforts to see P.L.P. while in prison, did not contact P.L.P., and would be unable to care for P.L.P. while incarcerated.

Father initially enjoyed regular visits with P.L.P. during his incarceration and testified that during these visits P.L.P. "was the happiest child you'd ever see. She never left my lap . . . She was pretty much a daddy's girl." However, DSS intervened and expressly prevented P.L.P. from visiting father due to its "policy" prohibiting children from visiting incarcerated parents. DSS admits never speaking with P.L.P. on the subject of visitation with her father. DSS further sought and obtained court orders banning and preventing father from visiting with P.L.P. Father applied for visitation, but was denied relief in the trial court on 19 January 2000 and 11 August 2003.

The majority's opinion relies on DSS's testimony that father was not "involved in any way, shape, or form with P.L.P." during the period of time associated with the May 2002 petition alleging neglect. Father testified that before DSS took custody of P.L.P. he wrote and mailed letters to her every other week through her mother and talked to P.L.P. on the telephone. He further testified that when DSS took custody of P.L.P., he asked the social worker if he could write to her in the group home, or if he could write to the social worker to give to P.L.P. The social worker told father that she would send him an address where he could write to P.L.P., but he never received an address from her.

The initial social worker ceased oversight of P.L.P. and the current social worker admitted neither seeking or having any communication with father. Father testified, "they stopped me from any contact whatsoever. They didn't want me to write her." Father testified that he keeps pictures of P.L.P. in his possession and "can't even count the number of pictures" he has of her. P.L.P. is father's only child.

Father participated in every aspect of the multiple juvenile proceedings in attempts to maintain his parental rights. The social worker testified that DSS was not aware of anything that would lead it to conclude that father has willfully failed to pay support to the child. The social worker further testified that father was unable to pay support. The social worker admitted DSS had done nothing to help or encourage father and P.L.P. maintain their familial relationship or to reunify. The present social worker admitted having no interaction or communication with father or any knowledge of the type of parent father was before or while in prison. She made no effort to contact father. The social worker admitted DSS failed to offer services to father solely because of his incarceration.

The majority's opinion relies on the social worker's testimony that father was not significantly involved in P.L.P.'s life before his incarceration. This is not supported by any evidence presented at the hearing. Father testified that until the time of his incarceration, he cared for P.L.P. himself and "pretty much did everything for the little girl." Father also raised C.R., another child of mother, and assumed the role of father to C.R.

DSS acknowledged throughout the hearing that it was apparent that father loved P.L.P. and failed to present any evidence that it assisted or offered services to father. Father stated,

> The thing I'm worried about is that I don't get to see her, I don't get to write her, I don't get to call her . . . All I want is my family to have a chance to be around [P.L.P.], even if you let them see [her] on the weekends and maybe let them bring her to see me.

Father requested home studies on family members as a placement for P.L.P. DSS failed to complete these requested home studies.

The record does not include clear, cogent, and convincing evidence to show father: (1) "made no efforts to provide anything for the minor child, and has not provided any love, nurturance or support for

the minor child;" (2) "willfully left the minor child in foster care or placement outside the home for more than 12 months" without showing reasonable progress to improve the underlying conditions; (3) cannot be reunified with P.L.P. while incarcerated; (4) could have written P.L.P., but chose not to; and (5) had no involvement with P.L.P. prior to his incarceration. *See In re Baker*, 158 N.C. App. at 493, 581 S.E.2d at 146. The trial court erred in finding grounds to terminate father's parental rights under N.C. Gen. Stat. § 7B-1111.

Further, the trial court's findings do not support its conclusions of law that father: (1) "neglected the minor child;" and (2) willfully left P.L.P. in "foster care or placement outside the home for more than 12 months without showing reasonable progress" to improve the underlying conditions. The basis for the trial court's findings and ruling stems entirely from DSS's prevention of contact or visitation between father and P.L.P. Although father is incarcerated and may remain so for approximately seven more years, that fact alone cannot support a conclusion to terminate his parental rights. Many parents are voluntarily and physically absent from their children for extended periods of time due to military deployment, hospitalization, or employment. Such physical absence cannot be a basis to terminate their parental rights where these parents seek to maintain contact within the physical limitations of their absence.

Substantial evidence shows father has consistently and continually done all he can do to maintain ongoing contact with P.L.P. and to preserve his parental rights. Such is particularly the case when DSS did absolutely nothing to encourage or facilitate father and P.L.P. to maintain a familial relationship or reunify as required by the statute and actively and expressly prevented contact or visitation between P.L.P. and her father due to DSS's no visitation "policy" regarding children of incarcerated parents.

DSS cannot base this petition to terminate father's parental rights on grounds of failure to make progress, visit, and maintain a relationship with P.L.P. when it failed to provide him with the means to communicate or visit with her and affirmatively prohibited such visits and opportunities for father to maintain his relationship with her. The sole reason for the lack of visits between father and P.L.P. was due to DSS's "policy" preventing children from contact or visiting with incarcerated parents.

Neither father nor P.L.P. should suffer the consequences of a termination of his parental rights and P.L.P.'s rights as a child of her

father. "Terminating the father's parental rights carries with it the ancillary action of terminating his responsibility to provide and support his child. In short, this child's right to seek support from [her] father is also terminated." *In re Hunt*, 127 N.C. App. 370, 374, 489 S.E.2d 428, 430 (1997) (Wynn, J. dissenting).

Retaining non-secure custody of P.L.P. or her placement with her relatives, rather than terminating father's parental rights and P.L.P.'s right to receive support, love, and nurture from her father, serves her best interests. *See In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995) (citation omitted) ("If the best interests of the children require that the parent's rights not be terminated, the court must dismiss the petition.")

The trial court erred in finding grounds to terminate father's parental rights under N.C. Gen. Stat. § 7B-1111. Where no grounds are proven by the required clear, cogent, and convincing evidence standard of proof to terminate parental rights, "the dispositional stage where the best interests of the child are considered" is not addressed. *In re Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. The trial court's order terminating father's parental rights should be reversed.

III. Conclusion

Respondents received proper notice of DSS's motion to terminate their parental rights. Clear, cogent, and convincing evidence supports the trial court's findings of fact and conclusions of law to terminate mother's parental rights. I concur with that portion of the majority's opinion.

The findings of fact and conclusions of law are not supported by clear, cogent, and convincing or any other evidence. The trial court erred in terminating father's parental rights. I respectfully dissent.

GWENDOLYN L. GORDON, PETITIONER v. NORTH CAROLINA DEPARTMENT OF CORRECTION, RESPONDENT

No. COA04-1494

(Filed 6 September 2005)

1. Administrative Law— delay in entering decision—no showing of good cause

The trial court did not err by reversing a State Personnel Commission order as untimely in violation of N.C.G.S. § 150B-44. Since the parties did not stipulate to an extension, the Commission must show that its delay in entering its decision was for good cause; the Commission's assertion that the delay resulted from an incomplete record was not persuasive.

2. Appeal and Error— administrative law—assignment of error—standard of review

The substantive nature of each assignment of error dictates the standard of judicial review of an administrative agency's final decision, whether in superior court or at the appellate level.

3. Administrative Law— judicial review—de novo

Subparts (1) through (4) of N.C.G.S. § 150B-51(b) are characterized as "law-based" inquiries, which are reviewed under a de novo standard.

4. Employer and Employee— denial of promotion—prima facie case of racial and gender discrimination

The four elements in *Dept. of Correction v. Gibson*, 308 N.C. 131, are not an exclusive determinant of a prima facie case of employment discrimination. A state employee made a sufficient showing of prima facie racial and gender discrimination by offering substantial evidence that the denial of her promotion was not based solely on the successful person being the better applicant.

5. Administrative Law— standard of review—whole record

Reviews under N.C.G.S. § 150B-51(b)(5) and (b)(6) are fact-based inquiries, to which the whole record test applies.

6. Employer and Employee— discrimination—contradictions in testimony

The administrative law judge and the trial court did not err by finding contradictions in the testimony of two witnesses in

an employment discrimination case against a state agency. Relevant evidence existed that a reasonable mind might accept as adequate to support the conclusion that the testimony was contradictory.

7. Employer and Employee— discrimination—findings—sufficiency of evidence

There was evidence in an employment discrimination case supporting the administrative law judge's findings about a state employee's experience, her accommodation of respondent in not taking a previous position, and the criticism of her by respondent's witnesses for not taking that position.

8. Administrative Law— findings—intent and credibility—sufficiency of evidence

The appellate court does not substitute its judgment for that of the ALJ, even if a different conclusion was possible. A finding by an administrative law judge about intent and credibility in an employment discrimination case was not overruled on appeal.

9. Employer and Employee— discrimination—falsity of employer's explanation—inference permissible

It is permissible for the trier of fact to infer the ultimate fact of employment discrimination from the falsity of the employer's explanation. The trial court here did not err by finding and concluding that the petitioner was more qualified than the successful applicant.

10. Administrative Law— attorney fees and costs—pre-judicial and judicial

The trial court did not err by awarding attorney fees and costs in an employment discrimination case against the State where it determined that the administrative law judge's award was not unreasonable or inadequate, and where it reversed the State Personnel Commission's decision against petitioner. Respondent had the opportunity to respond to the award because the trial judge mailed letters to both parties notifying them of the decision and directing affidavits about fees and costs two weeks before the order was drafted. N.C.G.S. § 126-41.

Appeal by respondent from order entered 2 June 2004 by Judge J. Richard Parker in Pitt County Superior Court. Heard in the Court of Appeals 8 June 2005.

Ward and Davis, LLP, by John A. J. Ward and Susan P. Ellis, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Neil Dalton, for respondent-appellant.

TYSON, Judge.

The North Carolina Department of Correction (the "DOC") appeals from order reversing the decision of the State Personnel Commission (the "Commission") and affirming the decision of the Administrative Law Judge (the "ALJ"). We affirm.

I. Background

On 17 July 2001, the DOC posted a job opening for Superintendent IV for the Pamlico Correctional Institution. Petitioner Gwendolyn L. Gordon ("Gordon"), Robert Hines ("Hines"), and five other individuals applied for the position. The Eastern Region Director of the DOC, Joseph Lofton ("Lofton"), was the hiring manager for the position. Lofton and two other DOC employees conducted the interviews in July and August 2001. DOC Administrative Officers Wayne Harris and George Hedrick helped screen the applicants for those who were most qualified.

Both Gordon and Hines had attained twenty-plus years experience within the DOC. Some of Gordon's experience concentrated on the "program side," which involved primarily delivering medical, dental, diagnostic, psychological, religious, and work training materials to the inmates. Gordon also had extensive experience in supervising inmates, making inmate housing assignments, opening jails, expanding facilities, and developing labor contracts and community work assignments. Gordon is certified as a Basic Correctional Officer. She earned a four-year degree in business administration in the late 1970s. Gordon had been an assistant superintendent for five years and eight months.

Hines's experience involved more operations and custodial matters than programs. He worked in several "close custody" facilities in the past and served as an assistant superintendent for nine years and nine months. He earned a two-year associate degree plus a number of credit hours in business administration in the late 1970s.

On 9 August 2001, Lofton recommended Hines for the position and DOC Secretary Theodis Beck ("Secretary Beck") promoted Hines on 13 September 2001. Hines began work on 1 October 2001.

On 18 January 2002, Gordon filed a petition for a contested case hearing with the Office of Administrative Hearings (the "OAH") to contest the DOC's decision to promote Hines over her. Gordon alleged the DOC's decision was based on race and gender discrimination. Following a hearing, the ALJ determined the DOC discriminated against Gordon because of her race and gender and ordered she receive back pay and benefits from the date of Hines's promotion forward until she received a comparable promotion.

The ALJ's decision and record were sent to the Commission on 11 February 2003. The Commission issued a decision and order on 26 March 2003 reversing the ALJ's order. Gordon petitioned the trial court on 9 April 2003 for review of the Commission's order reversing the ALJ decision. After Gordon petitioned for judicial review and filed motions for sanctions against the DOC, the Commission withdrew its 26 March 2003 decision and order on 14 April 2003 on the grounds it did not have the complete record. The Commission failed to file a motion to extend the time to issue its decision and the parties did not stipulate to an extension. On 4 June 2003, the Commission issued a second order and decision reversing the ALJ. Gordon filed a second petition for judicial review by the trial court, re-filed her motion for sanctions against the DOC, and also moved the trial court for entry of the ALJ's order on the grounds that the Commission was late in filing its order.

The trial court conducted a hearing on Gordon's motions on 19 April 2004 and issued an order on 2 June 2004: (1) reversing the Commission's decision as untimely and based on the merits; (2) adopting the ALJ's findings of fact, conclusions of law, and final order; and (3) awarding Gordon damages, attorneys' fees, and costs. The DOC appeals.

II. Issues

The issues on appeal are whether the trial court erred by: (1) determining the Commission's decision was null and void for its late entry; (2) determining Gordon established a *prima facie* case of race and gender discrimination; and (3) ordering the DOC to pay attorneys' fees and costs.

III. Late Entry of Order

[1] The DOC argues the trial court erred in concluding the Commission's order, which reversed the ALJ's decision, was null and void due to its late entry. We disagree.

N.C. Gen. Stat. § 150B-44 (2003) provides in part:

> Unreasonable delay on the part of *any agency* or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge . . . . An agency that is subject to Article 3 of this Chapter and is a board or commission has 60 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or *60 days* after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 60 days. If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's decision as the agency's final decision.

(Emphasis supplied).

This Court considered this same issue in *Occaneechi Band of the Saponi Nation v. N.C. Comm'n of Indian Affairs*, 145 N.C. App. 649, 551 S.E.2d 535, *cert. denied*, 354 N.C. 365, 556 S.E.2d 575 (2001). We reversed the trial court's ruling that the time frame to make a decision under N.C. Gen. Stat. § 150B-44 is "intended to be presumptive, not absolute, and therefore, if an agency can demonstrate reasonableness in issuing a final decision beyond the statutory limit, the agency is not considered to have adopted the recommended decision of the ALJ." *Id.* at 652, 551 S.E.2d at 538. We held, "[t]he statute is clear that if a final decision has not been made within these time limits the agency is considered to have adopted the ALJ's recommended decision. We find no ambiguity in this statutory language that would give the trial court need to further explore legislative intent." *Id.* at 653, 551 S.E.2d at 538 (internal quotations omitted).

We recognized under N.C. Gen. Stat. § 150B-44 the initial time limit, here sixty days, could be extended: "(1) by agreement of the parties and (2) for good cause shown . . . . The statute is clear that if a final decision has not been made 'within these time limits' the agency is considered to have adopted the ALJ's recommended decision." *Id.* There, the Commission had . . . "[f]ound that the complexity of the case and the length of the Recommended Decision constitute good cause to extend the time . . . ." in entering its decision. *Id.* at 656, 551 S.E.2d at 540. However, we held the Commission "was without

authority to unilaterally extend the deadline for issuing its final decision." *Id.* (citing *Holland Group v. N.C. Dept. of Administration*, 130 N.C. App. 721, 504 S.E.2d 300 (1998)).

In *Holland*, a contractor filed a contested case against the Department of Administration challenging the imposition of liquidated damages. 130 N.C. App. at 722-23, 504 S.E.2d at 302. The ALJ issued a recommended decision in the contractor's favor and transmitted the case to the Department of Administration for a final agency decision. *Id.* at 723, 504 S.E.2d at 302. The Department of Administration entered a notice that it received the "Official Record" in the case on 1 August 1995. *Id.* On 31 October 1995, the Department of Administration filed an "Extension of Time" to enter its decision due to the lack of tape recordings of the hearing in the record. *Id.* The tape recordings were received on 14 November 1995, completing the record. *Id.* Following a second extension, the Department of Administration entered its final decision on 13 May 1996. *Id.* at 724, 504 S.E.2d at 303. On judicial review, the trial court determined the final decision was untimely pursuant to N.C. Gen. Stat. § 150B-44 and adopted the ALJ's decision. *Id.*

On review by this Court, we held the "trial court did not err in concluding the Decision was not issued in a timely manner under G.S. § 150B-44." *Id.* at 728, 504 S.E.2d at 305. This holding was based on two primary factors. First, we noted, "[t]he plain language of G.S. § 150B-44 indicates the section is intended to guard those involved in the administrative process from the inconvenience and uncertainty of unreasonable delay." *Id.* at 725, 504 S.E.2d at 304. Second, we considered whether the Department of Administration was estopped from asserting the extensions were based on it not having the complete record. *Id.* at 726, 504 S.E.2d at 304. We recognized that in its notice, the Department of Administration acknowledged receipt of the "Official Record." *Id.* However, on appeal and before the trial court, the Department of Administration "sought to disavow this earlier representation and designate 14 November 1995 as the date it received the official record." *Id.* at 727, 504 S.E.2d at 304. We noted the Department of Administration could have easily determined the tape recordings were missing from the record. *Id.* However, the contractor "lacked the facility to ascertain whether or not the Department had indeed received the complete record . . . [and] accepted the Department's official assurance and anticipated a decision . . ." accordingly. *Id.* at 727, 504 S.E.2d at 304-05. "Given the precise language of G.S. § 150B-44 and the principles of equity, we [held] the

Department [was] estopped from denying it received the record on 1 August 1995." *Id.* at 727, 504 S.E.2d at 305.

Here, the ALJ's decision finding the DOC discriminated against Gordon was entered on 24 October 2002. On 11 February 2003, the Commission received the "Official Record" from the OAH. Included with the Official Record was a "Certification" by the OAH that the attached comprised the "Official Record." The certification also noted, "Video Tape Deposition of Joseph Lofton (4 video tapes) could not be duplicated for inclusion in the Official Record. They are on file in the Clerk's office and are available for review upon advanced notice." Kim Hausen, Chief Clerk of the OAH, provided a sworn affidavit stating in pertinent part, "no commission member contacted me at the Office of Administrative Hearings to view the tapes."

Despite not requesting the videotapes, the Commission issued its original decision and order on 26 March 2003 reversing the ALJ's order. On 8 April 2003, Gordon petitioned the trial court for judicial review of the Commission's decision. That same day, Gordon also filed a motion to reopen the record and for sanctions against the DOC for withholding discovery. On 14 April 2003, the Commission withdrew its 26 March 2003 decision and order claiming it did not receive the "whole" record from the OAH. Based on the withdrawal, Gordon filed an objection on 17 April 2003 to any further action by the Commission due to untimeliness under N.C. Gen. Stat. § 150B-44.

After receiving the "complete" record, the videotapes, on 16 April 2003, the Commission issued its second decision and order on 4 June 2003. Our review of both the Commission's original and second decisions and orders show they are virtually identical. Between withdrawal of the Commission's 26 March 2003 decision and order and passage of sixty days from 11 February 2003, the first date of receipt of the record, neither the Commission nor the parties filed a motion to extend the time for filing or stipulated to the extension. Based on this delay, Gordon filed a motion for entry of orders of the ALJ on 30 June 2003. Gordon also re-filed her motions to reopen the record and for sanctions against the DOC. Finally, Gordon petitioned the trial court for judicial review and entry of the ALJ's order. Following judicial review, the trial court reversed the Commission's decision and order and the ALJ's 24 October 2002 decision was deemed "adopted" by the Commission. The basis for the reversal was the late entry of the Commission's order.

Following *de novo* review of the issue, we hold the trial court did not err in reversing the Commission's decision as untimely in violation of N.C. Gen. Stat. § 150B-44. We note initially that Gordon properly preserved this issue for appellate review through her numerous objections to the Commission's delay. *See N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res.*, 162 N.C. App. 467, 472, 591 S.E.2d 549, 553 (2004) ("We do not address the issue of whether an agency may extend the time limits under N.C. Gen. Stat. § 150B-44 in this manner. Petitioner raised its timeliness argument for the first time on appeal in the superior court and has waived any objection to the extension."), *overruled on other grounds by N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).

The mandatory sixty day time limit prescribed by N.C. Gen. Stat. § 150B-44 may only be extended: "(1) by agreement of the parties; [or] (2) for good cause shown [by the Commission]." *Occaneechi Band of the Saponi Nation*, 145 N.C. App. at 653, 551 S.E.2d at 538. The record indicates the parties did not stipulate to an extension. Thus, the Commission must show its delay in entering its decision and order was based on good cause.

The Commission asserts the delay resulted from receipt of an incomplete record transmitted by the OAH and such constitutes good cause. We are not persuaded. This Court has held the Commission is "without authority to unilaterally extend the deadline for issuing its final decision." *Id.* at 656, 551 S.E.2d at 540; *see Holland*, 130 N.C. App. at 728, 504 S.E.2d at 305. In addition, the doctrine of estoppel implemented in *Holland* is equally applicable here. 130 N.C. App. at 726, 504 S.E.2d at 304. The Commission's original decision and order dated 26 March 2003 began by stating, "The State Personnel Commission received the *official record* from the Office of Administrative Hearings on February 11, 2003." As in *Holland*, the Commission seeks to "disavow" this earlier representation and designate 16 April 2003 as the date it received the official record. 130 N.C. App. at 727, 504 S.E.2d at 304.

We further recognize the Commission was on notice of the four videotapes upon receipt of the official record on 11 February 2003. The OAH made the tapes readily available for the Commission's review. The Commission did not withdraw its original decision and order until *after* Gordon filed both a petition for judicial review and motions for sanctions against the DOC. No evidence shows the Commission filed its intent to extend the sixty day time limit as

required by the statute. Finally, the Commission's original and second decision and orders are virtually identical.

The trial court properly reversed the Commission's second decision and order dated 4 June 2003 as untimely under N.C. Gen. Stat. § 150B-44. Based on N.C. Gen. Stat. § 150B-44 and this Court's holdings in *Holland* and *Occaneechi Band of the Saponi Nation*, the Commission was without authority or good cause to extend the required sixty day time limit. This assignment of error is overruled.

IV. Race and Gender Discrimination

The DOC argues the trial court erred by finding as fact and concluding as a matter of law that it discriminated against Gordon based on her race and gender. We disagree.

A. Standard of Review

[2] Our Supreme Court has held that upon "judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *Carroll*, 358 N.C. at 658, 599 S.E.2d at 894 (citations omitted). N.C. Gen. Stat. § 150B-51(b) (2003) states:

> [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.

This standard of review applies to judicial review of an agency's decision whether at the superior or the appellate court level. *See*

Rector v. N.C. Sheriffs' Educ. and Training Standards Comm., 103 N.C. App. 527, 532, 406 S.E.2d 613, 616-17 (1991) (superior court review); *see also Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998) (appellate court review) (citing *Shoney's v. Bd. of Adjustment for City of Asheville*, 119 N.C. App. 420, 421, 458 S.E.2d 510, 511 (1995)).

1. Law-Based Inquiries

[3] Subparts (1) through (4) of N.C. Gen. Stat. § 150B-51(b) are characterized as "law-based" inquiries. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 (citation omitted). Reviewing courts consider such questions of law under a *de novo* standard. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000). *De novo* review requires the court to consider " 'the matter anew[] and freely substitute[] its own judgment for the agency's.' " *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002) (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)).

Here, the only two "law-based" inquiries presented by the DOC are whether the trial court properly concluded as a matter of law: (1) Gordon established a *prima facie* case of race and gender discrimination; and (2) Gordon was more qualified for the position than Hines. The DOC also contends this latter conclusion of law is based upon improperly found facts. We address these two arguments together.

a. *Prima Facie* Case

[4] In *Dept. of Correction v. Gibson*, our Supreme Court adopted the standard used by the United States Supreme Court in proving discrimination. 308 N.C. 131, 137, 301 S.E.2d 79, 82 (1983) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973)).

> (1) The claimant carries the initial burden of establishing a *prima facie* case of discrimination; (2) The burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection; and (3) If a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination.

Id. (emphasis supplied).

Our Supreme Court noted in *Gibson* that a *prima facie* case of discrimination "may be established in various ways." 308 N.C. at 137, 301 S.E.2d at 82-83 (citing as examples of proving a *prima facie* case: *Coleman v. Braniff Airways, Inc.*, 664 F.2d 1282, 1284 (5th Cir. 1982) (*prima facie* case established if: "(1) a claimant is a member of a minority group, (2) he was qualified for the position, (3) he was discharged, and (4) the employer replaced him with a person who was not a member of a minority group."); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977) (the discharge of a black employee and the retention of a white employee under apparently similar circumstances), *overruled on other grounds by Burdine v. Texas Dept. of Community Affairs*, 647 F.2d 513 (5th Cir. 1981); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 49 L. Ed. 2d 493 (1976) (white employees discharged while black employees retained under similar circumstances)).

> The showing of a *prima facie* case is not equivalent to a finding of discrimination. Rather, it is proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has proven that in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations.

Gibson, 308 N.C. at 138, 301 S.E.2d at 83 (citations omitted).

Gordon offered substantial evidence showing her denial of the promotion was not based solely on Hines allegedly being a better applicant. First, Gordon satisfied the optional four elements for gender discrimination: (1) as a female, she is a member of a protected group; (2) she was qualified for a promotion; (3) she was passed over for the promotion; and (4) the person receiving the promotion was not a member of the protected class. *See Enoch v. Alamance County*, 164 N.C. App. 233, 242, 595 S.E.2d 744, 752 (2004) (citations omitted). Further, evidence was proffered showing Gordon was more qualified than Hines by: (1) greater length of service and experience at the DOC; (2) more management training; (3) higher formal education; (4) higher classification and pay grade; (5) higher screening and test scores; (6) higher (TAPS) performance ratings; (7) more favorable supervisor recommendations; and (8) greater participation on task forces and specialty projects.

In addition, Gordon showed: (1) the DOC hired applicants in the past as superintendents with "program" experience; (2) the DOC committed procedural errors and irregularities in screening candi-

dates to Gordon's detriment; (3) Lofton signed off on performance appraisals of both Gordon and Hines where Hines was rated "very good" and Gordon "outstanding." Finally, Gordon offered into evidence an email from Secretary Beck to Lofton concerning Hines's hiring which stated,

> This is good. I am a little more comfortable in defending a Hines decision rather than a Washington decision in the event we are challenged by GG. Your 154 on Hines needs to give him all he is entitled to and I will take care of the rest if it becomes an issue . . . .

The DOC bases much of its argument on the contention that Gordon must satisfy the four elements enumerated in *Gibson* of a *prima facie* case. 308 N.C. at 137, 301 S.E.2d at 83 ("For example, a prima facie case of discrimination may be made out by showing that (1) a claimant is a member of a minority group, (2) he was qualified for the position, (3) he was discharged, and (4) the employer replaced him with a person who was not a member of a minority group."). However, as outlined in *Gibson* and above, this four-part analysis is not "onerous" or an exclusive determinant of a *prima facie* case of discrimination. *Id.* at 137, 301 S.E.2d at 82-83 (A *prima facie* case of discrimination "may be established in various ways.").

Gordon's proffered evidence was sufficient to show a *prima facie* case of discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 215 (1981) (the burden of establishing a *prima facie* case of discrimination is not onerous); *Area Mental Health Authority v. Speed*, 69 N.C. App. 247, 253, 317 S.E.2d 22, 26 (such evidence tends to show the employee was qualified for the job and the dismissal resulted from "discriminatory motives"), *disc. rev. denied*, 312 N.C. 81, 321 S.E.2d 893 (1984). As the DOC assigned error only to the first prong of a discrimination claim, Gordon's *prima facie* case, our inquiry ends there. *See Gibson*, 308 N.C. at 137, 301 S.E.2d at 82 ("(1) The claimant carries the initial burden of establishing a *prima facie* case of discrimination; (2) The burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection; and (3) If a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination."); *see also Vanderburg v. N.C. Dept. of Revenue*, 168 N.C. App. 598, 609, 608 S.E.2d 831, 839-40 (2005). This portion of the DOC's assignment of error is overruled.

2. Fact-Based Inquiries

[5] Review under N.C. Gen. Stat. § 150B-51(b)(5) and (b)(6) are "fact-based" inquiries. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 (citation omitted). Fact-intensive issues " 'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.' " *Id.* (quoting *In re Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). This standard of review requires the reviewing court to analyze all the evidence provided in the record "to determine whether there is substantial evidence to justify the agency's decision." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895. Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8b) (2003). A reviewing court "may not substitute its judgment for the agency's," even if a different conclusion may result under a whole record review. *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). Having affirmed the trial court's determination that the Commission adopted the ALJ's decision by delaying in issuing its own decision and order, we review the ALJ's findings of fact.

The "factual-based" inquiries presented by the DOC are whether the ALJ or trial court erred in finding as fact: (1) the content of Secretary Beck's email to Lofton; (2) conflicting testimony by Lofton and Hines regarding their past relationship; (3) the DOC's witnesses being "critical" of Gordon's prior work experience; and (4) Gordon was more qualified for the position than Hines.

a. Conflicting Testimony

[6] The DOC argues substantial evidence does not support the ALJ's and trial court's finding of fact eleven, which states in pertinent part, "The testimonies of [Lofton] and [Hines] were contradictory, with [Lofton] asserting that he did not know [Hines] other than meeting him one time at Wayne and with [Hines] asserting that he had worked with [Lofton] in the past . . . ."

In response to questions about his relationship with Hines, Lofton testified in his deposition:

> Lofton: It's rather difficult to say. I guess my actual recollection of professionally involvement with Mr. Hines, really, is when Ms. O'Konek had contacted me about some issues at Wayne Correctional Center, and I met with Mr. Hines and Ms. O'Konek at that point.

Question: You say professionally. Did you know him on an individual basis prior to that time?

Lofton: No. No, not really because, I mean, he lives in Goldsboro and I live in Goldsboro, but as far as interacting with each other, no.

Question: Are you a member of any social organizations that Mr. Hines is a member of?

Lofton: ACA. He's a—I think he's a—he's a member of the Minority Pioneers. I don't know whether he's a member of NABJA or not. I don't know whether he's a member of Southern Correctional Association. These are organizations that I belong to. I'm a fraternity member. He's not. As far as I know, he's not a member of the fraternity.

Hines testified that he met Lofton in 1978 when they worked together as correctional officers at Green Correctional Center, a small facility. Only ten to twelve officers worked at Green, in two to three officer shifts. Hines testified that he occasionally worked the same shift with Lofton. Hines also testified that he lived in the same town as Lofton and was a member of some of the same professional and social organizations as Lofton, like the North Carolina Correctional Association and Minority Pioneers. Hines testified both he and Lofton attended meetings and reunions for these clubs.

We hold the ALJ and the trial court did not err in finding contradictions in their testimony. Based on the inconsistencies in testimony by Lofton and Hines, relevant evidence existed that "a reasonable mind might accept as adequate to support [the] conclusion" that their versions were contradictory. N.C. Gen. Stat. § 150B-2(8b). We "may not substitute [our own] judgment for the [ALJ's and the trial court's]," even if a different conclusion may result under a whole record review. *Watkins*, 358 N.C. at 199, 593 S.E.2d at 769.

b. Gordon's Work Experience

[7] Finding of fact twenty states in pertinent part:

[Gordon] at one time applied for the position of Assistant Superintendent for Custody and Operations at Craven Correctional Institution and was awarded the promotion. [The DOC] asked [Gordon] to accommodate it by giving up that posi-

> tion and taking a position as Assistant Superintendent of Programs, which she did. Witnesses for [the DOC] in this hearing were critical of [Gordon] for not taking assignments in custody and operations and for not having geographic diversity in her work experience.

The DOC argues its witnesses' testimony "merely pointed out that [Gordon] could have received [custody and operations] experience if she chose and encouraged her to do so but she declined." However, the record shows the DOC argued Gordon's *lack* of experience was "the principle reason for promoting [Hines] over [Gordon]." In support of its decision, the DOC's witnesses would, and did, negatively comment on Gordon's past work experience at the DOC and minimized or was critical of it. Further, substantial evidence shows Gordon accepted an alternate position at Craven at DOC's request.

c. Beck's Email

[8] Finally, DOC contends finding of fact twenty-one was not supported by substantial evidence. That finding states:

> On September 12, 2001, Secretary Beck transmitted an email to Director Lofton stating: This is good. I am a little more comfortable in defending a Hines decision rather than a Washington decision in the event we are challenged by GG . . . . This email tends to show that Respondent intended to hire an African American male over a white female regardless of qualification.

The ALJ determined this email supported Gordon's claim of discrimination. Other evidence found as fact by the trial court and unchallenged by the DOC was "Oliver Washington, another candidate . . ., was not as qualified as either Robert Hines or [Gordon]." DOC asserts it never considered Washington for the position and the email was only a message by Secretary Beck to Lofton that "he was content with the choice." However, the ALJ and the trial court both found Secretary Beck's explanation for the contents of the email to be "unworthy of credence." *See Carroll*, 358 N.C. at 662, 599 S.E.2d at 896 ("there is but one fact-finding hearing of record when witness demeanor may be directly observed. Thus, the ALJ who conducts a contested case hearing possesses those institutional advantages, that make it appropriate for a reviewing court to defer to his findings of fact."). We are not permitted to substitute our own judgment for the ALJ, even if a different conclusion could result under a whole record review. *Watkins*, 358 N.C. at 199, 593 S.E.2d at 769.

3. Applicant Qualifications

[9] The ALJ and the trial court found as fact and concluded as a matter of law that Gordon was more qualified than Hines. The DOC asserts the ALJ and the trial court substituted their "business judgment" for that of the DOC to determine what criteria is relevant for the position. *See Gibson*, 308 N.C. at 140, 301 S.E.2d at 84 ("The trier of fact is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination."). "The sole question is what is the motivation behind the employer's decision . . . . [I]t is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Enoch*, 164 N.C. App. at 242-43, 595 S.E.2d at 752 (internal citations and quotation marks omitted). However, "it is *permissible for* the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 147 L. Ed. 2d 105, 119 (2000).

> The factfinder's disbelief of the reasons put forward by defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 125 L. Ed. 2d 407, 418 (1993).

a. Finding of Fact

Finding of fact twenty-three states:

> It is found as a fact that both Robert Hines and Petitioner were highly qualified for promotion to position number 58000. As between the two candidates, Petitioner was more qualified in the following respects:
>
> 1. Petitioner has greater length of service, 27 years compared to 24 years,
> 2. Petitioner has more education, a 4 year degree compared to a 2 year associates degree,
> 3. Petitioner has achieved consistent ratings of outstanding on her performance appraisals compared to very good ratings for Robert Hines,

4. Petitioner has made significant contributions to the Department of Corrections and served on statewide task forces, and

5. Petitioner scored higher on both the interview for position 58000 and on the screening instrument.

Hines had more years experience in custody situations. However, our review of the transcripts and record shows substantial evidence exists to support the ALJ's and the trial court's findings that Gordon has met her burden to show that the DOC intentionally discriminated against her. Gordon presented evidence from which the finder of fact could conclude she was more qualified than Hines based on her education, seniority, overall record with the DOC, her "outstanding" grades on performance reports, and higher scores on the interviewing and screening tests. This portion of the assignment of error is overruled.

b. Conclusion of Law

In *Dorsey v. UNC-Wilmington*, this Court addressed a claim of disparate treatment. 122 N.C. App. 58, 468 S.E.2d 557, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996). We held:

> once the complaining employee meets her initial burden of proving, by a preponderance of the evidence, a *prima facie* case of such "disparate treatment," the employer then has the burden of articulating some legitimate, nondiscriminatory reason for the employee's rejection. The employer's burden is satisfied if it simply produces evidence that it hired a better-qualified candidate. However, the employee can ultimately prevail in her claim of "disparate treatment" if she can prove that the employer's claim to have hired a better-qualified applicant is pretextual by showing that she was, in fact, better-qualified than the person chosen for the job.

Id. at 63, 468 S.E.2d at 560 (citing *N.C. Dept. of Correction v. Hodge*, 99 N.C. App. 602, 611-13, 394 S.E.2d 285, 290-91 (1990)).

Here, the advertised qualifications for Superintendent IV at Pamlico Correctional Institution were contained in the notice for applications:

> Brief Job Description: This position will be responsible for the management and operation of all functions of institutional operations, including personnel, fiscal affairs, custody, security, main-

tenance, and inmate programs. Facility houses 529 inmates. Position manages approximately 200 employees. Position is responsible to formulate operational policy and interpret division policy applications. Extensive correctional experience and at least four years of management experience in prison operations is required.

Skills and abilities: Considerable knowledge of the management techniques and human resource development aspects of inmate custody and program management. Some knowledge of basic human psychology applicable to the inmate population. Considerable knowledge of departmental rules, policies, and procedures concerning the custody, care, treatment and training of inmates. Considerable knowledge of the principles of administration involved in operating a state correctional facility. Ability to provide leadership necessary to organize and supervise the activities of a large group of employees. Ability to establish and maintain effective relationship with inmates, inmates' relatives, professional and para-professional personnel, and volunteers. Ability to express ideas clearly and concisely, both orally and in writing. Ability to think clearly and act quickly and effectively during emergencies.

Education and Experience: Graduation from a four-year college or university and three years of supervisory, administrative, or consultative experience in correction or related work; or graduation from high school and five years of supervisory experience beyond the correctional officer level in correction or related work; or an equivalent combination of education and experience. Necessary special qualification: must be eligible for certification by the NC Justice Training and Standards Council.

Based on Gordon's qualifications set out above and found by both the ALJ and the trial court, substantial evidence exists showing Gordon was objectively better qualified for the position than Hines. We hold the ALJ and the trial court properly found as fact and concluded as a matter of law that Gordon was more qualified for the position than Hines to support her claim of race and gender discrimination.

V. Attorneys' Fees

[10] The DOC contends the trial court erred in awarding attorneys' fees and costs to Gordon. We disagree.

Three statutes are applicable to this issue. N.C. Gen. Stat. § 126-4 (2003) provides:

> Subject to the approval of the Governor, the State Personnel Commission shall establish policies and rules governing each of the following:
>
> . . . .
>
> (11) In cases where the Commission finds discrimination, harassment, or orders reinstatement or back pay whether (i) heard by the Commission or (ii) appealed for limited review after settlement or (iii) resolved at the agency level, the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved.

N.C. Gen. Stat. § 126-41 (2003) states:

> The decision of the Commission assessing or refusing to assess reasonable witness fees or a reasonable attorney's fee as provided in G.S. 126-4(11) is a final agency decision appealable under Article 4 of Chapter 150B of the General Statutes. The reviewing court may reverse or modify the decision of the Commission if the decision is unreasonable or the award is inadequate. The reviewing court shall award court costs and a reasonable attorney's fee for representation in connection with the appeal to an employee who obtains a reversal or modification of the Commission's decision in an appeal under this section.

N.C. Gen. Stat. § 6-19.1 (2003) provides in part:

> In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or 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. The party shall

petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

This Court considered each of the above statutes in addressing an award of attorney's fees and costs in *Morgan v. N.C. Dept. of Transportation*, 124 N.C. App. 180, 476 S.E.2d 431 (1996). We held review of attorney's fees under N.C. Gen. Stat. § 126-41 was limited to those fees accrued *prior* to judicial review. *Id.* at 183, 476 S.E.2d at 433 (N.C. Gen. Stat. § 6-19.1 does not apply to "services rendered prior to judicial review."). The trial court must review the Commission's decree of attorney's fees under N.C. Gen. Stat. § 126-41. *Id.* at 184, 476 S.E.2d at 433.

A. Pre-Judicial Review

Here, the ALJ made extensive findings concerning attorneys' fees and costs during its review. Following its consideration of the matter, it substantially reduced the number of hours requested by Gordon to be paid from 315.85 to 233.35 hours. The trial court reviewed the ALJ's award and reviewed affidavits from counsel in support of and in opposition to Gordon's motion for attorneys' fees. In addition to those fees accrued prior to judicial review, the trial court awarded additional attorneys' fees for representation subsequent to the ALJ's decision.

Based on our review of both the ALJ's thorough consideration and decision concerning attorneys' fees and costs prior to judicial review and the trial court's subsequent adoption, we hold the trial court did not err in determining the ALJ's award was not "unreasonable" or "inadequate."

B. Judicial Review

After reversing the Commission's decision, the trial court was required to award Gordon attorneys' fees and costs. *See* N.C. Gen. Stat. § 126-41 ("The reviewing court *shall* award court costs and a reasonable attorney's fee for representation in connection with the appeal to an employee who obtains a reversal or modification of the Commission's decision in an appeal under this section." (emphasis supplied)). The trial court properly awarded attorneys' fees and costs under N.C. Gen. Stat. § 126-41. Thus, we need not consider the application of N.C. Gen. Stat. § 6-19.1.

C. Opportunity to Respond

The DOC also asserts it had no opportunity to respond to the award of attorneys' fees to Gordon. Gordon correctly notes and the record shows that on 28 April 2004, Judge J. Richard Parker sent letters to both parties notifying them of his intention to reverse the Commission's decision and adopt the decision of the ALJ. Included in the letter is the following provision: "Prior to drafting an order reflecting my decision, I direct Ms. Bryant to submit an affidavit regarding attorney's fees and costs of Petitioner as directed by the Administrative Law Judge in his decision. If the Respondent so elects an affidavit may be filed in opposition to attorney's fees." The DOC's counsel responded on 10 May 2004, asserting, "I will be responding to Ms. Bryant's affidavit within one (1) week." On 12 May 2004, Judge Parker sent both parties a letter affirming the ALJ's award of attorneys' fees and costs and ordering additional attorneys' fees and costs.

We are not persuaded that the DOC did not have an opportunity to respond. Two weeks passed between Judge Parker mailing the first letter and drafting the order for additional attorneys' fees. We hold the trial court provided sufficient notice and time for both parties to respond to its request for affidavits in support of or in opposition to attorneys' fees and costs. This assignment of error is overruled.

VI. Conclusion

The trial court properly reversed the Commission's decision due to delay in entry of its decision and, as a result, adopted the ALJ's recommended decision. N.C. Gen. Stat. § 150B-44. Substantial evidence supported the ALJ's and the trial court's findings of fact. Our *de novo* review of the conclusions of law shows Gordon proffered evidence to prove a *prima facie* case of discrimination. The ALJ and trial court properly awarded Gordon attorneys' fees and costs for representation before the ALJ, the Commission, and the trial court. The trial court's adoption of the ALJ's decision and its subsequent order is affirmed.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

THE STATE OF NORTH CAROLINA v. TEDDY TERRELL BETHEA

No. COA04-537

(Filed 6 September 2005)

1. Criminal Law— continuance denied—no prejudice

The trial court did not abuse its discretion by denying defendant's motion for a continuance to prepare for a witness not disclosed by the State until the morning of the trial. The trial court did postpone the trial for one day to allow defense counsel to interview the witness and there was no evidence of how defendant would have been better prepared with the continuance or that he was materially prejudiced by its denial.

2. Criminal Law— impermissible juror contact—requested limiting instruction denied

There was no prejudicial error in the trial court's refusal to give defendant's requested limiting instruction that neither the defense nor the State was connected with an impermissible contact with jurors in an elevator. The court questioned the jurors about their ability to be fair and impartial, and defendant did not show that any jurors were prejudiced by the misconduct or that there would have been a different result with the instruction.

3. Criminal Law— control of witness examination—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for murder and assault in its efforts to control the examination of witnesses by defense counsel. Although defendant argued that the court gave the jury a sense of partiality favoring the State, it is clear that the court focused on moving the trial forward.

4. Constitutional Law— right of confrontation—reports forming basis of expert opinion—no violation

The Confrontation Clause does not act as a bar to testimonial statements admitted for purposes other than the truth of the matter asserted. The trial court here did not err when it allowed an SBI agent to use another agent's report as the basis of his expert opinion that shell casings were discharged from the weapon in question. It is clear in this case that the testimony was offered as the basis of an expert's opinion rather than for the truth of the matter asserted.

5. Constitutional Law— double jeopardy—attempted first-degree murder and assault—no violation

Double jeopardy was not violated by the submission to the jury of both attempted first-degree murder and assault with a deadly weapon inflicting serious injury. The charge of attempted murder does not contain an assault with a deadly weapon or serious injury requirement, and assault with a deadly weapon with intent to kill inflicting serious injury does not require premeditation and deliberation.

6. Sentencing— prior record level—defendant's stipulation—no prejudice

There was no prejudicial error in the determination of defendant's prior record level for sentencing where defense counsel appeared to stipulate to the State's worksheet. Moreover, defendant's record level is the same even without the conviction defendant now claims was erroneously considered.

Judge HUDSON concurs in the result only.

Appeal by defendant from judgments entered 10 September 2003 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 7 March 2005.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kathleen M. Waylett, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

JACKSON, Judge.

On 10 September 2003, a jury convicted Teddy Terrell Bethea ("defendant") of one count of attempted first-degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury against Efrem Colson ("Colson"). The jury also convicted defendant of one count of attempted first-degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury against Michelle Carden ("Carden"). After consolidating the counts, the trial court sentenced defendant, a level IV offender, to confinement in the North Carolina Department of Correction for a minimum of two hundred and fifty-one months and a maximum of three hundred and eleven months.

On 27 November 2001, Carden and Colson were shot while sitting in Carden's car in front of a house located in Guilford County, North

Carolina. After the shooting, Carden and Colson left the scene to find help. Upon finding police officers, Carden got out of the vehicle and Colson drove away. Carden had a gunshot wound to her right shoulder, and was bleeding from her left forearm. Colson was found in the vehicle into which defendant had fired. Both individuals were subsequently hospitalized for their injuries. Defendant was apprehended leaving the scene of the shooting.

At the scene, officers found three shell casings in the roadway. The windshield of the vehicle Colson was found in had a bullet hole in it. The passenger's side window had been shot out and there was blood located on that side of the vehicle. A 9mm Glock Pistol (the "weapon") was found a few weeks after the shooting near where defendant had been seen running away from the scene of the shooting. State Bureau of Investigation Agent Dave Santora ("Agent Santora"), a forensic firearms examiner, tested the weapon and determined that the four shell casings recovered from the scene were from the same weapon recovered by officers investigating the shooting. It was later determined that the gun used in the shooting had been stolen by Colson and Kevin Darden ("Darden"), approximately one month prior to the shooting and that Darden subsequently had sold the weapon to defendant.

At the scene, Detective James O'Connor ("Detective O'Connor") questioned Carden about the identity of the shooter. Carden stated that she did not know defendant and had never seen him before, but that she heard Colson yell, "Teddy Bethea shot us." Carden also identified defendant as the shooter in a lineup and at trial, and provided a statement to the police, identifying defendant as the shooter.

On 30 June 2003, the trial court granted defense counsel's motion to continue in order to allow for additional time to prepare for the hearing and to investigate the facts relating to the weapon used in the shooting. On 2 September 2003, the first day of trial, the State provided defendant with a copy of a statement it had obtained from Darden. The State's attorney notified defense counsel approximately two hours prior to trial that they had located and interviewed a witness (Darden) incarcerated in the North Carolina Department of Correction, who was prepared to testify at trial that he had stolen the weapon during a breaking and entering and then sold that firearm to defendant. Defense counsel moved to continue the case because he needed more time to investigate this new information. The trial court denied defense counsel's motion, but recessed

the hearing until the following morning to allow time for defense counsel to interview Darden.

Defendant, while testifying at trial, denied shooting Colson and Carden, denied buying the weapon from Colson and Darden, and denied accusing Colson of stealing from him.

[1] Defendant first asserts that the trial court committed reversible error when it denied defense counsel's motion to continue because defense counsel was not permitted sufficient time to investigate and prepare for the State's untimely disclosure of a new witness on the morning of defendant's trial. Defendant further contends that the trial court committed reversible error when it denied defendant's motion for a mistrial when there was impermissible contact with jurors, prejudicing defendant's jury panel.

It is within the trial court's discretion to grant or deny a motion for continuance. *State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993) (citing *Ungar v. Sarafite*, 376 U.S. 575, 589, 11 L. Ed. 2d 921, 931 (1964)); *State v. Roper*, 328 N.C. 337, 348, 402 S.E.2d 600, 606, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). While this determination rests within the trial court's discretion, "that discretion does not extend to the point of permitting the denial of a continuance that results in a violation of a defendant's right to due process." *Tunstall*, 334 N.C. at 328, 432 S.E.2d at 336; *Roper*, 328 N.C. at 349, 402 S.E.2d at 606. When a motion for continuance is based upon a defendant's constitutional right to assistance of counsel and to confront witnesses, the issue is one of law and thus becomes fully reviewable on appeal. *State v. Harris*, 290 N.C. 681, 686, 228 S.E.2d 437, 440 (1976); *see Tunstall*, 334 N.C. at 328, 432 S.E.2d at 336 (citing *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977); *State v. Smathers*, 287 N.C. 226, 230, 214 S.E.2d 112, 114-15 (1975); *State v. Hackney*, 240 N.C. 230, 235, 81 S.E.2d 778, 781 (1954); *State v. Farrell*, 223 N.C. 321, 326, 26 S.E.2d 322, 325 (1943)). This constitutional right to assistance of counsel and the right to confront witnesses are " 'guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and by sections 19 and 23 of Article I of the Constitution of North Carolina.' " *Tunstall*, 334 N.C. at 328, 432 S.E.2d at 336 (citing *State v. Harris*, 290 N.C. 681, 686-87, 228 S.E.2d 437, 440 (1976)).

A defendant further is entitled to have " 'reasonable time to investigate, prepare and present his defense.' " *Tunstall*, 334 N.C. at 328,

432 S.E.2d at 336 (quoting *Harris*, 290 N.C. at 687, 228 S.E.2d at 440). Our Court previously has found that there is no definite " 'length of time for investigation, preparation and presentation . . ., and whether [the] defendant is denied due process must be determined upon the basis of the circumstances of each case.' " *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 337 (quoting *Harris*, 290 N.C. at 687, 228 S.E.2d at 440); *State v. Horner*, 310 N.C. 274, 277, 311 S.E.2d 281, 284 (1984). To establish that a constitutional violation has occurred, "a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 337. Inadequate time to prepare may be shown by defendant through either a showing of " '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.' " *Id.* (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986)); s*ee also State v. Morgan*, 359 N.C. 131, 143, 604 S.E.2d 886, 894 (2004) (" '[W]hen the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that "the denial was erroneous and also that [the] defendant was prejudiced as a result of the error." ' ") (quoting *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982)).

In the instant case, defendant has shown no evidence that he would have been better prepared had the motion to continue been granted or that he was materially prejudiced by the denial of his motion. The record tended to show the State voluntarily gave defendant a copy of Darden's written statement on the morning of trial. Darden's statement noted that in October 2001, he and Colson stole the weapon at issue, which they later sold to defendant. The State, however, was not required to provide defendant with a copy of Darden's statement prior to Darden's testifying on direct examination. *State v. Harris*, 323 N.C. 112, 122, 371 S.E.2d 689, 695-96 (1988). Moreover, defendant conceded that the statement provided to defense counsel on the day of trial did not constitute discoverable information and that the State voluntarily had provided a copy to defendant.

> State: I don't believe . . . that this information is discoverable. It's certainly not exculpatory as to his client, so it wouldn't be *Brady* material. He is getting it before trial, before jury selection. . . .

Court: Mr. Butler, sir, do you wish to respond to the State's contention that under our rules of discovery this material is not included?

. . . .

Defense: And I can't, in all fairness, . . . say that it's required. . . . I would rather [the State] let me know about information so I can do a better job representing my client, so I can do a better job pretrial in determining whether to go to trial or not. You know, whether or not that's true doesn't change the fact that the State did voluntarily disclose it . . . .

In the interest of justice, the trial court postponed the trial until the following morning to allow defense counsel an opportunity to interview Darden, although it denied defendant's second motion to continue.

Court: The Court having considered the arguments before it denies the motion to continue. However, in the spirit of accommodating counsel for the defendant, the Court will hold this matter open for jury selection until in the morning in order to allow counsel some time to investigate the matters that he has referred to here in his arguments for a continuance.

The record further indicated that prior to 2 September 2003, the trial court granted defendant's first motion to continue to allow defense counsel more time to prepare adequately, including more time to prepare for newly discovered information relating to scientific evaluation of the crime weapon. Defense counsel had ample opportunity to conduct an investigation into the facts surrounding the October 2001 incident.

Defense: The alleged weapon that was used . . . was discovered some five or six weeks later . . . . It was sent away, and I learned in the discovery process that in fact, the gun had belonged in . . . a breaking and entering . . . . One of the victims of the shooting in this case was a codefendant with . . . Darden. That's the new witness that I found out about five minutes after twelve this morning . . . . Darden and . . . Colson . . . were codefendants on this matter. *I did an investigation. I talked to Officer Saintsing, I've seen all the records*

> *from that. I've got everything that I need to show the connection that this particular [weapon]* had been stolen by the victim and a codefendant. But I come in today . . . and find out . . . he's going to be a witness.

(Emphasis added).

Therefore, we conclude that "the trial court did not abuse its discretion in denying defendant's motion to continue, as there was no evidence presented to show how defendant 'would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.' " *State v. McCullers*, 341 N.C. 19, 30-33, 460 S.E.2d 163, 170-71 (1995) (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986)). This assignment of error is overruled.

[2] Defendant next asserts that the trial court committed reversible error by refusing to give defendant's proposed limiting instruction regarding the impermissible contact with jurors.

"A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985) (citing *State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982)). Whether to grant a motion for mistrial is within the trial court's discretion, and its ruling will not be disturbed unless it clearly amounts to a manifest abuse of discretion. *State v. Perkins*, 345 N.C. 254, 277, 481 S.E.2d 25, 34, *cert. denied*, 522 U.S. 837, 139 L. Ed. 2d 64 (1997); *State v. Wood*, 168 N.C. App. 581, 608 S.E.2d 368, 370 (2005); *State v. Ward*, 338 N.C. 64, 92-93, 449 S.E.2d 709, 724 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995). The question of misconduct is determined based on the facts and circumstances of each case. *Wood*, 168 N.C. App. at 583-84, 608 S.E.2d at 370. "The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings." *Id.* Accordingly, when a defendant alleges juror misconduct, the trial court is responsible for investigating the matter and making an appropriate inquiry. *Id.* (quoting *State v. Najewicz*, 112 N.C. App. 280, 291, 436 S.E.2d 132, 139 (1993) (emphasis omitted)). " 'Not every violation of a trial court's instruction to jurors is such prejudicial misconduct as to require a mistrial.' " *Id.* at 584, 608 S.E.2d at 370 (quoting *State v. Harris*, 145 N.C. App. 570, 578, 551 S.E.2d 499, 504 (2001)).

In the instant case, three days after defendant's trial began, a juror reported to the trial judge that two courtroom spectators told five jurors in an elevator that the victims were lying when they said that defendant had shot them. The trial court instructed the five jurors not to "consider in any way what took place, set it completely out of your mind and not consider it in any way in your deliberations." The trial court then questioned each of the five jurors individually and asked if they could completely set aside the comment, not consider the spectator's comments, and not allow it to influence them in any way. All five jurors responded affirmatively. The trial court instructed the five jurors not to discuss what they had heard with other members of the jury.

When the jury was brought back into the courtroom, the trial judge informed the jury that two people expressed "an opinion about the lack of credibility . . . of a person or persons . . . in this trial." The trial judge further instructed that the jurors were to "base [their] verdict on the evidence presented in [the] courtroom, the law as given to [them] by this judge, and [their] common sense, not something that may have been said in an elevator or any other matter outside [the] court proceeding." The trial judge then made the following statement to the jury:

> Court: It has been brought to my attention that there is a possibility that some other event or events or transactions may have occurred that should not have occurred with regards to the jury and other persons. . . . Has anything happened, anything been said in your presence, any gesture been made, has anything occurred at all since this trial began, that causes you to feel that you cannot be fair and impartial to both sides in the trial of this case? If anything of that sort has occurred, please raise your hand.
>
> Jury: (No response)
>
> Court: I have made arrangements for you to be able to use an elevator that's back here in the back, to spare you having to walk through the public lobby and use the public elevator. So when you leave today, you will be escorted a different route than you've been taking.

At the conclusion of this inquiry, the trial judge once again asked the five jurors who had been in the elevator whether they could put aside the comments. The five jurors reiterated that they could. Subse-

quently, the trial court denied defendant's request to instruct the jury that there was no evidence this event was connected to either the State or defense.

Here, the trial court made an appropriate investigation into the matter and questioned the jurors individually. The trial court further questioned each juror regarding his or her ability to be fair and impartial. Defendant has not shown that any of the jurors were prejudiced by the alleged misconduct or that a different result would have been reached had the trial court granted defendant's request to give a limiting instruction regarding the impermissible contact with jurors. *See State v. Brown*, 335 N.C. 477, 488, 439 S.E.2d 589, 596 (1994); *see also State v. Larrimore*, 340 N.C. 119, 456 S.E.2d 789 (1995); *State v. Lippard*, 152 N.C. App. 564, 574, 568 S.E.2d 657, 664, *disc. rev. denied*, 356 N.C. 441, 573 S.E.2d 159 (2002). Accordingly, the denial of defendant's motion to continue did not result in a "substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2003). Therefore, this assignment of error is overruled.

[3] Defendant next contends the trial court committed plain error when it repeatedly entered objections on behalf of the prosecution and criticized defense counsel in front of the jury, thus giving the jury a sense of partiality favoring the State. Specifically, defendant argues that such conduct by the trial court violated defendant's due process rights and his right to a fair trial. We disagree.

Our Supreme Court previously has stated that:

> [a] prerequisite to our engaging in a "plain error" analysis is the determination that the [trial court's action] constitutes "error" at all. Then "before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict."

State v. Shepherd, 163 N.C. App. 646, 652, 594 S.E.2d 439, 443-44 (2004) (quoting *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), *distinguished by State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986))). "The court may interrogate witnesses, whether called by itself or by a party," and may question a witness to clarify confusing or conflicting testimony. N.C. Gen. Stat. § 8C-1, Rule 614(b) (2003); *Shepherd*, 163 N.C. App. at 652,

594 S.E.2d at 444 (quoting *State v. Chandler*, 100 N.C. App. 706, 710, 398 S.E.2d 337, 339 (1990) (citing *State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986))). On appeal, the trial judge's broad discretionary power to supervise and control the trial " 'will not be disturbed absent a manifest abuse of discretion.' " *State v. Mack*, 161 N.C. App. 595, 598, 589 S.E.2d 168, 171 (2003), (quoting *State v. Goldman*, 311 N.C. 338, 350, 317 S.E.2d 361, 368 (1984)), *cert. denied*, 543 U.S. 966, 160 L. Ed. 2d 236 (2004).

> In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized. Unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered *harmless*.

Mack, 161 N.C. App. at 598, 589 S.E.2d at 171 (quoting *Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (emphasis added)).

In the instant case, the trial judge interrupted defense counsel's questioning of witnesses on numerous occasions. For example, during the cross examination of the State's first witness, the trial court interjected:

> Defense: Have you also seen a statement that's been signed by . . . Colson that [defendant] was not the shooter?
>
> Witness: Have I seen it? Yes.
>
> . . . .
>
> Defense: Well, the document that you saw—
>
> Witness: It's notarized; yes.
>
> Defense: Okay. And it says that [defendant] did not shoot him. [Defendant] was there, but [he] did not shoot him. You've seen that document, haven't you?
>
> Witness: Yes, I have.
>
> . . . .
>
> Defense: And in that notarized statement that you've seen, he clearly says [defendant] did not shoot him?
>
> Court: Well, asked and answered. Please proceed.

Additional similar exchanges occurred. All of the trial judge's comments were made in open court in the presence of the jury.

The last time the trial judge interrupted defense counsel was not in open court.

> Court: I'm laughing because I'm not going to believe that any time is going to be saved in this trial by any method whatsoever. Go ahead. I'm listening to your serious argument about the admissibility or inadmissibility of these exhibits. Go ahead.

As demonstrated by the exchanges recited above, the trial court did not abuse its discretion in its efforts to control examinations of witnesses by defense counsel. Our courts previously have stated that "[t]he trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination." *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 861, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). Based on the record before this Court, it is clear that the trial court focused on moving the trial forward by maintaining control over certain witness examinations by defense counsel. This assignment of error is overruled.

[4] Defendant also asserts the trial court erred when it allowed an incompetent witness to testify as to evidence regarding the ballistics and firearms testing. Specifically, defendant argues the trial court erred when it allowed Agent Scott Jones ("Agent Jones"), a forensic firearms examiner assigned to the firearms and toolmark section for the State Bureau of Investigation lab, to rely on Agent Santora's findings in order to form an opinion as to the identity of the weapon used to fire shell casings recovered from the scene of the shooting. Defendant argues that Agent Jones' testimony violated the rule set forth in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). We disagree.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In essence, the goal of the Confrontation Clause is to ensure reliability of the evidence and to act as "a procedural rather than a substantive guarantee." *Crawford*, 541 U.S. at 61, 158 L. Ed. 2d at 199.

> It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of

> cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Id.

A violation of the defendant's Sixth Amendment right of confrontation is determined by examining "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217, *disc. rev. denied*, 358 N.C. 734, 601 S.E.2d 866, *appeal dismissed*, 359 N.C. 192, 607 S.E.2d 651 (2004) (citing *Crawford*, 541 U.S. at 54, 158 L. Ed. 2d at 203 (2004)).

In *Crawford*, the Court determined that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59, 158 L. Ed. 2d at 197. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203.

In the instant case, however, even if Agent Jones' statements were testimonial in nature, his statements still do not violate the rule set forth in *Crawford*. This is because the Court recognized various exceptions to its rule: the Confrontation Clause does not act as a bar to testimonial statements admitted for purposes other than the truth of the matter asserted. *Crawford*, 541 U.S. at 59, n.9, 158 L. Ed. 2d at 197 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 85 L. Ed. 2d 425 (1985)). One such purpose may include the basis for an expert's opinion.

North Carolina General Statutes section 8C-1, Rule 703 (2003) provides:

> [F]acts 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.

In *State v. Jones*, our Supreme Court stated that this rule permits "an expert witness to rely on an out-of-court communication as a basis for an opinion and to relate the content of that communication to the jury." 322 N.C. 406, 410, 368 S.E.2d 844, 846 (1988) (citing *In re Wheeler*, 87 N.C. App. 189, 360 S.E.2d 458 (1987)). In *Jones*, over defendant's objection, the trial court allowed a State Bureau of Investigation agent to testify as to the standard State Bureau of Investigation procedures for fingerprint identification and to inform the jury that another agent verified the match. *Id.* "Rule 703 permits an expert witness to base an opinion on the out-of-court opinion of an expert who does not testify." *Id.* at 410-11, 368 S.E.2d at 846. As such, the Court held that "[t]he opinion of the other examiner thus necessarily forms a part of the basis for the opinion to which the witness testified, and it clearly was reasonable for an expert in the field of fingerprint identification to rely upon such a procedure." *Id.* at 414, 368 S.E.2d at 848. *See also*, *State v. McCord*, 140 N.C. App. 634, 649, 538 S.E.2d 633, 642-43 (2000) (When the court allowed an expert witness, who had reviewed another SBI Agent's file, to testify as to SBI procedures and that someone other than himself conducted the testing of DNA, . . . this information was "inherently reliable."); *State v. Daughtry*, 340 N.C. 488, 511, 459 S.E.2d 747, 758 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996); *State v. Quick*, 329 N.C. 1, 29-30, 405 S.E.2d 179, 196 (1991) (establishing the basis for expert testimony is admissible for non-hearsay purposes); *State v. Wade*, 296 N.C. 454, 462, 251 S.E.2d 407, 412 (1979) (If the expert's opinion "is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion.").

In the instant case, the weapon was located twenty days after the shooting of Carden and Colson. Agent Santora of the State Bureau of Investigation lab received the weapon and several shell casings from the scene for investigation. Agent Santora then examined these items, conducted tests, and prepared a report of his findings. At trial, Agent Jones, a forensic examiner for the State Bureau of Investigation, testified in Agent Santora's place.

State: Have you had occasion to review your records at the SBI lab to see who conducted the examination?

Witness: Yes, I have.

State: And who was it?

Witness: It was at that time Agent Dave Santora . . . .

State: And is he still with the SBI lab?

Witness: No, he's not.

Without objection, Agent Jones was accepted as an expert in forensic firearms identification. His duties included examining fired cartridge cases, bullets, and projectiles recovered from crime scenes to identify their characteristics. Agent Jones also tested firearms to determine whether the cases, bullets, or projectiles recovered were from certain firearms.

Based on Agent Jones's examination of the shell casings recovered from the shooting, and his review of tests conducted by Agent Santora, Agent Jones, over defendant's objection, testified to his conclusion that the four shell casings recovered from the shooting had been fired from the weapon in question.

State: And have you reviewed [Agent Santora's] notes and his findings?

Witness: Yes, sir.

State: Have you also reviewed his lab report?

Witness: Yes, sir.

State: Have you, since you've been here today, examined, at least with the naked eye, the gun and the shell casings?

Witness: Yes, I have.

State: From looking at the records, what did your section receive for firearms examination in this case?

Defense: If your Honor please, I'm going to have to object, . . . I'm going to request a voir dire at this time.

. . . .

Defense: I think it's very important that we have the person, so that I can properly cross-examine the person who conducted these tests . . . . I preserve my right to claim it is hearsay, and that this agent is not the one who conducted the tests, and therefore I'm not being given an opportunity to examine the person who did do the testing.

. . . .

Court: The court notes the objection, the Court overrules the objection.

. . . .

State: And based on your review of Agent Santora's notes and the other records there from your section, was a firearms examination done concerning those items of evidence?

Witness: Yes, it was.

. . . .

State: Okay. And does your file and the notes of Agent Santora indicate that the shell casings under this case number were examined and compared to test fired casings from this weapon?

Witness: Yes.

State: Okay. And did Agent Santora prepare a laboratory report based upon that examination?

Witness: Yes, he did.

. . . .

State: Agent Jones, based on your training and experience, and your review of Agent Santora's notes, do you have an opinion, to a scientific certainty and to your own satisfaction, as to whether or not the shell casings that were examined were fired from this [weapon]. . . ?

Witness: Yes, I do.

. . . .

Witness: That is that all the fired casings, all four fired cartridge cases, were fired in this [weapon], to the exclusion of all other guns.

Defendant alleges that Agent Jones' testimony concerning the contents of Agent Santora's report was hearsay, and therefore, inadmissible at trial. Based on the evidence, however, it is clear that Agent Jones' testimony was not offered for the truth of the matter asserted. Rather, his testimony was offered as a basis of an expert's opinion, which falls within the exception set forth in *Crawford*.

Accordingly, we hold that the trial court did not err when it allowed Agent Jones to use Agent Santora's report as the basis of his expert opinion that the shell casings were discharged from the weapon in question. Therefore, this assignment of error is overruled.

[5] In the instant case, defendant was convicted of attempted first-degree murder and assault with a deadly weapon with the intent to kill inflicting serious injury of both Colson and Carden. Defendant also contends the trial court erred when it submitted to the jury both attempted first-degree murder and assault with a deadly weapon with the intent to kill inflicting serious injury in violation of his state and federal constitutional rights to be free from double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment provides, in relevant part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see also* N.C. Const. art. I, section 19. This Clause is made applicable to North Carolina through the Fourteenth Amendment. *State v. Battle*, 279 N.C. 484, 486, 183 S.E.2d 641, 643 (1971).

In order for double jeopardy to apply, the two convictions must be identical:

> [E]ven where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

State v. Tirado, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004), *cert. denied sub nom*, *Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005) (quoting *State v. Murray*, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988)).

To be convicted of attempted first-degree murder, the State must prove the defendant (1) had a specific intent to kill another; (2) made a calculated overt act to carry out that intent; (3) possessed malice, premeditation, and deliberation accompanying the act; and (4) failed to complete the intended killing. N.C. Gen. Stat. § 14-17 (2003); *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534; *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000). "The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill,

and (4) inflicting serious injury, not resulting in death." *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534 (citing N.C. Gen. Stat. § 14-32(a) (2003); *Peoples*, 141 N.C. App. at 117, 539 S.E.2d at 28). When the defendant is charged with assault with a deadly weapon with intent to kill inflicting serious injury, the State must prove "the use of a deadly weapon" and "proof of serious injury;" however, the charge of attempted murder does not contain the assault with a deadly weapon or serious injury requirement. *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534; *State v. Rainey*, 154 N.C. App. 282, 285, 574 S.E.2d 25, 27 (2002); *see* N.C. Gen. Stat. § 14-17, -32(a) (2003). Moreover, when the defendant is charged with attempted first-degree murder, the State must show proof of premeditation and deliberation; however, these elements are not required for the charge of assault with a deadly weapon with intent to kill inflicting serious injury. *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534 (citing N.C. Gen. Stat. § 14-17, -32(a) (2003)). "[E]ach offense contains at least one element not included in the other." *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534. Defendant contends the instant case is unique on its facts and therefore requests this Court to reevaluate *Tirado*. However, this we cannot do, for "we are bound by this holding until it is overturned by a higher court." *State v. Forrest*, 168 N.C. App. 614, 624, 609 S.E.2d 241, 247 (2005) (citing *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). Accordingly, defendant has not been subjected to double jeopardy and this assignment of error is overruled.

[6] Finally, Defendant asserts the trial court erred when it sentenced defendant as a prior record level IV offender because his prior convictions were ineligible to be considered when determining his prior record points.

A defendant's prior record level is calculated by taking the "sum of the points assigned to each of the [defendant's] prior convictions that the court finds to have been proved in accordance with" the North Carolina General Statutes, section 15A-1340.14. Under section 15A-1340.14(f), a prior conviction shall be proved by any of the following methods:

(1) Stipulation of the parties.

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

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

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

N.C. Gen. Stat. § 15A-1340.14(f) (2003). The State must prove, by a preponderance of the evidence, that defendant's prior convictions exist and that the defendant standing before the court is the same defendant named in the prior conviction. *Id.*

Here, the trial court, after determining defendant had eleven points, sentenced defendant within the presumptive range as a Record Level IV offender, to two hundred and fifty-one months minimum and three hundred and eleven months maximum in the North Carolina Department of Correction. Defendant's prior convictions included: (1) misdemeanor larceny, on 18 November 1992; (2) possession of cocaine, on 25 May 1993; (3) felony larceny, on 16 September 1996; (4) possession of stolen goods, on 11 April 1996; and (5) attempted assault with a deadly weapon with intent to inflict serious injury, on 11 April 1996. During the sentencing phase, the trial court, the State, and defendant engaged in the following exchange:

State: The only evidence I have on sentencing is the prior record work sheet that I prepared. I believe counsel has seen this. I show him with 11 prior record points, placing him in Record Level IV. . . . Do you stipulate he has 11 points, Record Level IV?

Defense: I stipulate that that document is the same as what I looked at and researched; yes.

. . . .

State: Your Honor, that's the only additional evidence I have at sentencing. I would like to be heard at the appropriate time.

Court: Will there be any evidence for the defendant?

Defense: No, your Honor.

No other documents were offered to the Court and the State did not present original or copied records of defendant's prior convictions. While the State did not offer any document other than their own worksheet of calculated points, defendant appeared to stipulate to the State's findings listed within that worksheet—that defendant had eleven prior record points. Defense counsel certainly failed to make clear that he was not stipulating to the State's prior record worksheet and presented no contrary information to the court at the time the

stipulation was being discussed. Based on North Carolina General Statutes, section 15A-1340.14(f), stipulation of the parties is sufficient to prove defendant in fact had eleven prior record points.

Assuming, *arguendo*, that the State did not meet their burden of proof by a preponderance of the evidence, that error was merely harmless. *State v. Smith*, 139 N.C. App. 209, 219-20, 533 S.E.2d 518, 524 (2000) (trial court's erroneous determination that defendant had ten points, when it should have found defendant had nine points, was harmless as defendant correctly was determined to have a prior record level of IV). Defendant, relying on North Carolina General Statutes, section 15A-1340.14(d), contends in his brief that the trial court should have counted only one of defendant's two convictions on 11 April 1996. Pursuant to subsection (d), which provides, in pertinent part, that "if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used." N.C. Gen. Stat. § 15A-1340.14(d) (2003). Even if the trial court had included only the points for the conviction on 11 April 1996, the trial court still would have determined that defendant had a total of nine points, which is within the Record Level IV point range. Therefore, we hold that defendant was sentenced properly as a Record Level IV offender and this assignment of error is overruled.

No error.

Chief Judge MARTIN concurs.

Judge HUDSON concurs in result only.

STATE OF NORTH CAROLINA v. ALBERT HILTON TUCK, JR.

No. COA04-1077

(Filed 6 September 2005)

1. Robbery— sufficiency of evidence—victim's awareness of defendant's intent

A conviction under N.C.G.S. § 14-87 (armed robbery) does not depend upon the defendant's pronouncement of his intentions or his directions to the victim. There was no error here sur-

rounding the failure to dismiss the charge and the verdict where defendant never spoke to the victim because she ran screaming from the store, but the evidence clearly established defendant's intentions on entering the store.

2. Identification of Defendants— in-court—perception during robbery—not inherently incredible

The credibility of a witness's identification testimony is for the jury and should be suppressed only on a finding that it is inherently incredible. The armed robbery victim here had personal knowledge of defendant from her perception of him during the robbery, even though it was brief, and her in-court identification was not inherently incredible.

3. Appeal and Error— admission of confession—pretrial motion to suppress denied—no objection at trial

Defendant did not properly preserve an issue for appeal (although it was heard under Appellate Rule 2) where he filed a pretrial motion to suppress his confession but did not object at trial. Legislation foregoing objections after a definitive evidence ruling (N.C.G.S. § 8C-1, Rule 103(a)(2)) has been held to fail to the extent that it conflicts with Appellate Rule 10(b)(1).

4. Confessions and Incriminating Statements— defendant under the influence of narcotics—aware of his words

The trial court did not err by admitting defendant's custodial confession despite his claim that he was under the influence of Percocet and Oxycontin and did not voluntarily waive his rights. The trial court's conclusion that defendant was not impaired to the extent that it affected his ability to voluntarily waive his rights was supported by the findings and the evidence, and there was no indication that defendant was in a condition leaving him unconscious of the meaning of his words.

5. Evidence— third-party forcing confession—excluded—not prejudicial

To the extent that there was error in excluding evidence that defendant was threatened into confession by another individual, that error was not prejudicial given the overwhelming evidence of defendant's guilt and the admission of much of the excluded evidence during the direct examination of defendant.

6. Sentencing— presumptive and mitigated ranges—no error

There was no error in the sentencing of defendant for multiple convictions of armed robbery where defendant received two sentences in the presumptive range and four in the mitigated range. He was not entitled to a sentence in the mitigated range for each conviction solely because his sentences in other convictions were in the mitigated range.

Appeal by defendant from judgment entered 5 April 2004 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 6 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.

Anne Bleyman for defendant-appellant.

TIMMONS-GOODSON, Judge.

Albert Hilton Tuck, Jr. ("defendant"), appeals his conviction for six counts of robbery with a dangerous weapon. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error.

The State's evidence presented at trial tends to show the following: On 26 November 2003, June Matal ("Matal") and Lois Ellen Smarella ("Smarella") were at Suzio's at Six Forks Station, a women's boutique located in Raleigh, North Carolina. Defendant entered the store, pointed a gun at Matal and Smarella, and ordered Smarella to open the store's cash register. After Smarella was unable to open the cash register, defendant ordered Matal and Smarella to go to the back of the store. Defendant thereafter took money from the cash register and left the store.

On 1 December 2003, Heather Hester ("Hester") was working at KooKaburra Kids, a children's clothing store located in Raleigh and owned by Hester. As Hester was wrapping presents for a customer, defendant entered the store and pointed a gun at her. Defendant ordered Hester to open the store's cash register, and, after "fumbling through" it, he asked Hester if the cash inside the register was all the money she had. Hester replied that it was, and she and an employee of KooKaburra Kids went into a dressing room "to get away." Defendant thereafter took the money from the cash register and left the store.

On 2 December 2003, Laura Maria Scott ("Scott") was working at the Gingerbread House, a florist located in Raleigh and owned by Scott. As Scott was on the telephone, defendant approached Scott, pointed a gun at her, and ordered her to give him her money. Scott thereafter opened the store's cash register, and defendant took between $130.00 and $150.00 from the register and left the store.

On 5 December 2003, Kathleen Elisa Henderson ("Henderson") was working at Triangle Nutrition, a health store located in Raleigh. As Henderson was taking inventory at the front of the store, defendant entered the store, pointed a gun at Henderson, and ordered her to "give him all the money out of the drawer." Henderson opened the store's cash register and gave defendant approximately $350.00. Defendant thereafter left the store.

On 9 December 2003, Karla Pyrtle ("Pyrtle") was working at Shop 20-12, a women's boutique located in Raleigh. After hearing the front door bell of the store chime, Pyrtle exited an office and saw defendant pointing a gun at her. Pyrtle immediately "started screaming" and ran out of the store. When Pyrtle returned to the store, approximately $200.00 had been taken from the store's cash register.

On 16 December 2003, Jennifer Dawn Johnson ("Johnson") was working at the Raleigh Cat Clinic, a veterinarian hospital located in Raleigh. Defendant entered the hospital, pointed a gun at Johnson, and asked her if anyone else was at the hospital. After Johnson informed defendant that a doctor was at the hospital, defendant ordered Johnson to show him the office. Once inside the office, defendant ordered Johnson to open the doctor's purse, and, after doing so, Johnson handed the doctor's wallet to defendant. Defendant took approximately $100.00 in cash out of the wallet, and he asked Johnson "what else" was in the office. Johnson gave defendant the "petty cash" folder, and defendant took approximately $200.00 from it. After ordering Johnson to lay down on the floor of the x-ray room, defendant left the hospital.

On 29 December 2003, Oxford Police Department Sergeant Mark Blair ("Sergeant Blair") went to defendant's residence in Vance County to question defendant about another matter. Two detectives from the Vance County Sheriff's Office and a detective from the Henderson Police Department accompanied Sergeant Blair to defendant's residence, and Sergeant Blair was notified that officers from the Raleigh Police Department were also on their way to the residence. After the officers approached his front door, defendant

asked them to come inside his residence. After advising defendant of his *Miranda* rights, the officers began questioning defendant about a firearm. Defendant initially informed the officers that he had "tossed" the firearm "into a pond" located near his residence. However, defendant later informed the officers that the firearm was located inside a vehicle parked in the driveway. Sergeant Blair thereafter searched the vehicle and discovered a loaded, .38 caliber revolver inside the glove box.

Raleigh Police Department Detective G.R. Passley ("Detective Passley") arrived at defendant's residence after the other officers. Detective Passely suspected defendant was involved in the robberies, and he questioned defendant about clothing the witnesses of the robberies had described the assailant wearing. Defendant told Detective Passley that he had previously thrown away several shirts and other articles of clothing used in the robberies, but that some shirts were inside another vehicle parked in his driveway. Detective Passley found a white t-shirt inside the vehicle, and he noted that it was cut in the back. Defendant informed Detective Passley that he had cut the shirt to enable him to easily pull the shirt over his face during the commission of the robberies.

Defendant was arrested and transported to the Vance County Sheriff's Department. After again advising defendant of his *Miranda* rights, Detective Passley asked defendant if he wanted to make a statement regarding the robberies. Defendant replied that he did, and he thereafter confessed to each of the six robberies.

On 9 February 2004, defendant was indicted for six counts of robbery with a dangerous weapon. Prior to trial, defendant moved to suppress his custodial confession, arguing that he was intoxicated and under the influence of several drugs at the time he was interviewed. The trial court denied defendant's motion, and his case proceeded to trial the week of 29 March 2004. At trial, defendant testified on his behalf, and he attempted to offer evidence that he was threatened into confession by another individual, who defendant contended had actually committed the crimes. The trial court excluded evidence of the individual's threats to defendant, concluding that the testimony contained hearsay statements used to prove the truth of the matters asserted therein. On 5 April 2004, the jury returned a guilty verdict on each of the charges. The trial court thereafter sentenced defendant to 324 to 446 months incarceration. Defendant appeals.

We note initially that defendant's brief does not contain arguments supporting each of the original nineteen 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 issues argued by defendant in his brief.

The issues on appeal are whether the trial court erred by: (I) denying defendant's motion to dismiss the charge of robbery of Pyrtle with a dangerous weapon; (II) failing to set aside the verdict on the charge of robbery of Pyrtle with a dangerous weapon; (III) allowing Pyrtle's in-court identification of defendant; (IV) denying defendant's motion to suppress his confession; (V) excluding evidence regarding any threats defendant may have received that prompted the confession; and (VI) refusing to sentence defendant in the mitigated range for each charge.

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of robbery of Pyrtle with a dangerous weapon. Defendant asserts that the State presented insufficient evidence to demonstrate that the taking occurred "from the person or in the presence" of Pyrtle. We disagree.

In order to withstand a motion to dismiss a charge of robbery with a dangerous weapon, the State must present substantial evidence that the defendant: (1) unlawfully took or attempted to take personal property from a person or in the presence of another; (2) by the use or threatened use of a dangerous weapon, implement, or means; and (3) thereby endangered or threatened the life of a person. *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002); N.C. Gen. Stat. § 14-87(a) (2003). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

In the instant case, defendant contends that because Pyrtle ran out of the store immediately upon seeing defendant with the weapon, the subsequent taking did not occur from her person or in her presence as contemplated by N.C. Gen. Stat. § 14-87. However, this Court has previously stated that

> The word "presence" [under N.C. Gen. Stat. § 14-87] must be interpreted broadly and with due consideration to the main element of the crime—intimidation or force by the use or threatened use of firearms. "Presence" here means a possession or control by a person so immediate that force or intimidation is essential to the taking of the property. And if the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous course of conduct, the taking is from the "presence" of the victim.

State v. Clemmons, 35 N.C. App. 192, 196, 241 S.E.2d 116, 118-19 (citations omitted), *disc. review denied*, 294 N.C. 737, 244 S.E.2d 155 (1978); *see also State v. Dunn*, 26 N.C. App. 475, 476, 216 S.E.2d 412, 414 (1975) ("The evidence that defendant and his companions picked up the groceries, after they had threatened, beaten and driven [the victim] away, also satisfies the element of a taking."); *State v. Reaves*, 9 N.C. App. 315, 317, 176 S.E.2d 13, 15 (1970) (concluding that "the elements of violence and of taking [were] so joined in time and circumstance as to be inseparable" where "[t]he car and gun were not abandoned or left unattended when they were taken by the defendant; [the] defendant had driven their custodian away by a vicious and murderous assault.").

In *Clemmons*, after being threatened by the defendant with force and shot by an unidentified robber, the victim fled to an adjoining room while her husband gave money to the defendant. On appeal, we held that the evidence supported the conviction for armed robbery of the victim. 35 N.C. App. at 195-96, 241 S.E.2d at 118-19. Similarly, in *State v. Edwards and State v. Nance*, 49 N.C. App. 547, 559, 272 S.E.2d 384, 393 (1980), we rejected one defendant's argument that the trial court had erred by denying his motion to dismiss, noting that from the evidence presented at trial, "it was reasonable to infer that [the defendant] had attempted to frighten [the victim] and that, as soon as she left the house, he went back into the bedroom and took property which did not belong to him." Likewise, in *State v. Herring*, 74 N.C. App. 269, 271, 328 S.E.2d 23, 25 (1985), *aff'd per curiam*, 316 N.C. 188, 340 S.E.2d 105 (1986), we held there was sufficient evidence to warrant an instruction on armed robbery where the evidence tended to show that one of the defendants "discharged a gun into the [victim's] vehicle, that the occupant fled the scene, and that several items of personal property were missing from the vehicle when he returned."

In the instant case, Pyrtle testified that she fled the store after defendant approached her with a handgun. Defendant attempts to distinguish the above-detailed case law from the facts of the instant case by asserting that Pyrtle "was not aware of what crime was being attempted" because defendant "never asked [Pyrtle] for money or spoke to her." However, we are not convinced that a conviction under N.C. Gen. Stat. § 14-87 depends upon the defendant's pronouncement of his intentions or his directions to the alleged victim. Instead, we note that "[t]he use of a weapon to frighten or intimidate a robbery victim is the main element of armed robbery." *State v. Haddick*, 76 N.C. App. 524, 525, 333 S.E.2d 518, 520 (1985). Furthermore, we note that the evidence presented at trial clearly establishes defendant's intentions upon entering the store. Pyrtle testified that defendant approached her store while she was in the rear office, and when she opened the door, defendant was wearing a mask and pointing a gun at her. Pyrtle testified that the "mask" worn by defendant "cover[ed] everything but his eyes." Pyrtle remembered defendant's gun "pointed at [her] the whole time when [she] ran out of the store[,]" and she recalled defendant "try[ing] to resist [her] with his hand." Pyrtle testified that she was "hysterical" and "didn't let" defendant speak "because [she] was just pretty much going crazy." When Pyrtle returned to the store, she discovered approximately $200.00 was missing from the cash register. In light of the foregoing, we conclude that the State produced sufficient evidence from which the jury could find that defendant took property from Pyrtle's person or in her presence, despite Pyrtle's flight during the incident. Accordingly, we overrule defendant's first argument.

Defendant next argues that the trial court erred by failing to set aside the jury's verdict on the charge of robbery of Pyrtle with a dangerous weapon. Defendant contends that the trial court abused its discretion by not setting aside the verdict *ex mero motu*. Alternatively, defendant contends that his trial counsel provided ineffective assistance by failing to move to dismiss the verdict. In support of these contentions, defendant reasserts his arguments regarding the insufficiency of the evidence demonstrating that a taking occurred in Pyrtle's presence.

This Court has previously held that

> Failure to set aside the verdict *ex mero motu* [is] reviewable only in the situation in which the jury's verdict is manifestly unjust and against the greater weight of the evidence. If there is sufficient

> evidence to support the verdict, the trial judge has acted within his or her discretion in denying the motion, or in failing to act *sua sponte* to set it aside.

State v. Mack, 81 N.C. App. 578, 584, 345 S.E.2d 223, 226-27 (1986). In the instant case, as detailed above, the State offered sufficient evidence to withstand defendant's motion to dismiss the charge of robbery of Pyrtle with a dangerous weapon. Therefore, we conclude that the trial court did not err by failing to set aside the verdict on the charge *ex mero motu*. Similarly, because we have examined the evidence presented by the State and found it sufficient, we are not persuaded that, but for his trial counsel's refusal to move to set aside the verdict, "there is a reasonable probability that . . . the result of the proceeding [against defendant] would have been different." *Strickland v. Washington*, 466 U.S 668, 694, 80 L. Ed. 2d 674, 698 (1984). Accordingly, we overrule defendant's second argument.

[2] Defendant next argues that the trial court committed plain error by allowing Pyrtle to identify defendant at trial as the individual who robbed her store. Defendant asserts that the identification should have been excluded because it was unreliable. We disagree.

"A prerequisite to our engaging in a 'plain error' analysis is the determination that [the trial court's action] 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). We note that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2003). "This rule is designed to prevent a witness from testifying to a fact about which he has no direct, personal knowledge." *State v. Poag*, 159 N.C. App. 312, 323, 583 S.E.2d 661, 669, *disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (2003). Furthermore, "[a] witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe and must have actually observed the facts. . . . '[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception.' " N.C. Gen. Stat. § 8C-1, Rule 602 (Commentary (quoting Advisory Committee's Notes)).

In the instant case, Pyrtle testified at trial that she has "always been an observant person" and that she focused on the "eyes and the kind of hair" of the individual who robbed her. She testified that the individual's eyes were "very noticeable[,]" and on cross-examination,

she testified that she and the individual were in the store together for "40, 45 seconds." She further testified that although the individual was wearing "something covering his face[,]" she could "clearly see his face[,]" including "[t]he bridge of his nose." Pyrtle testified that the individual had brown hair, weighed approximately 185 pounds, and was approximately 5'10" tall. She stated that the picture of defendant shown to her by the State was "the robber[,]" and that it was consistent with "all the descriptions from what [she] did see of him."

In light of the foregoing evidence, we conclude that Pyrtle had personal knowledge of defendant stemming from her perception of him during the robbery. Defendant maintains that Pyrtle's identification should have been excluded because she had only forty-five seconds to observe her assailant, and because it was "based in part on a composite shown on the news." However, "[t]he credibility of a witness's identification testimony is a matter for the jury's determination, and only in rare instances will credibility be a matter for the court's determination." *State v. Green*, 296 N.C. 183, 188, 250 S.E.2d 197, 200-01 (1978) (citations omitted). Where an in-court identification is objected to, the identification should be suppressed "[o]nly if there is a finding that the identification testimony 'is inherently incredible because of the undisputed facts . . . as to the physical conditions under which the alleged observation occurred[.]' " *Id.* at 189, 250 S.E.2d at 201 (quoting *State v. Miller*, 270 N.C. 726, 731, 154 S.E.2d 902, 905 (1967)). In the instant case, we are not persuaded that Pyrtle's in-court identification is inherently incredible. Therefore, we conclude that the trial court did not err by allowing Pyrtle's in-court identification of defendant. Accordingly, we overrule defendant's third argument.

[3] Defendant next argues that the trial court erred by denying his motion to suppress his confession. Defendant asserts that the confession should have been suppressed because his statements to officers were involuntary, in that he was under the influence of the prescription drugs Percocet and OxyContin at the time he made the statements. As an initial matter, we note that although he filed a pretrial motion to suppress his confession, defendant failed to object to presentation of this evidence at trial. Furthermore, although defendant alternatively assigned plain error to this issue, defendant failed to offer any support in his brief for the plain error assignment, and therefore he has abandoned that method of review. *See State v. Nobles*, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999). Our courts

have previously held that questions regarding the admissibility of evidence are not preserved merely by a pre-trial motion *in limine*; instead, the defendant is required to reassert his objection at trial when the evidence is offered. *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam). Although our legislature has recently enacted legislation providing 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 Court has recently held that "to the extent that N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) is inconsistent with N.C. R. App. P. 10(b)(1), it must fail." *State v. Tutt*, 171 N.C. App. 518, 524, 615 S.E.2d 688, —– (2005); *but see State v. Rose*, 170 N.C. App. 284, 288, 612 S.E.2d 336, 339 (Filed 17 May 2005) (No. COA04-353) ("Since the trial in this case occurred two months following the effective date of the amendment [of Rule 103], once the trial court denied defendant's motion to suppress, he was not required to object again at trial in order to preserve his argument for appeal."), *disc. review denied*, 359 N.C. 641, —– S.E.2d —– (Filed 30 June 2005) (No. 296P05). In the instant case, to the extent defendant has failed to properly preserve this issue for appeal, we have nevertheless chosen to review defendant's argument in our discretion pursuant to N.C.R. App. P. 2. As detailed below, we conclude that the trial court did not err.

[4] The record reflects that prior to trial, defendant moved to suppress his confession on the grounds that it was involuntarily given, in that defendant was under the influence of Percocet and OxyContin when he was interviewed. After receiving evidence and hearing argument from both parties during *voir dire*, the trial court disagreed, concluding that defendant "fully understood his Miranda rights, . . . knowingly waived his Miranda rights, and . . . voluntarily made statements to the law enforcement officers." In support of its conclusion, the trial made the following pertinent findings of fact:

> 5. Defendant has testified at this hearing that he voluntarily took Percocet and OxyContin on December 29th, 2003. Court has also heard evidence from the law enforcement officers present in his home and outside his home that the defendant appeared alert and responded to all questions. There is further testimony that the defendant did not appear impaired to the law enforcement officers.

> 6. Court finds that the defendant was not impaired to the extent that it affected his ability to voluntarily, knowingly and understandingly waive his Miranda rights.
>
> . . . .
>
> 8. The defendant was arrested in his home and taken to the Vance County Sheriff's office where he was again advised of his Miranda rights at 1920 hours on December 29, 2003.
>
> 9. The defendant did voluntarily, knowingly and understandingly waive his Miranda rights . . . .

"Whether a confession was voluntarily given is to be determined from the totality of the circumstances surrounding the confession." *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992). "[W]hile they are factors to be considered, intoxication and subnormal mentality do not of themselves necessarily cause a confession to be inadmissible because of involuntariness or the ineffectiveness of a waiver." *State v. Barnes*, 345 N.C. 184, 245, 481 S.E.2d 44, 78 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). Instead, the confession "is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981). "The trial court is to determine whether the State has borne its burden of showing, by a preponderance of the evidence, that [the] defendant's confession was voluntary. The factual findings by the trial court are binding on appeal if supported by competent evidence; however, conclusions of law are fully reviewable." *State v. Perdue*, 320 N.C. 51, 59, 357 S.E.2d 345, 350 (1987) (citations omitted).

In the instant case, we conclude that the trial court's findings of fact were supported by competent evidence. During *voir dire*, Sergeant Blair testified that defendant was attentive when read his *Miranda* rights, and that defendant did not act unusual or otherwise suggest he was impaired. Sergeant Blair testified that defendant answered the questions asked of him, did not make any unusual physical movements, and "didn't appear to be under the influence of anything." Although Henderson Police Department Sergeant Sandra Lawhorn ("Sergeant Lawhorn") remembered defendant taking medication given to him by his wife for his "back problems[,]" she testified that she did not notice anything unusual about defendant's appearance or interaction with officers. Vance County Sheriff's Department Sergeant Steve Lyles ("Sergeant Lyles") testified that

defendant "definitely didn't appear to be impaired" when questioned, and that defendant's demeanor did not change during questioning. Sergeant Lyles further testified that defendant appeared to be listening when read his *Miranda* rights, and that he was "[v]ery coherent" and "very understanding." Detective Passley also testified that defendant did not do anything unusual during questioning, and that his demeanor did not change at any point during the interview. Although we note that defendant offered testimony contradicting the officers' testimony, we also note that discrepancies and contradictions involving the voluntariness of a confession are for the trial court to resolve in its findings of fact.

> Whether the defendant did or did not make the statement attributed to him is a question of fact to be determined by the jury from the evidence admitted in its presence. Whether the statement, assuming it to have been made, was made voluntarily and understandingly, so as to permit evidence thereof to be given in the presence of the jury, is a question of fact to be determined by the trial judge in the absence of the jury upon the evidence presented to him in the jury's absence. . . . The trial judge should make findings of fact with reference to this question and incorporate those findings of fact in the record. . . . No reviewing court may properly set aside or modify those findings if so supported by competent evidence in the record.

State v. Gray, 268 N.C. 69, 78, 150 S.E.2d 1, 8 (1966) (citations omitted).

As detailed above, the trial court's findings of fact in the instant case are supported by competent evidence, and they support its conclusion of law. There is no indication in the record that defendant's alleged impairment amounted to "mania—that is, [a condition leaving him] unconscious of the meaning of his words[.]" *State v. Logner*, 266 N.C. 238, 243, 145 S.E.2d 867, 871 (1966). Therefore, we conclude that the trial court did not err by admitting defendant's custodial confession. Accordingly, we overrule defendant's fourth argument.

[5] Defendant next argues that the trial court erred by excluding evidence tending to show that he was threatened into confession by another individual. Defendant asserts that the evidence was admissible because it was offered to explain his rationale for confessing, and that therefore the trial court committed reversible error by excluding it. We disagree.

At trial, defendant testified on his own behalf and attempted to offer evidence tending to show that he was threatened into confession by Charles Vick ("Vick"), whom defendant's wife, Marcy Clark-Tuck ("Marcy"), had implicated in the robberies. During her testimony, Marcy described "inadvertently" helping Vick "rob these places" by "dropp[ing] him off in the vicinity about the same time that [the robberies] happened." On direct examination, defendant was asked why he confessed to the robberies. In response, defendant stated that he was "threatened" by "an individual known by the name Charles Vick [who] had approached [defendant] earlier, probably a week before the cops arrived at [his] house." The State objected to defendant's attempt to testify as to what Vick said to him, and during *voir dire*, defendant provided the following pertinent testimony as an offer of proof:

Q. Mr. Tuck, what did Mr. Vick tell you?

A. He said—he said there is some stuff probably might come up. He said you could say yes or no. He said it would probably be more beneficial if you said yes for what they accuse you of. He said you ain't got a bad record. You will probably get a slap on the wrist.

Q. What . . . exactly did Mr. Vick tell you had happened in Raleigh?

A. He told me stories about places he had robbed, stuff he had done. He told me several stores. Named quite a few.

. . . .

Q. He named all six places?

A. Yep. And a few more at that, too.

Q. Now, why did you confess to the robberies?

A. He said he'd hurt my family if I didn't.

. . . .

Q. What reason did you have to believe that?

A. He is a bad person.

Q. Okay. What do you mean he is a bad person?

A. He had been in and out of prison since he was 16. He has been known to actually go to the person's front door, and when they

> come to the door he'd grab them and rob them right there. Last time I was in the prison he attacked a woman in her own house with a pump action and his partner in crime was shot in the stomach at the same time in the same robbery. I have known him to break into several businesses. I have known him to rob old ladies of jewelry, lots of stuff.

Following argument from both parties, the trial court concluded that the testimony was "being offered to prove the truth of the matter asserted therein and it is hearsay." After noting that Vick was not present for cross-examination, the trial court sustained the State's objection to the testimony.

On appeal, defendant contends that the trial court erred by ruling that the testimony was inadmissible hearsay. Assuming *arguendo* that the trial court erred, we note that a trial court's refusal "to admit or exclude evidence will not result in the granting of a new trial absent a showing by the defendant that a reasonable possibility exists that a different result would have been reached absent the error." *State v. Macon*, 346 N.C. 109, 117, 484 S.E.2d 538, 543 (1997). In the instant case, defendant has failed to make such a showing. As detailed above, the State presented evidence from owners and employees of each of the businesses allegedly robbed by defendant. Henderson, Pyrtle, and Johnson each identified defendant as the individual who robbed their store. Matal testified that she "picked out a picture in the book that was him and—and [she] picked it out from the eyes and the eyes were like [defendant's]." Scott testified that defendant "look[ed] very much like the person that [she] believed" robbed her. Each witness described the weapon used in the robberies as similar to the one obtained by law enforcement officers at defendant's residence. The State also presented testimony from Andy Parker ("Agent Parker"), a latent print examiner for the City County Bureau of Identification of Wake County. Agent Parker testified that defendant's fingerprints were found on the front door handle of the Gingerbread House, the petty cash envelope of the Raleigh Cat Clinic, the front door handle of the Raleigh Cat Clinic, and the front door handle of the x-ray room of the Raleigh Cat Clinic. In his confession, defendant provided a detailed description of each of the robberies, including where they occurred, what dates they occurred on, how many individuals were inside each store, what took place once he was inside the stores, how much money he took from each store, and where he parked his car prior to entering the stores. On direct examination, the trial court allowed defendant to testify that he confessed to the crimes because

he "thought it would protect [his] family" and "thought that [his] family's life was in danger and [he] had to do whatever it took." In light of the foregoing evidence, we conclude that, to the extent the trial court erred by sustaining the State's objection, defendant has failed to demonstrate that a different result would have been reached absent this error. The State offered overwhelming evidence of defendant's guilt, and much of the evidence presented by defendant during *voir dire* was actually admitted during defendant's direct examination. Accordingly, we overrule defendant's fifth argument.

[6] Defendant's final argument is that the trial court erred by sentencing him in the presumptive range for two convictions, but in the mitigated range for the other four convictions. Defendant asserts that the trial court considered improper and irrelevant factors in sentencing him in the presumptive range. We disagree.

The record in the instant case reflects that with respect to the armed robbery of Hester and the armed robbery of Henderson, the trial court sentenced defendant in the presumptive range. Prior to sentencing defendant for the armed robbery of Hester, the trial court noted that "there was a small child who was with a customer in the store" when the robbery was committed. Prior to sentencing defendant for the armed robbery of Henderson, the trial court noted that "since the robbery occurred [Henderson] has been seeing a counselor." Citing the trial court's statements, defendant contends that the trial court "improperly aggravated" his sentence "even though there were no written find[ing]s of aggravation."

In *State v. Pope*, our Supreme Court concluded that

> In our opinion it would not be in the interest of justice to put a trial judge in a straitjacket of restrictive procedure in sentencing. . . . There is a presumption that the judgment of a court is valid and just. The burden is upon [the] appellant to show error amounting to a denial of some substantial right. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to [the] defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962) (citation omitted).

After reviewing the record in the instant case, we conclude that defendant has failed to demonstrate a "denial of some substantial

right." *Id.* Although it is clear that the trial court considered a witness's age and a victim's resulting injuries while sentencing defendant for two particular convictions, the trial court nevertheless chose to sentence defendant within the presumptive range mandated by our legislature and approved by our courts. We are not persuaded that defendant was entitled to a sentence in the mitigated range for each conviction solely because his sentences in other convictions were in the mitigated range. Furthermore, because defendant was sentenced in the mitigated and presumptive ranges and the trial court did not find any aggravating factors, defendant's assertions regarding the impact of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) to his case are without merit. *See State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (Filed 1 July 2005) (No. 485PA04). Accordingly, we overrule defendant's final argument.

In light of the foregoing conclusions, we hold that defendant received a trial free of prejudicial error.

No error.

Chief Judge MARTIN and Judge WYNN concur.

IN RE: A.B.D., A MINOR CHILD

No. COA04-941

(Filed 6 September 2005)

Process and Service— Rule 60(b)(4) motion to set aside order—personal jurisdiction—subject matter jurisdiction—notice—laches

The trial court abused its discretion by denying respondent's N.C.G.S. § 1A-1, Rule 60(b)(4) motion to set aside a 1999 termination of parental rights order based on untimely service of process and the order terminating his parental rights is reversed, because: (1) the trial court lacked personal jurisdiction since the summons was served more than thirty days after its issuance and respondent made no general appearance in the action; (2) the trial court lacked subject matter jurisdiction since petitioner could have but failed to obtain an endorsement for an extension on the original summons, an alias and pluries summons within 90

days of the summons' issuance, or an N.C.G.S. § 1A-1, Rule 6 extension; (3) although petitioner contends an extension of time within which to serve process was implicit in the termination order, the termination order was entered 116 days after the summons had been issued which was well after the ninety days within which a court may grant any extension for service of process; (4) even where a defendant has notice of a lawsuit, that notice cannot make service of process valid unless the service is in the manner prescribed by statute; and (5) although petitioner contends respondent's delay in seeking to have the order set aside constitutes laches and fault on his part, petitioner cannot show disadvantage, injury, or prejudice in the delay and thus cannot establish laches.

Appeal by Respondent from order entered 16 February 2004 by Judge Michael R. Morgan in District Court, Wake County. Heard in the Court of Appeals 13 June 2004.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, for respondent-appellant.

Sally H. Scherer, for petitioner-appellee.

WYNN, Judge.

Civil Procedure Rule 4 required, at the time this action was instituted, that service of process be effectuated within thirty days of the issuance of a summons. N.C. Gen. Stat. § 1-1A, Rule 4 (1999). Where service does not occur within the required period and an endorsement, extension, or alias/pluries summons is not acquired within ninety days of the summons' issuance, the action is discontinued, the trial court lacks jurisdiction, and any judgment rendered is void. *Cole v. Cole*, 37 N.C. App. 737, 738, 247 S.E.2d 16, 17 (1978). In the case *sub judice*, Respondent contends that service of process was not timely, no extension was obtained, and the order terminating his parental rights as to A.B.D. is thus void. For the reasons stated herein, we agree and reverse the order of the trial court.

I. Facts

The record reflects that on 23 July 1999, Petitioner (natural mother of A.B.D.) filed a petition to terminate Respondent's parental rights as to A.B.D. and caused a summons to be issued. Process was served on Respondent personally on 2 September 1999 and by mail on

9 September 1999. The record indicates that no extension, endorsement, alias summons, or pluries summons was obtained as to the 23 July 1999 summons.

On 16 November 1999, Respondent's parental rights were terminated. The termination order stated that Respondent did not make an appearance, either personally or through counsel, in the termination proceeding. Respondent did not appeal the termination order.

After his parental rights had been terminated, Respondent brought an action for custody and support of the minor child. On 13 October 2000, Petitioner and Respondent entered into a Consent Order For Custody And Child Support "effectuating their agreements[.]" In the consent order, the parties agreed that "it is in the best interest of the minor child that she remain in the custody of [Petitioner] but that [Respondent] have regular visitation and play an active role in the child's life." Moreover, under the consent order, Respondent was obligated to pay $1055.72 per month in child support for A.B.D. During the hearing on Respondent's Rule 60(b) motion, the parties stipulated that "they have, in essence, complied for the most part with that order."

On 13 November 2002, Respondent brought an action to legitimate A.B.D. The Assistant Clerk of Court entered a legitimation order on 5 February 2003. On 4 December 2003, however, Petitioner moved to have the legitimation order set aside because Respondent's parental rights had previously been terminated. On 18 December 2003, the Assistant Clerk of Court set aside the legitimation order, stating that the legitimation order "was improvidently granted because of the lack of information regarding the termination of parental rights, and the order would not have been issued or granted had the undersigned known of the termination."[1]

On 8 December 2003, Respondent moved to set aside the termination order pursuant to North Carolina Civil Procedure Rule 60(b), contending, *inter alia*, that service of process was invalid, as Defendant was served forty-one days after the issuance of the summons, *i.e.*, not within the thirty-day requirement for service in effect in 1999, when the termination action was filed and the termination order entered. On 16 February 2004, the trial court denied

1. This order, and an order issued on 26 April 2004 by Superior Court, Wake County setting aside the legitimation order have been appealed to this Court. The opinion in that matter is being filed simultaneously with this opinion. *Gorsuch v. Dees*, —— N.C. App. ——, —— S.E.2d —— (filed 6 September 2005).

Respondent's Rule 60(b) motion, finding that, while service of process occurred forty-one days after the summons had been issued, the action did not discontinue, the summons was not invalid, and Respondent was ultimately properly served. Respondent appealed.

On appeal, Respondent contends, *inter alia*, that the trial court erred and abused its discretion in refusing to set aside a 1999 termination of parental rights order under Civil Procedure Rule 60(b)(4) because process was served after forty-one days had passed, the court lacked jurisdiction, and the order is thus void.

II. Standard of Review

A trial court's ruling on a Civil Procedure Rule 60(b) motion is reviewable only for an abuse of discretion. *Harris v. Harris*, 162 N.C. App. 511, 513, 591 S.E.2d 560, 561 (2004). An "[a]buse of discretion is shown only when 'the challenged actions are manifestly unsupported by reason.' " *Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 384 (2003) (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

III. Timeliness of the Order on Appeal

Generally, a motion made pursuant to Civil Procedure Rule 60(b) "shall be made within a reasonable time, and for reasons (1),(2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2004); *see also*, *e.g.*, *Jenkins v. Richmond County*, 118 N.C. App. 166, 169, 454 S.E.2d 290, 292 (1995) (stating that a Rule 60(b) motion "must be made within a reasonable time[]"). However, a motion made pursuant to Rule 60(b)(4), to set aside a void judgment, may be made at any time. *See*, *e.g.*, *Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002) ("[A] judgment or order . . . rendered without an essential element such as jurisdiction or proper service of process . . . is void. . . . Because a void judgment is a legal nullity which may be attacked at any time[,]" Rule 60(b) motion was timely. (internal quotations and citation omitted)); *Burton v. Blanton*, 107 N.C. App. 615, 616-17, 421 S.E.2d 381, 383 (1992) ("If a judgment is void, it is a nullity and may be attacked at any time. Rule 60(b)(4) is an appropriate method of challenging such a judgment." (citations omitted)).

IV. Application of Rule 4 to Termination of Parental Rights Proceedings

As this Court has made clear,

> The Rules of Civil Procedure apply to proceedings for termination of parental rights:
>
> > The conclusion that G.S. 1A-1, Rule 17(c)(2), Rules of Civil Procedure, applies [to termination of parental rights proceedings] is inescapable. All remedies in the courts of this State divide into (1) actions or (2) special proceedings. [N.C.]G.S. § 1-1. A proceeding to terminate parental rights is . . . either a civil action or a special proceeding, . . . [and thus] the Rules apply, G.S. 1-393, except where a different procedure may be prescribed by statute.
>
> *In re Clark*, 303 N.C. 592, 598, n.3, 281 S.E.2d 47, 52 n. 3 (1981); *see also In re Hodge*, 153 N.C. App. 102, 105, 568 S.E.2d 878, 880 (2002) ("proceedings under the Juvenile Code are civil in nature, and accordingly, 'proceedings in juvenile matters are to be governed by the Rules of Civil Procedure.' ") (quoting *Matter of Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988)); *In re Brown*, 141 N.C. App. 550, 551, 539 S.E.2d 366, 368 (2000), *cert. denied*, 353 N.C. 374, 547 S.E.2d 809 (2001) ("because a termination of parental rights proceeding is civil in nature, it is governed by the Rules of Civil Procedure unless otherwise provided") (citing *In re Bullabough*, 89 N.C. App. at 179, 365 S.E.2d at 646).

In re McKinney, 158 N.C. App. 441, 444-45, 581 S.E.2d 793, 795-96 (2003). Nothing in the Juvenile Code prescribes a different service of process procedure under the circumstances of this case;[2] Civil Procedure Rule 4's service of process requirements therefore apply.

V. Civil Procedure Rule 4

North Carolina Civil Procedure Rule 4, which governs process and service of process, is intended to provide notice of the commencement of an action and " 'to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit.' " *Harris v. Maready*, 311 N.C. 536, 541-42, 319 S.E.2d 912, 916 (1984) (quoting *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 84, 243 S.E.2d 756, 758

2. The Juvenile Code does state that where abuse, neglect, or dependency proceedings are pending, service of process pursuant to Civil Procedure Rule 5(b) may be sufficient. *See* N.C. Gen. Stat. § 7B-1102 (2004). Nothing in the record indicates, however, that such proceedings were pending in this case.

(1978)). In 1999, the time when the termination action commenced, Rule 4 stated:

> (c) *Summons—Return.*—Personal service or substituted personal service of summons as prescribed by Rule 4(j)(1) a and b must be made within 30 days[3] after the date of the issuance of summons. . . . If the summons is not served within the time allowed upon every party named in the summons, it shall be returned immediately upon the expiration of such time by the officer to the clerk of court who issued it with notation thereon of its nonservice and the reasons therefor as to every such party not served . . . .
>
> (d) *Summons—Extension; endorsement, alias and pluries.*—When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:
>
> (1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or
>
> (2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.
>
> * * *
>
> (e) *Summons—Discontinuance.*—When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed.

N.C. Gen. Stat. § 1-1A, Rule 4.

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3. A 2001 amendment to Rule 4(c), applicable only to actions filed on or after 1 October 2001, extended the time allowed for service of a summons to sixty days. Because this action was filed in 1999, the former thirty-day requirement applies. *See* 2001 N.C. Sess. Laws 379.

A. Rule 4's Thirty-Day Service Requirement and Personal Jurisdiction

"Jurisdiction has been defined as the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment. Personal jurisdiction refers to the Court's ability to assert judicial power over the parties and bind them by its adjudication." *Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs*, 158 N.C. App. 376, 378, 581 S.E.2d 798, 800-01 (internal quotations and citations omitted), *rev'd on other grounds*, 357 N.C. 651, 588 S.E.2d 465 (2003). "[A] court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods." *Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999); *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) ("Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent." (citation omitted)).

As this Court has stated, "[a] summons not served within 30 days loses its vitality and becomes *functus officio*, and service obtained thereafter does not confer jurisdiction on the trial court over the defendant." *Dozier v. Crandall*, 105 N.C. App. 74, 75-76, 411 S.E.2d 635, 636 (1992) (citing *Carolina Narrow Fabric Co. v. Alexandria Spinning Mills, Inc.*, 42 N.C. App. 722, 724, 257 S.E.2d 654, 655 (1979)); *Hollowell v. Carlisle*, 115 N.C. App. 364, 444 S.E.2d 681 (1994) (same); *In re Shermer*, 156 N.C. App. 281, 291, 576 S.E.2d 403, 410 (2003) (reversing a termination of parental rights order on other grounds but stating "[a] defect in service of process is jurisdictional, rendering any judgment or order obtained thereby void. Thus, if service of process on the respondent were defective, the orders . . . would be void, and respondent could be relieved from the judgment.").

Here, service of process took place forty-one days after the issuance of the summons. Service more than thirty days after the summons had been issued violated Rule 4(c), and the summons served had therefore "los[t] its vitality" and could "not confer jurisdiction on the trial court over the defendant." *Dozier*, 105 N.C. App. at 75-76, 411 S.E.2d at 636.

Notably, "any act which constitutes a general appearance obviates the necessity of service of summons and waives the right to challenge the court's exercise of personal jurisdiction over the party making the general appearance." *Lynch v. Lynch*, 302 N.C. 189, 197, 274 S.E.2d 212, 219 (1981) (citations omitted).

Here, the trial court found, and Petitioner did not contest, that Respondent made no appearance in the termination proceeding. Indeed, in her appellate brief, Petitioner stated Respondent "was personally served with summons on two separate occasions but failed to answer or respond in any way. He was served with notice of the hearing but failed to appear." Respondent therefore did not waive the service of process issue by making a general appearance.

In sum, because the summons was served more than thirty days after its issuance, and because Respondent made no general appearance in the action, the trial court lacked personal jurisdiction over Respondent. *Cole*, 37 N.C. App. at 738, 247 S.E.2d at 16-17 ("Where the summons is not served within the statutory period, it loses its vitality and does not confer jurisdiction over the person of the defendant. . . . Thus the court was without jurisdiction to enter judgment against defendant[.]").

B. Rule 4's Ninety-Day Rule and Subject Matter Jurisdiction

While a summons not served within the requisite thirty days has "los[t] its vitality" and cannot "confer jurisdiction on the trial court over the defendant," *Dozier*, 105 N.C. App. at 75-76, 411 S.E.2d at 636, the action is not yet necessarily discontinued.

> The summons must be served within thirty days after the date of the issuance of the summons. G.S. 1A-1, Rule 4(c). However, the failure to make service within the time allowed does not invalidate the summons. The action may continue to exist as to the unserved defendant by two methods. First, within ninety days after the issuance of the summons or the date of the last prior endorsement, the plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Secondly, the plaintiff may sue out an alias or pluries summons at any time within ninety days after the date of issue of the last preceding summons in the chain of summonses or within ninety days of the last prior endorsement. G.S. 1A-1, Rule 4(d)(1) and (2). Thus, a summons that is not served within the thirty-day period becomes dormant and cannot effect service over the defendant, but may be revived by either of these two methods.

County of Wayne ex rel. Williams v. Whitley, 72 N.C. App. 155, 157-58, 323 S.E.2d 458, 461 (1984).

In addition to endorsements and alias/pluries summonses, a plaintiff/petitioner may also obtain an extension of time within which to effectuate service of process pursuant to Civil Procedure Rule 6. N.C. Gen. Stat. § 1-1A, Rule 6 (2004); *Hollowell*, 115 N.C. App. 364, 444 S.E.2d 681; *Dozier*, 105 N.C. App. 74, 411 S.E.2d 635. Such an extension may be granted, even after the period within which the summons should have been served, but prior to the passage of ninety days after the issuance of the summons, upon motion and a showing of excusable neglect. *Id.*

Here, while service of process took place forty-one days after the issuance of the summons and thus violated Rule 4(c)'s thirty-day requirement, Petitioner's action need not have been discontinued. Petitioner could have obtained an endorsement for an extension on the original summons, could have obtained alias and pluries summonses, or could have moved for an extension pursuant to Civil Procedure Rule 6. These things Petitioner did not do: The trial court found that no endorsement on the original summons was obtained, no alias or pluries summons was issued, and nothing in the record before us indicates that Petitioner moved for or obtained a Rule 6 extension.

The consequence of not obtaining an endorsement, extension, or alias/pluries summons within ninety days after the issuance of the summons is the discontinuation of the action.

> Rule 4(e) specifically provides that where there is neither endorsement nor issuance of alias or pluries summons within 90 days after issuance of the last preceding summons, ***the action is discontinued*** as to any defendant not served within the time allowed ***and treated as if it had never been filed.*** *Johnson v. City of Raleigh*, 98 N.C. App. 147, 148-49, 389 S.E.2d 849, 851, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176 (1990). Under Rule 4(e), either an extension can be endorsed by the clerk or an alias or pluries summons can be issued after the 90 days has run, but "the action is deemed to have commenced, as to such a defendant, on the date of the endorsement or the issuance of the alias or pluries summons." *Lemons*, 322 N.C. at 275, 367 S.E.2d at 657. ***Thus, when plaintiff failed to have this action continued through endorsement or issuance of alias or pluries summons within 90 days, this action was discontinued.***

Dozier, 105 N.C. App. at 78, 411 S.E.2d at 638 (emphasis added). Stated differently,

> Defective or failed original service in a suit may be remedied by endorsement of the original summons or by application for alias and pluries summons within ninety days of original issue or last endorsement. N.C.G.S. § 1A-1, Rule 4(d) (1989). ***If a party fails to use either method to extend time for service, the suit is discontinued, and treated as if it had never been filed.*** Rule 4(e); *Hall*, 44 N.C. App. at 26-27, 260 S.E.2d at 158. ***If a new summons is issued after the original suit is discontinued, it begins a new action.*** Rule 4(e); *Everhart v. Sowers*, 63 N.C. App. 747, 751, 306 S.E.2d 472, 475 (1983).

Johnson, 98 N.C. App. at 148-49, 389 S.E.2d at 851 (emphasis added).

Because Petitioner failed to obtain an endorsement, extension, or alias/pluries summons within ninety days after the issuance of the summons, the termination of parental action should have been "treated as if it had never been filed." *Id.* And where an action has not been filed, a trial court necessarily lacks subject matter jurisdiction.

> "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (citing 1 Restatement (Second) of Judgments § 11, at 108 (1982)), *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citing W. Shuford, *N.C. Civil Practice and Procedure* § 12-6 (1981)).

In re N.R.M., T.F.M., 165 N.C. App. 294, 297, 598 S.E.2d 147, 149 (2004) (quoting *In re McKinney*, 158 N.C. App. at 443, 581 S.E.2d at 795).

"[A] trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action." *In re McKinney*, 158 N.C. App. at 447, 581 S.E.2d at 797 (citation omitted). " 'Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.' " *Id.* at 444, 581 S.E.2d at 795 (quoting *In re Transp. of Juveniles*, 102 N.C. App. 806, 808, 403

S.E.2d 557, 558-59 (1991)). As this Court made plain in *In re Transp. of Juveniles*, 102 N.C. App. at 808, 403 S.E.2d at 558-59,

> A court cannot undertake to adjudicate a controversy on its own motion; rather, it can adjudicate a controversy only when a party presents the controversy to it, and then, only if it is presented in the form of a proper pleading. 20 Am. Jur. 2d Courts § 94 (1965). Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question. *Id. See Carolina Freight Carriers Corp. v. Local 61, International Bhd. of Teamsters*, 11 N.C. App. 159, 180 S.E.2d 461, *cert. denied*, 278 N.C. 701, 181 S.E.2d 601 (1971) (holding that "the filing of a complaint or the issuance of summons pursuant to G.S. 1A-1, Rule 3, [was] a condition precedent to the issuance of an injunction or restraining order." 11 N.C. App. at 161, 180 S.E.2d at 463). *See also* N.C. Gen. Stat. § 7A-193 (1989) (stating in pertinent part, that, "A civil action is commenced by filing a complaint with the court.").
>
> It is clear in this case that no action or proceeding had been commenced. We conclude that without an action pending before it, the district court was without jurisdiction to enter an order . . . .

In this case, after ninety days had passed without the issuance of an endorsement, extension, or alias/pluries summons, the termination of parental rights action should have been "treated as if it had never been filed." *Johnson*, 98 N.C. App. at 148-49, 389 S.E.2d at 851. Because the termination petition was, for all intents and purposes, not filed after ninety days past the summons' 23 July 1999 issuance, the trial court had no subject matter jurisdiction to enter the termination order on 16 November 1999, 116 days after the summons had been issued.

In sum, because the summons was served more than thirty days after its issuance, and because Respondent made no general appearance in the action, the trial court lacked personal jurisdiction over Respondent. *Cole*, 37 N.C. App. at 738, 247 S.E.2d at 16-17 ("Where the summons is not served within the statutory period, it loses its vitality and does not confer jurisdiction over the person of the defendant. . . . Thus the court was without jurisdiction to enter judgment against defendant[.]"). And because no endorsement, extension, or alias/pluries summons was obtained within ninety days of the summons' issuance, the termination action, for all intents and purposes, was not filed after ninety days past the summons' 23 July

1999 issuance. *Johnson*, 98 N.C. App. at 148-49, 389 S.E.2d at 851. The trial court therefore had no subject matter jurisdiction to enter the termination order. *In re Transp. of Juveniles*, 102 N.C. App. at 808, 403 S.E.2d at 558-59. Because the trial court lacked both personal and subject matter jurisdiction at the time it entered the termination order, the order is clearly void, and the trial court abused its discretion in denying Respondent's motion to set aside the termination order as void pursuant to Civil Procedure Rule 60(b)(4).

VI. Petitioner's Arguments

Petitioner contends that an extension of time within which to serve process was "implicit in the [termination] order itself, so the absence of a written motion or order extending time is of no significance." We disagree, not least because the termination order was entered 116 days after the summons had been issued, *i.e.*, well after the ninety days within which a court may grant any extension for service of process. *Dozier*, 105 N.C. App. at 75-78, 411 S.E.2d at 636-38.

Petitioner also contends that because Respondent had notice of the termination proceeding, there was adequate service of process. Again, we disagree. Even where a defendant has notice of a lawsuit, that notice cannot make service of process valid "unless the service is in the manner prescribed by statute." *Stone v. Hicks*, 45 N.C. App. 66, 67, 262 S.E.2d 318, 319 (1980) (citing *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967)); *see also*, *e.g.*, *Guthrie v. Ray*, 293 N.C. 67, 69, 235 S.E.2d 146, 148 (1977) ("Where a statute provides for service of summons or notices . . . by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service." (quotation omitted)).

Petitioner also argues that Respondent's delay in seeking to have the order set aside "constitutes laches and fault on his part, so relief, even were it appropriate, cannot now be granted." Yet again, we disagree. First, this Court has stated that "[w]hile some jurisdictions have allowed laches to breathe life into a void judgment, we believe the better view is not to apply the doctrine to a void . . . judgment. We are wary of any result that allows for the enforcement of a void judgment." *Jenkins v. Richmond County*, 99 N.C. App. 717, 722, 394 S.E.2d 258, 262 (1990) (internal citation omitted). Moreover, our Supreme Court has made clear that " 'the mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay must be shown to be unreasonable

and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it.' " *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 182, 581 S.E.2d 415, 424-25 (2003) (citations omitted). Here, Petitioner entered into a consent order stating that "it is in the best interest of the minor child that . . . [Respondent] have regular visitation and play an active role in the child's life." Under the consent order, Respondent was given extensive visitation privileges as to A.B.D., including visitation on Father's Day, and Petitioner accepted substantial monthly child support for A.B.D. from Respondent. Under these circumstances, Petitioner cannot show "disadvantage, injury or prejudice" in the delayed setting aside of the order terminating Respondent's parental rights and thus cannot establish laches. *Williams*, 357 N.C. at 182, 581 S.E.2d at 424-25.

VII. Conclusion

In sum, because the trial court first lacked personal jurisdiction over Respondent and then lacked subject matter jurisdiction, the order terminating Respondent's parental rights is void. The trial court therefore abused its discretion in denying Respondent's Rule 60(b)(4) motion, and that order is reversed.

Reversed.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

BEROTH OIL COMPANY, A NORTH CAROLINA CORPORATION, PLAINTIFF v. WILLIAM H. WHITEHEART D/B/A WHITEHEART OUTDOOR ADVERTISING COMPANY, DEFENDANT

AMERICAN ADVERTISING CONSULTANTS, INC. AND SKYAD, LLC AND DARLENE JOY PAYNE, PLAINTIFFS v. WILLIAM H. WHITEHEART D/B/A WHITEHEART OUTDOOR ADVERTISING COMPANY, DEFENDANT

No. COA03-1608

(Filed 6 September 2005)

1. Unfair Trade Practices— disputed billboard lease—damages

The trial court did not err by denying defendant's motion for a new trial on plaintiffs' unfair and deceptive trade practices claims arising from a disputed billboard lease. Although defendant argued that plaintiffs' damages were overly speculative and

not supported by adequate evidence, the evidence was sufficient to allow the jury to calculate damages to a reasonable certainty and the jury's awards do not amount to a substantial miscarriage of justice.

2. Unfair Trade Practices— attorney fees—sufficiency of evidence

The evidence was sufficient and there was no abuse of discretion in an award of attorney fees in an action for unfair and deceptive trade practices arising from a disputed billboard lease.

3. Unfair Trade Practices— disputed billboard lease—sufficiency of evidence—new trial denied

There was no abuse of discretion in not granting a new trial on an unfair and deceptive practices claim arising from a disputed billboard lease. The jury found deliberate deception, delay, and interference with attempts to lease the property to a successor.

4. Civil Procedure— request for jury instructions—requirements

The trial court did not abuse its discretion by denying defendant's request for additional language in the jury charge in an action rising from a disputed billboard lease. Defendant did not comply with the requirements of N.C.G.S. § 1A-1, Rule 51(b) in making the request; moreover, the jury resolved the disputed issue in its verdicts.

5. Malicious Prosecution and Abuse of Process— disputed billboard lease—sufficiency of evidence

There was sufficient evidence to support claims of malicious prosecution and abuse of process in an action arising from a disputed billboard lease.

6. Libel and Slander— disputed billboard lease—sufficiency of evidence

There was sufficient evidence to support a jury verdict for libel in an action arising from a disputed billboard lease.

Appeal by defendant from judgments entered 18 February 2003 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 21 March 2005.

Hendrick & Bryant, LLP, by Matthew H. Bryant and Timothy Nerhood, for plaintiff-appellees.

David E. Shives, PLLC, by David E. Shives, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from judgments of the trial court entered upon jury verdicts finding him liable for slander of title, unfair trade practices, malicious prosecution, abuse of process, libel *per se* and punitive damages, and awarding plaintiff Beroth Oil Company $213,500.00 in damages and plaintiffs American Advertising Consultants, Inc., SkyAd, LLC, and Darlene Joy Payne $450,000.00 in damages. Defendant also appeals from orders of the trial court denying his motions for judgment notwithstanding the verdict, new trial and remittitur. We find no error.

On 20 December 2001, plaintiff Beroth Oil Company ("Beroth") filed a complaint in Forsyth County Superior Court alleging claims against defendant for slander of title, unfair and deceptive practices, and unjust enrichment. Beroth later amended its complaint to allege a claim of illegal restraint of trade. In its complaint, Beroth alleged, in pertinent part: Beroth owned real property ("the property") in Statesville, North Carolina, which defendant leased for purposes of maintaining a billboard. Beroth stated defendant had failed to pay his yearly $2,000.00 rent for the property for the 1998-99 and 1999-2000 periods. Although defendant received late notices from Beroth, he made no payment as demanded.

In July of 2000, plaintiff Darlene Payne ("Payne") approached Beroth and offered to lease the property for an annual amount of $9,000.00 for twelve years. Beroth and Payne subsequently entered into a lease for the property. Acting as Beroth's agent, Payne sent a letter to defendant informing him of the new lease on the property and demanding that defendant remove his billboard.

On or about 25 July 2000, defendant tendered the past due payment of $2,000.00 for the 1999-2000 period. Defendant also sent Beroth a proposed written lease, offering to renew the lease for $2,000.00 annual rent for a term of July 1999 until July 2009. With the proposed lease, defendant sent a check for $2,000.00 for the 2000-2001 term.

In August of 2000, defendant met with Payne to discuss the possible sale of the billboard to her. Negotiations to sell the billboard to Payne continued for several months, but were ultimately unsuccessful. Beroth sent a letter to defendant in November of 2000 informing him he had no lease on the property. Defendant responded in a letter acknowledging there was no agreement to lease the property to him, there was competition for leasing the property, and that negotiations were ongoing.

On 5 February 2001, Beroth notified defendant that it rejected his lease offer and returned the proffered $2,000.00 check for the 2000-2001 term. Beroth informed defendant he had thirty days to quit the property and remove his fixtures. On 13 February 2001, defendant informed Beroth that he would remove or sell the billboard, and he affirmed he was not stalling or circumventing the issue of the billboard's removal. Defendant, however, failed to remove the billboard.

Over the next several months, Beroth repeatedly demanded the immediate removal of defendant's billboard. Defendant continued to indicate that he would remove the billboard, but that he needed more time to do so. Meanwhile in April 2001, unknown to Beroth and Payne, defendant renewed his annual sign permit for the property from the North Carolina Department of Transportation ("NCDOT") for the years 2001-2002. In his renewal application of April 2001, defendant falsely asserted he had Beroth's permission and consent to maintain the billboard on the property. Defendant's City of Statesville sign permit had been rescinded in March of 2001.

Defendant agreed to remove his billboard from the property by 30 April 2001 and no later than 11 May 2001. Instead of removing the billboard, however, defendant filed for and obtained a temporary restraining order in Iredell County Superior Court on 4 May 2001 in order to (1) prevent Beroth and others from obtaining a sign permit on the property; (2) prevent Beroth and others from contesting defendant's sign permit on adjoining property; (3) prevent Beroth from leasing the property to Payne; and (4) allow defendant to remain on the property. Defendant also filed a complaint against Beroth and others, including Payne, for conspiracy and tortious interference with contract.

On or about 7 May 2001, defendant submitted a second renewal application to NCDOT. On 14 May 2001 the trial court denied defendant's motion to convert his temporary restraining order to a preliminary injunction. Following the 14 May 2001 hearing, Payne applied for

and was denied a NCDOT permit for a billboard on the property because defendant already held the permit for the property, although he had no city permit. The NCDOT refused to act on defendant's misrepresentation on the permit application due to ongoing litigation in the Iredell County civil proceeding. As a result, Beroth was unable to receive any rental income from the property. Moreover, Beroth incurred expenses in contesting defendant's permit with the NCDOT and in the Iredell County civil action.

Defendant removed his billboard from the property on 4 June 2001. He also voluntarily dismissed the Iredell County civil action on 12 October 2001.

Plaintiff Payne and her company SkyAd, LLC ("SkyAd"), along with American Advertising Consultants, Inc. ("AAC"), in which Payne maintained fifty-percent ownership, also filed a complaint against defendant on 20 December 2001. The complaint contained substantially the same allegations as that filed by Beroth, with the following pertinent additions: according to the complaint, defendant made defamatory statements about Payne and her companies to third persons, calling her a "lease jumper," a term with extremely negative connotations in the billboard industry, and a "billboard whore." Defendant also published to members of the outdoor sign industry a 26 March 2001 letter in which he stated that Payne's actions were unprofessional, unethical and despicable. He also called Payne a "bitch" and sent a facsimile to persons in the outdoor advertising industry "alerting" them to potential "lease-jumping" by Payne. Payne alleged she incurred damages as a result of defendant's defamatory statements, her inability to erect a sign on the site and obtain the NCDOT permit, and in defending the Iredell County civil action. The complaint set forth claims against defendant for malicious prosecution of civil action, abuse of process, libel and slander per se and per quod, and unfair and deceptive practices.

The cases were consolidated for trial. Plaintiffs presented evidence in support of their claims. Defendant did not testify, nor did he present evidence. At the close of the evidence, the trial court denied defendant's motions for directed verdict.

The jury returned verdicts against defendant and awarded Beroth the following damages: $1.00 for slander of title; $70,500.00 for unfair and deceptive practices; and $2,000.00 for unjust enrichment. The jury found defendant not liable for punitive damages as to Beroth. The jury awarded Payne, SkyAd and AAC the following: $16,766.00

for malicious prosecution; $1.00 for abuse of process; $1.00 for libel; and $150,000.00 for unfair and deceptive practices. The jury also awarded $100,000.00 in punitive damages. The trial court subsequently trebled the damages for the unfair and deceptive practices verdicts and entered judgment in favor of Beroth in the amount of $213,500.00 and in favor of Payne, SkyAd and AAC in the amount of $450,000.01. The trial court awarded attorneys' fees to plaintiffs as prevailing parties. N.C. Gen. Stat. § 75-16.1 (2003). The trial court denied defendant's motions for judgment notwithstanding the verdict and new trial. Defendant appeals.

Defendant argues the trial court abused its discretion in denying his motion for a new trial on the unfair and deceptive practices claim in that plaintiffs presented (1) insufficient evidence of damages and (2) insufficient evidence that defendant committed unfair and deceptive practices. Defendant further contends the trial court erred in (3) denying his requested jury instructions and (4) denying his motion for judgment notwithstanding the verdict and new trial on the malicious prosecution, abuse of process, and libel claims. We conclude there was no error in the trial.

[1] Defendant first argues the trial court erred in denying his motion for a new trial on plaintiffs' unfair and deceptive practices claims. Defendant contends plaintiffs presented insufficient evidence of damages to support the jury verdicts, and that plaintiffs AAC, SkyAd and Payne offered insufficient evidence to support an award of attorneys' fees. Defendant maintains that a new trial is required. We reject his arguments.

It is well established that an appellate court's review of a trial court's discretionary ruling denying a motion to set aside a verdict and order a new trial is "strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 482, 290 S.E. 2d 599, 602 (1982); *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E. 2d 676, 680 (1967). Our Supreme Court has cautioned that

> the trial judges of this state have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings. We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for

> a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case. Because of this, we find much wisdom in the remark made many years ago by Justice Livingston of the United States Supreme Court that "there would be more danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion." *Insurance Co. v. Hodgson*, 10 U.S. (6 Cranch) 206, 218 (1810). Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.

Worthington, 305 N.C. at 487, 290 S.E.2d at 605.

Defendant argues that the damages plaintiffs incurred were overly speculative and not supported by adequate evidence at trial. The party seeking damages bears the burden of proving them in a manner that allows the fact-finder to calculate the amount of damages to a reasonable certainty. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586 (1987). "However, a party seeking recovery for losses occasioned by another's breach of contract need not prove the amount of his prospective damages with absolute certainty; a reasonable showing will suffice." *Pipkin v. Thomas & Hill, Inc.*, 298 N.C. 278, 287, 258 S.E.2d 778, 785 (1979); *see also Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 462, 553 S.E.2d 431, 440 (2001) (noting that while the claiming party must present relevant data providing a basis for a reasonable estimate, proof to an absolute mathematical certainty is not required), *disc. review denied*, 356 N.C. 315, 571 S.E.2d 220 (2002). " 'Substantial damages may be recovered though plaintiff can only give his loss proximately.' " *Pipkin*, 298 N.C. at 287, 258 S.E.2d at 785 (quoting *Wilkinson v. Dunbar*, 149 N.C. 20, 22, 23, 62 S.E. 748 (1908)). Any challenges to the quality of the data upon which an expert witness based his opinion go to the weight to be accorded that opinion and not its admissibility. *State Properties, LLC v. Ray*, 155 N.C. App. 65, 76, 574 S.E.2d 180, 188 (2002). "Moreover, there is no bright-line rule in determining what amount of evidence is sufficient to establish lost profits." *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 377-78, 542 S.E.2d 689, 693 (2001).

Here, plaintiff Payne presented evidence that the permitted sign was worth between $250,000.00 and $275,000.00. Payne testified that defendant himself valued the sign at $275,000.00. According to Payne, the cost of erecting a sign on the site was approximately $25,000.00. In addition, she stated she received lease revenue of twelve hundred dollars per month from a one-sided sign across the street from the disputed two-sided site. Based on the gross advertisement revenue less expenses, Payne estimated her lost advertisement revenue as $34,800.00 for the total twenty-two month time period between February of 2001, the point at which Payne could have erected a sign but for defendant's actions, and the time of trial. Payne testified she continued in her attempts to obtain the necessary NCDOT permit, but had been unsuccessful. Defendant continued to hold the permit at the time of trial. The jury valued Payne's loss at $150,000.00 for the unfair trade practices claim.

Darrell Sayles, the chief financial officer for Beroth and a certified public accountant, testified as an expert in present value calculations. Sayles testified that, using the United States Treasury standard rate of interest of three percent, he calculated the present value of Beroth's twelve-year lease with Payne at $92,274.00. Sayles stated that the Treasury rate was the "more commonly used rate" of interest, but for comparison purposes, Sayles also performed a calculation using the Bank of America CD rate of 1.45%, with a resulting present value of $99,902.00. The jury ultimately awarded Beroth $70,500.00 on its unfair trade practices claim.

Defendant made no objection to Payne's or Sayles' damages testimony at trial, nor did he introduce any conflicting evidence as to valuation. The jury awarded both Payne and Beroth substantially less than the amount of damages they claimed to have incurred. We conclude that plaintiffs presented sufficient evidence to allow the jury to calculate the damages to a reasonable certainty, and that the jury's awards in this case do not amount to a "substantial miscarriage of justice." *See Byrd's Lawn & Landscaping, Inc.*, 142 N.C. App. at 378, 542 S.E.2d at 694 (holding that, where the plaintiff offered evidence to show the gross revenues which would have been realized upon certain contracts, and the profit margins which the plaintiff would have realized on those revenues, the evidence established a sufficient basis for the jury to calculate the amount of those profits with reasonable certainty).

We conclude the trial court did not abuse its discretion in denying defendant's motion for a new trial on the unfair and deceptive practices claim. We overrule this assignment of error.

[2] We also reject defendant's argument that AAC, SkyAd and Payne presented insufficient evidence of the attorneys' fees they incurred as a result of the dispute with defendant. Payne testified she incurred attorneys' fees of $16,765.79 in defense of the Iredell County civil action, and she presented documents in support of her testimony. Payne's attorneys submitted detailed documents and affidavits of their work on the case. The trial court awarded attorneys' fees of $3,227.29. We discern no abuse of discretion. By further assignment of error, defendant contends plaintiffs presented insufficient evidence that he committed unfair and deceptive practices, and that the trial court should have granted a new trial. Again, we find no abuse of discretion by the trial court.

[3] "Chapter 75 of our General Statutes prohibits unfair acts which undermine ethical standards and good faith between persons engaged in business dealings." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 657, 464 S.E.2d 47, 54 (1995). To establish a *prima facie* claim for unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1, the 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. *Id.*; N.C. Gen. Stat. § 75-1.1(a) (2003).

In response to special interrogatories submitted to it, the jury in the instant case found that (1) defendant told Beroth that he would timely vacate the property when in fact he had no intention to vacate the property at the time he made the statement; (2) defendant filed a complaint in Iredell County alleging he had a valid lease on the property; (3) defendant filed the complaint and obtained a temporary restraining order for the purposes of interfering with or delaying Beroth from negotiating a lease with Payne and her companies; (4) defendant's conduct was in or affected commerce; and (5) defendant's conduct was the proximate cause of plaintiff Beroth's injury. The jury made substantially the same findings as to plaintiff Payne and her companies.

Defendant argues that malicious prosecution and abuse of process do not constitute unfair or deceptive practices. Even assuming that were true, defendant's conduct rises above mere abuse of process and malicious prosecution. The jury found that defendant

deliberately deceived Beroth and Payne as to his intent to vacate the property and remove his sign. Defendant remained on the property, delaying and ultimately preventing Payne from securing a permit for the site. Defendant filed his civil action for the express purpose of further delaying the lease negotiations between Beroth and Payne. As a result, Payne was unable to occupy the property and failed to obtain the necessary permit for the site. At the time of the trial, defendant retained the permit for the site, although he had no lease for the property and no city permit for the site. We conclude the evidence and the jury findings support the award for unfair and deceptive practices in this case. The trial court did not abuse its discretion in denying defendant's motion for a new trial on the unfair practices claim.

[4] By further assignment of error, defendant argues the trial court erred by denying his request for additional language in the jury charge. The special interrogatory submitted to the jury reads as follows: "Did the Defendant file a Complaint in Iredell County alleging that the Defendant had a valid lease on the property?" At trial, defendant orally requested the addition of "at a time when he had no basis to believe this" to the end of the special interrogatory. Defendant contends the issue of whether the Iredell civil action was baseless was a question of fact for the jury, and that the requested instruction would have properly resolved the matter. Defendant argues the trial court therefore erred in denying the oral request.

Rule 51(b) of the North Carolina Rules of Civil Procedure requires that a request for special instructions be in writing, signed by counsel, and submitted to the court before the court instructs the jury. N.C. Gen. Stat. § 1A-1, Rule 51(b) (2003). Because defendant did not comply with the requirements of Rule 51(b), the trial court acted properly within its discretion in denying the request. *Byrd's Lawn & Landscaping, Inc.*, 142 N.C. App. at 378-79, 542 S.E.2d at 694; N.C. Gen. Stat. § 1A-1, Rule 51(b) (2003). Moreover, we agree with plaintiffs that the jury did in fact resolve the matter of whether the Iredell County civil action was baseless when it returned verdicts against defendant in the malicious prosecution and abuse of process claims. We overrule this assignment of error.

[5] Finally, defendant argues the trial court erred by denying his motion for directed verdict, entering judgment on, and denying his motions for judgment notwithstanding the verdict and new trial on the claims of malicious prosecution, abuse of process, and libel. Defendant contends there was insufficient evidence to support these claims.

Upon a defendant's motion for directed verdict, the trial court must determine whether the plaintiff's evidence is sufficient " 'to take the case to the jury and support a verdict for the plaintiff.' " *Byrd's Lawn & Landscaping, Inc.*, 142 N.C. App. at 374 542 S.E.2d at 691 (quoting *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)). The plaintiff's evidence " 'must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom.' " *Id.* The motion should be denied unless as a matter of law it appears that the plaintiff is not entitled to recover under any view of the evidence. *Id.* "A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict and presents the same question." *Id.* We therefore examine the evidence in the instant case to determine whether plaintiffs presented sufficient evidence on the claims of malicious prosecution, abuse of process, and libel.

The essential elements for a malicious prosecution claim are: (1) the defendant initiated the earlier proceeding; (2) malice on the part of the defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff. *Best v. Duke University*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994). In an action for malicious prosecution, the malice element may be satisfied by a showing of either actual or implied malice. *Best v. Duke University*, 112 N.C. App. 548, 553, 436 S.E.2d 395, 399 (1993), *aff'd in part, rev'd in part on other grounds*, 337 N.C. 742, 448 S.E.2d 506 (1994). Actual malice includes " 'ill-will, spite, or desire for revenge, or under circumstances of insult, rudeness or oppression, or in a manner evidencing a reckless and wanton disregard of rights.' " *Moore v. City of Creedmoor*, 120 N.C. App. 27, 43, 460 S.E.2d 899, 909 (1995) (quoting *Williams v. Kuppenheimer Manufacturing Co.*, 105 N.C. App. 198, 202-03, 412 S.E.2d 897, 901 (1992), *aff'd in part, rev'd in part on other grounds*, 345 N.C. 356, 481 S.E.2d 14 (1997). Implied malice, however, may be inferred from want of probable cause in reckless disregard of the plaintiff's rights. *Id.* at 44, 460 S.E.2d at 909. Want of probable cause may not be inferred from malice for purposes of determining whether there is a cause of action for malicious prosecution but malice may be inferred from want of probable cause. *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966).

The essential elements of abuse of process are: (1) the existence of an ulterior purpose; and (2) an act in the use of the process not

proper in the regular prosecution of the proceeding. *Barnette v. Woody*, 242 N.C. 424, 431, 88 S.E.2d 223, 227-28 (1955). " '[A]buse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process after issuance to accomplish some purpose not warranted or commanded by the writ.' " *Stanback v. Stanback*, 297 N.C. 181, 200, 254 S.E.2d 611, 624 (1979) (quoting *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965)).

Defendant contends there was no evidence of any ulterior purpose or that he committed any improper act in the use of the legal process. Defendant asserts that his purpose throughout was "to protect his own interests," and that there was no evidence of any malice on his part. We disagree.

Plaintiffs here presented evidence that defendant did not have a lease with Beroth yet continued to occupy the property, and that defendant filed the Iredell County civil action while simultaneously assuring Beroth and Payne he intended to vacate the property. Defendant falsely asserted on his NCDOT application that he had Beroth's consent to remain on the site. Defendant's action in renewing the permit and in filing the Iredell County suit prevented Payne from obtaining the permit. Defendant had no city permit for the site, however, nor did he have permission to remain on the property. Defendant presented no evidence at trial to contradict plaintiffs' presentation of the facts. From this evidence, the jury could properly conclude that defendant's action in filing the Iredell County civil action was motivated by malice towards plaintiffs rather than any genuine concern over his legal rights. We also note the trial court found defendant's civil action to be "a sham." We overrule this assignment of error.

[6] Finally, we conclude there was sufficient evidence to support the jury verdict for libel. Actionable libel includes the publication of written statements to third persons which tend to impeach a person in that person's trade or profession or to subject one to ridicule, contempt or disgrace. *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 317, 312 S.E.2d 405, 409 (1984). Plaintiffs presented evidence that defendant made defamatory written statements about Payne and her companies to third persons, calling her a "lease jumper," "bitch" and "billboard whore." Defendant also published to members of the outdoor sign industry a 26 March 2001 letter in which he stated that Payne's actions were unprofes-

sional, unethical and despicable. The trial court did not err in denying defendant's motion for directed verdict on these claims.

In the judgments of the trial court, we find no error.

No error.

Judges HUDSON and JACKSON concur.

STATE OF NORTH CAROLINA v. PRINCE McBRIDE

No. COA03-740

(Filed 6 September 2005)

1. Evidence— character—drug use and drug dealing—no prejudice

There was no prejudice in a prosecution for cocaine related charges from the erroneous admission of evidence that two people found at the motel room where defendant was arrested had a reputation for dealing or using illegal drugs. One person was found with a crack pipe in her hand and there was ample evidence to convict defendant without the reputation of the other. N.C.G.S. § 8C-1, Rule 404(a).

2. Drugs— constructive possession—effort to hide contraband

Evidence that defendant scuffled with officers outside his motel room permitted an inference that defendant sought to get inside the room to hide or dispose of his contraband, and was sufficient evidence of constructive possession to deny defendant's motion to dismiss.

3. Sentencing— habitual felon—sufficiency of evidence

The essential question in a habitual felon indictment is whether a felony was committed. There was enough evidence here to deny a motion to dismiss an habitual felon charge, although the deputy clerk of court did not testify to the date of the third offense.

4. Sentencing— case number—habitual felon

There was a clerical error, remanded for correction, where the trial court entered a judgment and commitment under the

case number assigned to the habitual felon indictment as opposed to the case numbers for the underlying offenses. The face of the commitment form shows that defendant was being sentenced for possession of cocaine and drug paraphernalia and that his habitual felon status merely increased his sentence.

5. Drugs— possession of cocaine—felony

Possession of cocaine is a felony which provides the superior court with jurisdiction and which can support an habitual felon sentence.

6. Sentencing— aggravating factors—*Blakely* error

Sentences in the aggravated range based upon an aggravating factor found by a judge rather than a jury were remanded for resentencing.

Appeal by defendant from judgment entered 8 July 2002 by Judge Michael E. Beale in Richmond County Superior Court. Heard in the Court of Appeals 24 August 2004.

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

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

McCULLOUGH, Judge.

Defendant was indicted for possession of drug paraphernalia, possession of cocaine, maintaining a place to keep controlled substances, and being an habitual felon. After a jury trial, defendant was convicted on all charges but that of maintaining a place to keep controlled substances. He now appeals.

At trial, the State's evidence tended to show the following: On 18 May 2001, Officer Freeman, Chief Sweatt, and Major Harrelson, all of the Richmond County Sheriff's Department, were traveling in an unmarked vehicle on Carolina Street in Richmond County, in the direction of U.S. Highway 74. The officers went to the Chek-Inn Motel to investigate reports of illegal drug activity.

Officer Freeman testified that when the officers pulled into the Chek-Inn Motel parking lot, he saw defendant and defendant's brother Robert McBride ("Mr. McBride") outside and on either side of the door of Room 124. Evidence is disputed as to whether or not the

door was open. It appeared to the officers that defendant and Mr. McBride were engaged in a drug transaction.

When the officers approached defendant, he remained standing outside of Room 124 at the motel. Defendant admitted that Room 124 was his room. The manager of the motel, Mr. Patel, testified that defendant's name and address were on the motel documentation as the person who had rented the room for the time in question. The evidence showed that as the officers approached, Mr. McBride ran into the room and away from the table inside the room. Officer Freeman was able to see Mr. McBride the entire time. Officer Freeman immediately followed Mr. McBride into Room 124.

Inside the room, seated at the table, was Martha Chavis ("Ms. Chavis"). In her hand was a crack cocaine pipe, entered into evidence at trial as State's Exhibit #2. Across the table from her was yet another crack cocaine pipe, entered into evidence as State's Exhibit #3. The pipes were visible to one of the officers as soon as he reached the doorway.

As the officers approached the room door, defendant was standing within "three to four steps" of the crack pipe. Defendant smelled of crack cocaine and had the characteristics of someone who had used crack or cocaine. Initially, defendant tried to get into the room and a scuffle with one of the officers ensued, with defendant cursing. The crack pipes were tested and David Nicholas, forensic drug chemist with the State Bureau of Investigation ("SBI"), testified that State's exhibits 2 and 3 contained a substance that he positively identified as cocaine base.

Defendant did not present any evidence.

At the close of all evidence the court allowed defendant's motion to dismiss the State's charge of maintaining a place for controlled substances. The jury found defendant guilty of possession of drug paraphernalia and possession of cocaine. Subsequently, during the habitual felon stage of the trial, the same jury entered a verdict against defendant as being an habitual felon. The trial court imposed a sentence for defendant's convictions for possession of drug paraphernalia and possession of cocaine based upon his attainment of habitual felon status; however, the court erroneously entered the consolidated judgment under the file number assigned to the habitual felon indictment. In addition, because the court found that a non-statutory aggravating factor existed, "obstruction of justice," based

on the fact that defendant did not appear at his trial, defendant received a sentence in the aggravated range of punishments.

On appeal, defendant contends that the trial court erred by: (I) allowing reputation evidence that Ms. Chavis was a drug user and Mr. McBride was a drug dealer; (II) failing to dismiss the charges of possession of drug paraphernalia and possession of cocaine; (III) failing to dismiss the habitual felon charge; (IV) imposing a sentence based on the habitual indictment and not the indictment for the underlying charges; (V) sentencing defendant as an habitual felon when the underlying charges were misdemeanors; (VI) failing to dismiss this case where jurisdiction was only proper in district court; and (VII) imposing an aggravated sentence in the absence of a jury finding, beyond a reasonable doubt, that an aggravating factor existed.

I.

[1] Defendant first contends that the court erred in admitting evidence, through the testimony of Officer Freeman and Chief Sweatt, that Ms. Chavis had the reputation for being a user of illegal drugs such as crack cocaine and Mr. McBride had the reputation for being a dealer of drugs such as cocaine and crack cocaine. Specifically, defendant contends that this was inadmissible character evidence under N.C. Gen. Stat. § 8C-1, Rule 404(a) (2003) of third parties to this matter.

Rule 404(a) states in relevant part:

> (a) *Character evidence generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) *Character of accused.*—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) *Character of victim.*—Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) *Character of witness.*—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

"The general rule is that evidence of the character of a third person who is not a witness or a party to an action is inadmissible." *State v. Winfrey*, 298 N.C. 260, 262, 258 S.E.2d 346, 347 (1979); *State v. Barbour*, 295 N.C. 66, 74, 243 S.E.2d 380, 385 (1978). While there are some exceptions to this general rule, we find none are invoked on the facts before us. *See, e.g.*, *Winfrey*, 298 N.C. at 262, 258 S.E.2d at 347 (where there is a plea of self-defense and there is evidence of a deceased's violent or dangerous character).

We agree with defendant that admitting the reputation evidence of Ms. Chavis and Mr. McBride violated Rule 404(a) and was error. In the instant case, the only logical relevance of admitting their reputation for drug use and drug dealing respectively, was to show that on the day in question, they were acting in conformity with their reputation in the company of defendant. The State contends this evidence is relevant to show the circumstantial evidence relevant to its theory of constructive possession of the drugs and paraphernalia by defendant. However, the intent of Rule 404(a) is to limit such circumstantial use of character evidence for only its provided exceptions, none of which are invoked on these facts. *See* N.C. Gen. Stat. § 8C-1, Rule 404(a)(1), (2) & (3).[1]

However, defendant has not shown prejudice such that "a different result likely would have ensued had the evidence been excluded." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987); *State v. Allen*, 162 N.C. App. 587, 598, 592 S.E.2d 31, 40 (2004), *appeal dismissed*, 358 N.C. 546, 599 S.E.2d 557 (2005); *see also* N.C. Gen. Stat. § 15A-1443(a) (2003). There was already evidence before the jury that Ms. Chavis had a crack cocaine pipe in her hand when the officers entered the room. Therefore, evidence of her reputation as a drug user was patently harmless. Further, as indicated *infra* in Section II, there was ample evidence to convict defendant without evidence of Mr. McBride's reputation for drug use and drug sales. Thus, defendant was not prejudiced by the improperly admitted testimony.

This assignment of error is overruled.

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1. We note that, by providing evidence that other drug users and dealers were in the proximity of the drugs and paraphernalia which were found, such evidence actually creates a stronger inference against the State's theory of constructive possession by defendant. This is especially true in light of the trace amounts which were found.

II.

[2] Defendant next contends the court erred in failing to deny his motion to dismiss the charges of possession of drug paraphernalia and possession of cocaine. We do not agree.[2]

Upon review of a motion to dismiss, this Court determines whether there is substantial evidence, viewed in the light most favorable to the State, of each essential element of the offense charged and of defendant being the perpetrator of the offense. *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001), *modified and aff'd*, 355 N.C. 266, 559 S.E.2d 788 (2002) (per curiam); *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 355 (1988). "Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Morgan*, 111 N.C. App. 662, 665, 432 S.E.2d 877, 879 (1993).

The State's theory for both of the possession charges in this case was constructive possession. The State is not required to prove actual physical possession of the controlled substance or paraphernalia; proof of constructive possession by the defendant is sufficient to carry the issue to the jury and such possession need not be exclusive. *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). Constructive possession exists when a person, while not having actual possession of the controlled substance or paraphernalia, has the intent and capability to maintain control and dominion over a controlled substance or paraphernalia. *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983). Where a controlled substance is found on premises under the defendant's control, this fact alone may be sufficient to overcome a motion to dismiss and to take the case to the jury. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). If a defendant does not maintain control of the premises, however, "other incriminating circumstances" must be established for constructive possession to be inferred. *State v. Alston*, 91 N.C. App. 707, 710, 373 S.E.2d 306, 309 (1988). Our determination then " 'depends on the totality of the circumstances in each case. No single factor controls, but ordinarily *the questions will be for the jury*.' " *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001) (quoting *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991), *aff'd*, 331 N.C. 113, 413 S.E.2d 798 (1992)), *aff'd*, 356 N.C. 141, 567 S.E.2d 137 (2002).

2. When analyzing this issue, we have not considered the improperly admitted testimony discussed in Section I.

Defendant was not in exclusive control of the premises at the time the drugs and paraphernalia were seized, and therefore other incriminating circumstances were necessary to support the constructive possession theory. In the instant case, the evidence of other incriminating circumstances was as follows: the officers approached the Chek-Inn Motel in an unmarked vehicle observing what appeared to be a drug transaction between defendant and his brother; officers were responding to reported drug activity at the motel; the supposed transaction was taking place outside of Room 124 with the door open; defendant admitted that Room 124 was his room; a business record from the motel shows that defendant's identification information was given to the desk clerk at registration; defendant had stayed in the Chek-Inn Motel on four or five previous occasions and was known to the proprietor; defendant smelled of crack cocaine and had the characteristics of someone under the influence of the drug; when defendant observed the officer approaching the room, he tried to get inside the motel and a scuffle with one of the officers ensued keeping him outside of the room and detained; one of the two crack pipes was visible as soon as the officers reached the doorway; and Ms. Chavis was inside holding one crack pipe in her hand, with the other before her on a table.

This evidence was sufficient for a reasonable mind to infer that defendant constructively possessed at least one of the two crack pipes in which the crack cocaine was found. In particular, defendant's scuffle with the officers outside the motel room permitted an inference that defendant sought to get inside the motel room and hide or dispose of his contraband before the officers could seize it. *See State v. Neal*, 109 N.C. App. 684, 685, 428 S.E.2d 287, 288 (1993) (holding that incriminating circumstances supported an inference of constructive possession when defendant was seen in an apartment bathroom where cocaine was later discovered, but fled the bathroom when the officers entered the apartment); *contra State v. Acolatse*, 158 N.C. App. 485, 486-87, 581 S.E.2d 807, 807 (2003) (holding that there was insufficient evidence of the defendant's constructive possession of controlled substances when officers lost sight of the defendant for a few seconds, and upon seeing him again, saw the defendant make a throwing motion towards a location where the drugs were *not* found.)

This assignment of error is overruled.

III.

[3] Defendant next contends that the trial court erred in denying his motion to dismiss the habitual felon charge, because the State lacked

any evidence that defendant had been found guilty of the predicate felonies. We do not agree.

At the outset, we note that on 29 April 2004, this Court granted the State's motion to amend the record on appeal to include the State's trial exhibit S-16, which contained court files for 87 CRS 6559, exhibit S-17, which contained court files for 92 CRS 7845, and exhibit S-18, which contained court files for 99 CRS 9612. These three exhibits were introduced at the trial as evidence of defendant's conviction of the prior felonies for the purpose of proving his habitual felon status.

In addition, the State elicited testimony from Jane Carriker (Ms. Carriker), Deputy Clerk in the Richmond County Clerk's Office for 12 years. Ms. Carriker testified to the dates of the felony offenses committed by defendant and the convictions for those offenses, as set out in exhibits S-16 and S-17. As to exhibit S-18, Ms. Carriker testified this exhibit included a bill of information which revealed defendant was charged with felony larceny from the person and that this exhibit also contained a transcript of plea and a judgment and commitment that showed defendant was found guilty of larceny from the person on 6 March 2000. However, she did not testify regarding the date the offense was committed. These exhibits were not published to the jury, but they were entered into evidence and were available to the jury upon request.

For purposes of the habitual felon statute, the evidence to be used to prove prior convictions is set out in N.C. Gen. Stat. § 14-7.4 (2003), which states:

> [T]he record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction.

In the instant case, exhibits containing both the dates of defendant's prior offenses and resulting convictions for three felonies were properly admitted into evidence. With the exception of the date of the third offense, all of the offense and conviction dates were testified to by the Deputy Clerk of Court for Richmond County. We hold that the testimony of the third conviction date was substantial evidence that defendant committed a third felony offense and is sufficient to sur-

vive defendant's motion to dismiss the habitual charge. *See*, *e.g.*, *State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994) (holding that the fact that another felony was committed, as opposed to its specific date, is the essential question in the habitual felon indictment). We are comfortable in this conclusion in light of the fact that the jury could have requested to see exhibit S-18, which contained the date of the third offense.[3]

This assignment of error is overruled.

IV.

[4] Defendant next contends, and the State concedes, that the trial court erred in entering a Judgment and Commitment for defendant under the case number assigned to the Habitual Felon Indictment as opposed to the case numbers for the underlying offenses. We conclude that this error was a clerical error, and remand for correction.

When indicting a defendant as an habitual felon, N.C. Gen. Stat. § 14-7.5 (2003) requires:

> The indictment that the person is an habitual felon shall not be revealed to the jury unless the jury shall find that the defendant is guilty of the principal felony or other felony with which he is charged. If the jury finds the defendant guilty of a felony, the bill of indictment charging the defendant as an habitual felon may be presented to the same jury. *Except that the same jury may be used, the proceedings shall be as if the issue of habitual felon were a principal charge.*

Therefore, defendant should be sentenced under the principal charge to ensure that his habitual status is not itself being used to determine the conviction.

Defendant was found guilty of the principal charges of possession of cocaine and possession of drug paraphernalia, case numbers 01 CRS 51293-94. Based on these convictions, the jury was presented with the indictment of defendant as an habitual felon for that phase of the trial, case number 01 CRS 04184. He was then determined by the same jury to have attained habitual felon status pursuant to Article 2A of N.C. Gen. Stat. § 14. The judgment and commitment

3. We note that the habitual indictment contained all three dates on which the prior offenses were committed, and the dates of conviction for those offenses. This was in accord with N.C. Gen. Stat. § 14-7.3 (2003).

form was filed under the habitual felon case number, and the form also listed all of the charges for which defendant was found guilty. Defendant was then given one active sentence, as a Class C felon pursuant to the habitual felon statute. *See* N.C. Gen. Stat. § 14-7.6 (2003) (sentencing of habitual felon).

Defendant argues this issue is controlled by *State v. Taylor*, 156 N.C. App. 172, 576 S.E.2d 114 (2003). In T*aylor*, the defendant pled guilty to ten counts of obtaining property by false pretenses, six counts of felonious breaking and entering, six counts of larceny after breaking and entering, three counts of felonious possession of stolen goods and six counts of misdemeanor possession of stolen goods. *Id.* at 173, 576 S.E.2d at 115. Additionally, the State indicted defendant on twenty counts of being an habitual felon to which he also pled guilty. *Id.* This Court noted that it is better practice for the State to only indict a defendant once as an habitual felon for the underlying substantive crimes, no matter how many are being charged. *Id.; see also State v. Patton*, 342 N.C. 633, 636, 466 S.E.2d 708, 710 (1996) (holding that one habitual indictment is sufficient to put a defendant on notice he is being prosecuted for his substantive offense as a recidivist). In *Taylor*, we vacated the sentences based solely on the basis of defendant's attainment of habitual felon status, and held that one who acquires habitual felon status subjects himself only to having the sentences of his current convictions enhanced. *Taylor*, 156 N.C. App. at 173, 576 S.E.2d at 115.

The instant case presents a different situation. The only error in this case was that the judgment and commitment form entered by the trial court was filed under the habitual felon indictment case number. Defendant insists that the use of the wrong case number demonstrates that his sentence was imposed solely upon his habitual felon status. However, the face of the commitment form shows that defendant was being sentenced for his charges of possession of cocaine and drug paraphernalia, and that his status as an habitual felon merely increased his sentence on the substantive offenses to that of a Class C felony. This is in accord with the habitual felon statute.

Therefore, we remand this case to the Richmond County Superior Court and direct the court to file the judgment and commitment form under the substantive case numbers, 01 CRS 51293-94. *See, e.g.*, *State v. Hammond*, 307 N.C. 662, 300 S.E.2d 361 (1983) (holding that clerical error existed in the felony judgment and commitment form listing the crime of robbery with a deadly weapon as a Class C felony, whereas in fact it was a Class D felony); *State v. Jarman*, 140 N.C.

App. 198, 202, 535 S.E.2d 875, 878 (2000) (" '[A] court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein[.]' "). (citation omitted).

V.

[5] In a Motion for Appropriate Relief defendant contends that the trial court erred by sentencing him as an habitual felon when the jury failed to find him guilty of a felony. Specifically, defendant contends that possession of cocaine cannot support an habitual felon sentence as either a substantive or predicate felony. This argument has recently been rejected by our Supreme Court in *State v. Jones*, 358 N.C. 473, 478-79, 598 S.E.2d 125, 128-29 (2004).

VI.

In the same Motion for Appropriate Relief, defendant contends that, because possession of cocaine is a misdemeanor, as opposed to a felony, the superior court lacked jurisdiction to try him. This is so, defendant contends, because N.C. Gen. Stat. § 7A-272 (2003) imbues district courts with the exclusive jurisdiction to try criminal actions "below the grade of felony." However, as indicated in part V, *supra*, possession of cocaine is a felony. Therefore, the superior court had jurisdiction to try defendant in the instant case.

VII.

[6] Defendant also contends that he was unconstitutionally sentenced to a term in the aggravated range based on judicial findings that an aggravating factor existed and warranted enhanced punishment. Specifically, defendant contends that his sentence could not be aggravated in the absence of a jury finding beyond a reasonable doubt that the alleged aggravating factor existed. We agree and remand for defendant to be sentenced in accordance with the principles set forth in *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), and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

No prejudicial error in part; remanded for clerical changes and resentencing.

Judges TIMMONS-GOODSON and HUNTER concur.

STATE OF NORTH CAROLINA v. IAN CHRISTOPHER GOBLET

No. COA04-925

(Filed 6 September 2005)

1. Evidence— hearsay—detective's testimony about pawn shop records—not offered for truth of matter asserted

The trial court did not err in a multiple felony breaking and entering, felony larceny, and felony possession of stolen goods case by concluding that a detective's testimony regarding his review of pawn shop records was not hearsay, because: (1) at no time during the detective's testimony were any of the pawn shop records admitted into evidence, nor was his testimony regarding the contents of those records used for any purpose other than to show the basis for his contacting the Kill Devil Hills Police; (2) the detective's testimony was not offered for the truth of the matter asserted; and (3) although the trial court found that the detective was the custodian or other qualified witness for purposes of introducing the pawn shop records under the business records exception, it is not necessary to determine whether this was error since the testimony did not need to qualify under an exception to the hearsay rule to be admissible.

2. Constitutional Law— right to confront witnesses—detective's testimony

The trial court did not err in a multiple felony breaking and entering, felony larceny, and felony possession of stolen goods case by concluding that a detective's testimony regarding his review of pawn shop records did not violate defendant's Sixth Amendment right to confront witnesses, because: (1) the pertinent records were subsequently admitted into evidence under the business records exception during the testimony of the owner of the pawn shop; and (2) defendant had the opportunity to, and in fact did, cross-examine the pawn shop owner.

3. Burglary and Unlawful Breaking or Entering; Larceny—breaking and entering—larceny—possession of stolen goods—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss multiple charges for felony breaking and entering, felony larceny, and felony possession of stolen goods at the close of the State's evidence, because: (1) although the evidence on the

charges of felony breaking and entering and felony larceny was almost entirely circumstantial, this fact does not preclude it from being substantial evidence; and (2) the evidence presented by the State, including testimony from a witness who drove defendant to the pertinent houses, was sufficient to support a reasonable inference that defendant committed the offenses charged.

4. Criminal Law— instruction—flight

The trial court did not err in a multiple felony breaking and entering, felony larceny, and felony possession of stolen goods case by instructing the jury regarding flight, because: (1) on one occasion when defendant and his coparticipant were at one of the homes that was broken into, the homeowner returned and spoke with the coparticipant first and thereafter spoke with defendant when he came running around the house; and (2) the State introduced evidence that defendant gave officers a false name and date of birth when he was a passenger in a car stopped by police, and the driver indicated that she was taking defendant to the bus station so that he could go to Ohio.

5. Possession of Stolen Property— found not guilty of underlying breaking and entering charge—possession conviction vacated

Defendant's conviction on the charge of felony possession of stolen goods in case number 02 CRS 4610 is vacated because the jury found defendant not guilty of the underlying breaking and entering charge.

6. Criminal Law— prosecutor's argument—failure to give curative instruction after sustaining objection

The trial court did not abuse its discretion in a multiple felony breaking and entering, felony larceny, and felony possession of stolen goods case by failing to give a curative instruction to the jury after sustaining defendant's objection to an argument by the State during closing that the jurors were in court because of defendant's drug problem, nor did it commit plain error in failing to intervene ex mero motu to stop the district attorney from continuing the improper argument after defendant's objection was sustained, because: (1) defendant did not request a curative instruction to the jury regarding the district attorney's statements; and (2) in light of the evidence of defendant's heroin use, these arguments were not so improper as to require the court to issue such an instruction ex mero motu.

STATE v. GOBLET

[173 N.C. App. 112 (2005)]

Appeal by defendant from judgments entered 9 October 2003 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 21 March 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Lisa B. Dawson, for the State.

William D. Spence, for defendant-appellant.

JACKSON, Judge.

Defendant, Ian Goblet, appeals from judgments entered on a jury verdict finding him guilty of six counts of felony breaking and entering, six counts of felony larceny and seven counts of felony possession of stolen goods.

At trial the State's evidence tended to show that during August, September, and October of 2002, there was a series of break-ins in residences on the Outer Banks. The break-ins were similar in that they generally occurred during the day, mostly jewelry and change were taken, and there was little or no sign of forced entry.

In the fall of 2002, Detective Roten of the Portsmouth Virginia Police Department was assigned the daily task of reviewing local pawn shop records. Detective Roten observed defendant's name appearing several times in pawn shop records as having pawned or sold numerous items of jewelry over a one to two month period. Based upon the records indicating the defendant's address was Kill Devil Hills, Detective Roten contacted the Kill Devil Hills Police Department to advise them of the suspicious activity. Officers in the Kill Devil Hills Police Department went to Portsmouth, photographed some of the items pawned by defendant that were still at the pawn shop, and took possession of those items. The seized items and photographs were shown to victims of the break-ins and some of the victims were able to identify items of jewelry that belonged to them. At trial, Detective Roten was allowed to testify, over defendant's objection, to the contents of the pawn shop records that aroused his suspicion regarding defendant.

Defendant was indicted on charges related to some of the break-ins on 23 September 2002. On 19 October 2002, an officer stopped a car driven by a female named Jamie Sargent ("Sargent"), in which defendant was a passenger, for a traffic violation. Defendant initially provided the officer with a false name, date of birth, and address. Once defendant's true identity was established, he was arrested

based on the officer's knowledge of the recent indictments and defendant being listed on the most wanted list for the area. A search of the vehicle revealed drug paraphernalia leading to charges against Sargent. Sargent told investigating officers, and testified at trial that she had driven defendant to many homes in the area of the break-ins and took officers to two specific homes she had driven defendant to which were, in fact, homes that had been victimized. Sargent also related an incident that occurred at one of the homes when the homeowner had returned home while they were at the residence and she and defendant had interacted with the homeowner. This account matched the statement of an incident related by one of the victims. She also stated she accompanied defendant to the pawn shops in Portsmouth where he sold or pawned the items and that they used the money to purchase heroin. Sargent testified at trial pursuant to a plea agreement.

At the close of the State's evidence, defendant moved to dismiss the charges. The motion was denied. Defendant presented no evidence.

The District Attorney began her closing argument by saying: "Good morning. Ladies and gentlemen, you are here today because of an ever present problem in your society. And that problem is drugs." Defendant objected and the objection was sustained by the court. The District Attorney then continued with her closing argument stating that defendant was the type of person who fell prey to the problem of drug use and that his job was to support his drug habit. Defendant again objected and asked to approach the bench. After a short bench conference off the record, the District Attorney resumed her closing argument.

Defendant was found guilty of six counts of felony breaking and entering, six counts of felony larceny and seven counts of felony possession of stolen goods. Defendant was found not guilty of three counts of felony breaking and entering, two counts of felony larceny and two counts of felony possession of stolen goods. Defendant was sentenced within the presumptive range to a term of active confinement of eight months minimum and eleven months maximum on each count with the sentences to run consecutively. The court arrested judgment on six of the counts of possession of stolen goods.

On appeal from these judgments, defendant assigns as error: (1) the trial court's finding that Detective Roten was the custodian or other qualified witness of pawn shop records for purposes of admissibility of his testimony regarding his review of those records; (2) the

admission of Detective Roten's testimony regarding his review of the pawn shop records; (3) the trial court's denial of his motion to dismiss for insufficient evidence at the close of all evidence; (4) the trial court's instructions to the jury regarding flight; (5) the trial court's acceptance of the jury's verdict of guilty on the charge of felony possession of stolen goods when defendant had been found not guilty of the underlying breaking and entering charge; and (6) the trial court's failure to instruct the jury not to consider the District Attorney's allegedly improper closing argument.

[1] We will address defendant's first two assignments of error together. Defendant's basis for both of these assignments of error is that the testimony provided by Detective Roten was hearsay and therefore was inadmissible unless it fell within an exception to the hearsay rule. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003). Hearsay is not admissible absent an applicable exception. N.C. Gen. Stat. § 8C-1, Rule 802 (2003). However, when a statement is not being offered for the "truth of the matter asserted," the statement is not considered hearsay and, therefore, is admissible even absent an applicable exception. *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, (citing *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998)), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002).

In the case *sub judice*, Detective Roten was asked on direct examination about his duties as a police officer and he described his responsibilities with regard to monitoring the pawn shops in his jurisdiction. Detective Roten testified that his duties included reviewing daily reports of pawn shop transactions which are submitted to him pursuant to Virginia law. Detective Roten was then asked if he had become aware of defendant's name during the performance of his duties in the fall of 2002. Detective Roten answered that he had and that defendant's name appeared numerous times over the course of several weeks. Defendant objected to this testimony on the basis of hearsay and the judge conducted extensive *voir dire* on the objection outside the presence of the jury.

During *voir dire* Detective Roten testified that because of the frequency with which defendant's name appeared—twenty-five times—and because most of the transactions involved "large amounts" of jewelry, defendant's name caught his attention. He fur-

ther testified that because defendant's address on all of the reports listed Kill Devil Hills as his home, he contacted a detective that he knew in Kill Devil Hills, Detective Underwood, to advise him of the unusual activity. Detective Roten's contact with Detective Underwood initiated the investigation of defendant resulting in the instant case. During the *voir dire*, the court stated that Detective Roten's testimony regarding his review of the pawn shop records and his resulting actions were going to be allowed to show the basis for his actions. A statement which explains a person's subsequent conduct is an example of such admissible nonhearsay. *State v. Anthony*, 354 N.C. 372, 404, 555 S.E.2d 557, 579 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002).

Defendant also argued during *voir dire* that the testimony should be excluded under Rule 403 of the North Carolina Rules of Evidence as its probative value was substantially outweighed by its prejudicial effect. The exclusion of evidence under Rule 403 is within the sound discretion of the trial court. *CIT Group/Commercial Servs, Inc. v. Vitale*, 148 N.C. App. 707, 710, 559 S.E.2d 275, 276 (2002) (citing *Reis v. Hoots*, 131 N.C. App. 721, 727-28, 509 S.E.2d 198, 203 (1998), *disc. rev. denied*, 350 N.C. 595, 537 S.E.2d 481 (1999)).

The court also found that the pawn shop records fell within the business record exception to the hearsay rule and that Detective Roten was the custodian or other qualified witness for those records, that the records had an adequate degree of trustworthiness, and that the probative value of the evidence was not outweighed by the danger of unfair prejudice to defendant.

After the jury returned, Detective Roten testified as he had during *voir dire* regarding the number of transactions listed under defendant's name and the type of items involved in those transactions. He further testified regarding his initial contact with the Kill Devil Hills Police Department and his subsequent assistance in their investigation. At no time during Detective Roten's testimony were any of the pawn shop records admitted into evidence, nor was his testimony regarding the contents of those records used for any purpose other than to show the basis for his contacting the Kill Devil Hills Police. Detective Roten's testimony regarding the records was not offered for the truth of the matter asserted and, accordingly, was not hearsay. Although the trial court found that Detective Roten was the custodian or other qualified witness for purposes of introducing the pawn shop records under the business records exception to the hearsay rule, it is not necessary to determine whether this was error

as his testimony did not need to qualify under an exception to the hearsay rule to be admissible.

[2] Defendant also argues that Detective Roten's testimony regarding his review of the pawn shop records violated his Sixth Amendment right to confront witnesses against him. However, the records in question subsequently were admitted into evidence under the business records exception during the testimony of the owner of the pawn shop. The pawn shop owner whose records were at issue in this case was subject to cross-examination by defendant. Because defendant had the opportunity to, and in fact did, cross-examine the shop owner, his Sixth Amendment right to confront all witnesses against him was not violated.

[3] Defendant next argues that the trial court erred in failing to dismiss all charges at the close of the State's evidence as the evidence was insufficient to support convictions on the charges. The standard of review on a motion to dismiss for insufficient evidence is whether the State has offered substantial evidence of each required element of the offense charged. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620 (2002). Evidence is substantial if it is relevant and is sufficient to persuade a rational juror to accept a particular conclusion. *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000). In ruling on a motion to dismiss for insufficient evidence, the court must view the evidence in the light most favorable to the State and every reasonable inference drawn from the evidence must be afforded to the State. *Id.* at 585, 528 S.E.2d at 899.

Defendant argues that the evidence presented by the State is sufficient only to arouse suspicion that he committed the offenses charged, which is not adequate to constitute substantial evidence. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). The State's evidence regarding the charges of felony breaking and entering and felony larceny is almost entirely circumstantial, however, this does not preclude it from being substantial evidence. When evaluating the sufficiency of circumstantial evidence in deciding a motion to dismiss for insufficient evidence a court must determine whether the circumstances could give rise to a reasonable inference of defendant's guilt. *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978). If the court determines that such an inference could be drawn, it must be left to the jury to determine whether the facts prove defendant's guilt beyond a reasonable doubt. *Id.* In deciding a motion

to dismiss for insufficient evidence, the weight of the evidence is not for the trial court's determination, but only whether it is sufficient to be submitted to the jury. *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002).

In the case *sub judice*, the State presented evidence showing that: all but one of the break-ins and larcenies occurred between August and October of 2002; almost all of the offenses occurred between 9:00 a.m. and 12:00 p.m.; in all of the incidents coins and jewelry were taken; in three incidents the perpetrator also took one pillow case from the residence; and there was little or no damage to the doors of the residences or other indications of entry into the homes in any of the incidents. The State further presented the evidence from the pawn shop records and owners showing that defendant had pawned items later identified by the victims as items taken from their residences.

The State also presented Sargent's testimony that: she had driven defendant to approximately ten homes in the area of the break-ins during the time the incidents occurred; defendant would make sure no one was home and then enter the homes using a credit card to gain entry; on more than one occasion defendant gave her jewelry when he returned to the car; they used coins defendant took from the homes to pay for gas or redeemed them at coin sorting machines for paper money; defendant had brought coins back to the car in pillow cases on more than one occasion; and they would drive to a pawnshop in Portsmouth, Virginia after leaving the homes and defendant would go into the shop returning with money. Sargent also took officers to the neighborhoods where she had driven defendant and specifically pointed out two houses that were broken into.

The elements necessary to support the charge of felony breaking and entering are: (1) breaking or entering any building and (2) with the intent to commit any felony or larceny therein. N.C. Gen. Stat. § 14-54(a) (2003). Larceny is a common law offense and is not statutorily defined. The essential elements of common law larceny are: (1) the taking of the property of another; (2) the carrying away of the property; (3) without the consent of the owner; (4) with the intent to permanently deprive the owner of the property. *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). Because the State had charged defendant with felony larceny, pursuant to the State's basis for that charge, there also must be substantial evidence that the larceny was committed pursuant to a breaking and entering of a build-

ing without regard to the value of the property taken. N.C. Gen. Stat. § 14-72(b)(2) (2003). Finally, the elements required to support the offense of felony possession of stolen goods in this instance are: (1) possession of goods that are stolen and (2) that the person in possession knows or had reasonable grounds to know that the goods were stolen pursuant to a breaking and entering of a building. N.C. Gen. Stat. § 14-72(c) (2003).

We find that the evidence presented by the State was sufficient to support a reasonable inference that defendant committed the offenses charged. Accordingly, the charges and the evidence were properly submitted to the jury for determination of whether the evidence established that defendant committed the offenses. This assignment of error is overruled.

[4] Next defendant argues that the trial court erred in instructing the jury regarding flight. When there is some evidence in the record to support the theory that defendant fled after committing the offense charged, it is the duty of the jury to determine whether the facts and circumstances support the State's theory. *State v. Norwood*, 344 N.C. 511, 535, 476 S.E.2d 349, 360 (1996), (citing *State v. Tucker*, 329 N.C. 709, 723, 407 S.E.2d 805, 813 (1991)), *cert. denied*, 520 U.S. 1158, 137 L. E. 2d 500 (1997). It is not enough to show that defendant left the scene of the crime to support a jury instruction on flight, but "[t]here must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991) (citing *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 435 (1990)).

The State's evidence tended to show that on one occasion when Sargent and defendant were at one of the homes that was broken into the homeowner returned. The homeowner first questioned Sargent about her presence and then spoke with defendant when he came running around the house. Defendant told the homeowner that he had been looking for a friend. The homeowner and Sargent's testimony regarding this incident were substantially consistent with one another. The State also introduced evidence that when Sargent was stopped by police while driving defendant to the bus station so he could go to Ohio defendant gave the officer a false name and date of birth. Both of these incidents adequately support the State's contention that defendant took steps to avoid apprehension and the jury was properly instructed on flight. Accordingly, this assignment of error is overruled.

[5] Defendant's next argument is that the trial court erred in accepting the jury's verdict of guilty on the charge of felony possession of stolen goods in case number 02 CRS 4610 when the jury had found defendant not guilty of the underlying breaking and entering charge. When a charge of felony possession of stolen goods is based on the goods having been stolen pursuant to a breaking and entering a court cannot properly accept a guilty verdict on the charge of felony possession of stolen goods when defendant has been acquitted of the breaking and entering charge. *Perry*, 305 N.C. at 229-30, 287 S.E.2d at 813.

The State concedes this assignment of error in its brief. Because defendant was found not guilty of the underlying breaking and entering charge upon which the State based this charge of felony possession of stolen goods, we vacate defendant's conviction on this count of felony possession of stolen goods.

[6] Defendant's final argument is that the trial court erred in failing to give a curative instruction to the jury after sustaining his objection to an improper closing argument by the State. Defendant further argues that the trial court committed plain error in failing to intervene *ex mero motu* to stop the district attorney from continuing the improper argument after his objection was sustained.

The control of the arguments of counsel largely is left up to the discretion of the trial court and the propriety of counsel's remarks generally will not be reviewed unless the remarks are extreme or clearly intended to prejudice the jury. *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). It is well established in this State that "when an objection is made to an improper argument of counsel and the court sustains the objection, that court does not err by failing to give a curative instruction if one is not requested." *Smith v. Hamrick*, 159 N.C. App. 696, 699, 583 S.E.2d 676, 679, *disc. rev. denied*, 357 N.C. 507, 587 S.E.2d 674 (2003); *see also State v. Correll*, 229 N.C. 640, 644, 50 S.E.2d 717, 720 (1948), *cert. denied*, 336 U.S. 969, 93 L. Ed. 1120 (1949); *State v. Barber*, 93 N.C. App. 42, 376 S.E.2d 497, *disc. rev. denied*, 328 N.C. 334, 381 S.E.2d 775 (1989); *State v. Sanderson*, 62 N.C. App. 520, 523, 302 S.E.2d 899, 901-02 (1983); *State v. Hammonds*, 45 N.C. App. 495, 499-500, 263 S.E.2d 326, 329 (1980). However, when the statements of counsel are grossly inappropriate it is proper for the court to correct the abuse *ex mero motu* even absent objection by the opposing party. *State v. Sanderson*, 336 N.C. 1, 15, 442 S.E.2d 33, 42 (1994).

> The district attorney began her closing argument by stating:
>
> Good morning. Ladies and gentlemen, you are here today because of an ever present problem in your society. And that problem is drugs.

Defendant objected and the trial court sustained the objection. Defendant did not move to strike nor did he request a curative instruction. The district attorney then continued:

> Unfortunately, the people who fall prey to this problem are young adults, adults like Ian Goblet.
>
> Now on Monday morning each of you told us what you did for a living. Some of you your current job was as a real estate broker or a salesman or you're a restaurant owner. Others of you are retired as an engineer or housewife. But you have an honest job, an honest and a lawful job and the reason you do this job is to support yourself or your family.
>
> Now this is what makes Mr. Goblet different from you. He had a job too. His job wasn't honest and it surely wasn't lawful. Mr. Goblet is addicted to heroin so his job was to feed and support his heroin addiction. And this is how he went about his job everyday. He'd get up in the morning and the first thing that he would do is he would have a need for heroin and he had to feed that need. So he would wait until you and your neighbors would go to work.

At this point defendant again objected and asked to approach the bench. After an off the record bench conference the district attorney was allowed to continue her closing argument without any further comment from the judge or defendant.

At no time did defendant request that the court issue a curative instruction to the jury regarding the district attorney's statements. These statements, particularly in light of the evidence in the record of defendant's heroin use, were not so improper as to require the court to issue such an instruction *ex mero motu*. Accordingly, we hold that the trial court did not abuse its discretion in failing to give curative instructions regarding the statements to which defendant objected in the absence of a request to do so.

Defendant's contention that the court committed plain error in failing to give curative instructions *ex mero motu* also is without merit. In reviewing a plain error argument it is this Court's duty to

determine from the whole record whether "the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983) (citing *United States v. Jackson*, 569 F.2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L. Ed. 2d 1137 (1978)). We hold that it did not in light of the fact that the evidence presented to the jury contained ample evidence of defendant's heroin use and involvement in the offenses charged. This assignment of error is overruled.

No error in part; vacated in part.

Chief Judge MARTIN and Judge HUDSON concur.

STATE OF NORTH CAROLINA v. ARTHUR WILLIAMS VERRIER

No. COA04-601

(Filed 6 September 2005)

1. Indecent Liberties— purpose arousing or gratifying sexual desire—sufficiency of evidence

There was sufficient evidence that an indecent liberties defendant acted for the purpose of arousing or gratifying sexual desire where the victim testified about tickling sessions in which she was touched inappropriately.

2. Appeal and Error— plain error—asserted in brief—not supported

Defendant's plain error assertion did not preserve certain issues for appeal where he did not support the bare assertion that the error was so fundamental that justice could not have been done.

3. Appeal and Error— plain error—failure to cite authority

A plain error argument was deemed abandoned where defendant did not cite any authority to support his argument.

4. Constitutional Law— effective assistance of appellate counsel—portions of trial not recorded

It is beyond the function of the Court of Appeals to modify statutory law concerning recordation of all trial proceed-

ings, and defendant's assignment of error concerning effective assistance of appellate counsel where trial counsel did not move for recordation was overruled. N.C.G.S. § 15A-1241(a) and (b).

5. Appeal and Error— motion for appropriate relief on appeal—issue of fact—inadequate materials for decision

A motion for appropriate relief filed in the Court of Appeals was dismissed (without prejudice to filing a new motion in superior court) where the materials filed with the motion were insufficient for the Court of Appeals to render a decision.

6. Sentencing— aggravating factor—*Blakely* error—harmless error not applicable

An indecent liberties conviction was remanded for resentencing where the judge unilaterally found an aggravating factor. Harmless error analysis does not apply to *Blakely* Sixth Amendment violations.

Appeal by defendant from judgment entered 21 October 2003 by Judge Lindsay R. Davis, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 12 January 2005.[1]

Attorney General Roy Cooper, by Assistant Attorney General Jennie Wilhelm Mau, for the State.

M. Alexander Charns for defendant-appellant.

TIMMONS-GOODSON, Judge.

Arthur Williams Verrier ("defendant") appeals his convictions for taking indecent liberties with a child, obtaining habitual felon status, three counts of third-degree sexual exploitation of a minor, and failure to register as a sex offender. For the reasons stated 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: In September and October of 2002, defendant lived with his

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, 615 S.E.2d 256 (Filed 1 July 2005) (No. 485PA04).

niece, Lisa,[2] and her daughter, Kim,[3] in Winston-Salem, North Carolina. Kim was in the first grade, and she ordinarily went to the home of her grandmother, Karen,[4] for after-school care while Lisa was at work. Defendant babysat Kim approximately three nights when Lisa had to work in the evening. Defendant also spent time at Karen's residence, which was located on the same street as Lisa's residence.

On or about 2 October 2002, Karen awoke in the middle of the night and saw defendant viewing something on the computer. The following day, Karen found pictures on the computer. Karen brought the pictures to Lisa's attention. Lisa and Karen then engaged in a conversation with Kim, during which Kim told Lisa and Karen that she and defendant "play[ed] the tickle game." Kim demonstrated the game as starting with tickling her leg and continuing with tickling her vaginal area. At that time, Lisa and Karen called the police.

Corporal S.E. Spencer ("Corporal Spencer") of the Winston-Salem Police Department responded to the call. Corporal Spencer interviewed Kim, and he recalled the following pertinent details of the interview:

> I asked [Kim] if [defendant] had ever touched her and she said yes, he had touched her on her private parts. When she made that statement, [Kim] reached, as she started making the statement, almost immediately reached down and touched with an open hand over her groin area directly above her vagina and said that he had touched her private parts.

Kim's case was assigned to Juvenile Detective Natashia James ("Detective James"). Detective James interviewed Kim, and she answered Detective James's questions consistent with her statements to Lisa, Karen, and Corporal Spencer.

Defendant was subsequently arrested, and, on 6 January 2003, indicted for taking indecent liberties with Kim. On 24 March 2003, defendant was indicted for failure to register as a sex offender. On 2 June 2003, defendant was indicted for obtaining habitual felon status.

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2. For the purposes of this opinion, we will refer to defendant's niece by the pseudonym "Lisa."

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

4. For the purposes of this opinion, we will refer to Lisa's mother and defendant's sister by the pseudonym "Karen."

On 20 October 2003, defendant was indicted for three counts of third-degree sexual exploitation of a minor.

Defendant was tried for the indecent liberties charge on 20 October 2003. At trial, the State presented evidence from Kim, Corporal Spencer, Karen, Lisa, and Detective James. Defendant presented no evidence. On 21 October 2003, the jury found defendant guilty of taking indecent liberties with Kim. Defendant subsequently pled guilty to the charges of failing to register as a sex offender, obtaining habitual felon status, and three counts of third-degree sexual exploitation of a minor. The trial court thereafter found as an aggravating factor to the taking of indecent liberties offense that defendant took advantage of a position of trust or confidence to commit the offense, and the trial court sentenced defendant to a total of 120 to 153 months imprisonment. Defendant appeals.

The issues on appeal are whether the trial court erred by: (I) denying defendant's motion to dismiss the charge of taking indecent liberties with a child; (II) allowing prosecution witnesses to render prejudicial testimony; (III) failing to grant a mistrial; and (IV) failing to record jury selection, bench conferences, and the attorneys' opening and closing arguments.

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of taking indecent liberties with a child. Defendant asserts that the State failed to demonstrate that defendant acted for the purpose of arousing or gratifying sexual desire. We disagree.

In considering a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that may be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The standard of review for a motion to dismiss based on insufficiency of the evidence is "the substantial evidence test." *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993), *cert. denied*, 336 N.C. 612, 447 S.E.2d 407 (1994). Substantial evidence is defined as the amount of "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).

N.C. Gen. Stat. § 14-202.1(a)(1) (2003) provides the elements of taking indecent liberties with a child as follows:

> 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 . . . [w]illfully 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[.]

"With regard to evidence that the touching by [the] defendant was for the purpose of arousal or sexual gratification, this Court has held that a defendant's purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference." *State v. Rogers*, 109 N.C. App. 491, 505, 428 S.E.2d 220, 228 (citation and quotation marks omitted), *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993). This element "may be inferred from the evidence of the defendant's actions." *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987).

In *Rogers*, where the evidence tended to show that the defendant touched the chest and vaginal area of a five-year-old child while alone in a bathroom, we held that sufficient evidence existed "to permit the jury to infer that [the] defendant's purpose in doing so was to arouse himself or to gratify his sexual desire." 109 N.C. App. at 505-06, 428 S.E.2d at 229. In the instant case, Kim testified on direct examination that defendant "tickle[d]" her "[t]wo or three" times in her "private[,]" and that it felt "[b]ad." Kim testified that defendant tickled her "[m]aybe [in] the living room[,]" and that as he was tickling her leg, defendant would "start going up . . . . [t]o [her] private." We conclude that this evidence, when viewed in the light most favorable to the State, tends to show that defendant touched Kim inappropriately in her "private" area, under the pretext of tickling her. Thus, because the State presented sufficient evidence tending to show that defendant acted for the purpose of arousing or gratifying sexual desire, there was substantial evidence of indecent liberties with a child. Accordingly, we conclude that the trial court did not err by denying defendant's motion to dismiss the charge of taking indecent liberties with Kim.

[2] Defendant next argues that the trial court erred by allowing the introduction of prejudicial evidence and by not inquiring as to whether the jurors were influenced by an inquiry made to them outside the courtroom. We note initially that, "[i]n criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the

judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4) (2005). In the instant case, defendant asserts in his brief that the trial court committed plain error by allowing Karen to describe the images she saw on the computer. Defendant also asserts that his trial was prejudiced by an inquiry of four jurors "about the location of a court case for a sexual assault case by a family member." However, defendant "provides no explanation, analysis or specific contention in his brief supporting the bare assertion that the claimed error is so fundamental that justice could not have been done[,]" *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001), or that "absent the error, the jury probably would have reached a different verdict[.]" *State v. King*, 342 N.C. 357, 365, 464 S.E.2d 288, 293 (1995). "The right and requirement to specifically and distinctly contend an error amounts to plain error does not obviate the requirement that a party provide argument supporting the contention" that the trial court's actions amounted to plain error as required by N.C.R. App. P. 28(a) and (b)(6). *Cummings*, 352 N.C. at 636, 536 S.E.2d at 61.

> To hold otherwise would negate those requirements, as well as those in Rule 10(b)(2). [A] defendant's empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule. By simply relying on the use of the words "plain error" as the extent of his argument in support of plain error, [the] defendant has effectively failed to argue plain error and has thereby waived appellate review.

Id. at 636-37, 536 S.E.2d at 61 (citations omitted). Accordingly, after reviewing the record in the instant case, we conclude that defendant has waived any right to pursue these arguments on appeal.

[3] Defendant next argues that the trial court erred by failing to declare a mistrial based upon (i) Karen's testimony about defendant's prior conviction, (ii) the failure to sequester witnesses, and (iii) the contact between members of the jury and a member of Kim's family. Although defendant did not move for a mistrial upon such grounds at trial, on appeal, he asserts that it was plain error for the trial court not to grant a mistrial on its own motion. However, our appellate courts have applied plain error review only to those questions involving jury instructions or the admissibility of evidence. *See State v. Childress*, 321 N.C. 226, 234, 362 S.E.2d 263, 268 (1987). Plain error review does

not apply to decisions made at the trial judge's discretion. *See State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000). In the instant case, defendant fails to cite any authority supporting his argument that this Court should review under plain error the trial court's failure to exercise its discretion *ex mero motu* on the question of a mistrial. Accordingly, we deem this argument abandoned.

[4] Defendant next argues that his rights to due process and effective assistance of appellate counsel were violated by the failure of his trial counsel to request that the trial court record jury selection, bench conferences, and the attorneys' opening and closing arguments at trial. We cannot agree.

N.C. Gen. Stat. § 15A-1241(a) and (b) (2003) provide for the recordation of trial proceedings as follows:

> (a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings *except*:
>
> (1) Selection of the jury in non capital cases;
>
> (2) Opening statements and final arguments of counsel to the jury; and
>
> (3) Arguments of counsel on questions of law.
>
> (b) *Upon motion of any party* or on the judge's own motion, proceedings excepted under subdivisions (1) and (2) of subsection (a) must be recorded.

(emphasis added).

In *State v. Cummings*, 332 N.C. 487, 422 S.E.2d 692 (1992), the defendant argued that § 15A-1241 applied to off-the-record bench conferences. Our Supreme Court declined to expand the statute to include bench conferences, concluding that

> the enactment of this statute by the legislature in 1977 was [not] intended to change the time-honored practice of off-the-record bench conferences between trial judges and attorneys. If the legislature had intended to make such a radical change in trial procedure, we feel confident it would have done so explicitly.

Id. at 498, 422 S.E.2d at 698.

In the instant case, there is no evidence in the record that defendant made a motion for the jury selection, bench conferences, and

opening and closing statements to be recorded. Defendant's brief contains the following contention:

> Defendant requests a modification or change of law to provide a per se rule granting a new trial where counsel neither requests nor the trial court requires that the entire trial, jury selection, arguments of counsel and bench conferences are recorded. The lack of a transcript for portions of his trial denied [defendant] the complete assistance of appellate counsel and consequently, deprived him of the most complete appellate review by this Court.

We recognize that appellate counsel may be at a disadvantage when preparing an appeal for a case in which he did not participate at the trial level, as appellate counsel is somewhat bound by the decisions and strategies of trial counsel. However, this Court cannot grant defendant the relief he seeks on this issue. It is outside the realm of this Court's function as the judiciary to modify statutory law. That role is reserved for the legislature. Accordingly, this argument is overruled.

[5] In two motions for appropriate relief filed with his appeal, defendant challenges the constitutionality of the sex offender registration statute as applied to him as well as the trial court's decision to sentence him in the aggravated range.[5] Defendant first asserts that N.C. Gen. Stat. § 14-208.11, which imposes a criminal penalty upon those individuals who have a reportable conviction but fail to register as sex offenders, is unconstitutional as applied to him. In *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479 (2005), our Supreme Court recently examined the constitutionality of N.C. Gen. Stat. § 14-208.11 as applied to an out-of-state sex offender who failed to register upon moving to North Carolina. In that case, the defendant was a convicted sex offender in South Carolina who was notified while serving his sentence that he had a duty to register with the State of South Carolina upon his release from prison. The defendant signed a form in which he acknowledged that he had been notified, orally and in writing, of his lifelong duty to register within the state. Although the defendant notified the State of South Carolina of his subsequent moves within South Carolina following his release, he failed to notify either the State of South Carolina or the

5. In related arguments, defendant requests this Court grant him relief due to his trial counsel's failure to provide him with effective assistance of counsel. However, due to our discussion and disposition of these issues, we decline to grant defendant relief on these grounds.

State of North Carolina of his move to Winston-Salem, North Carolina, in November 2000.

In 2001, the defendant was arrested, charged, and convicted in North Carolina for failing to register as a convicted sex offender. On appeal, he cited *Lambert v. California*, 355 U.S. 225, 2 L. Ed. 2d 228 (1957), in support of his assertion that the State had to prove actual or probable notice of his duty to register in order to satisfy due process. Our Supreme Court acknowledged the "narrow *Lambert* exception to the general rule that ignorance of the law is no excuse[,]" 359 N.C. at 569, 614 S.E.2d at 488, and it noted that

> to be entitled to relief under the decidedly narrow *Lambert* exception, a defendant must establish that his conduct was "wholly passive" such that "*circumstances which might move one to inquire as to the necessity of registration are completely lacking*" and that [the] defendant was ignorant of his duty to register and there was no reasonable probability that [the] defendant knew his conduct was illegal.

Id. at 568, 614 S.E.2d at 488 (quoting *Lambert*, 355 U.S. at 228-29, 2 L. Ed. 2d at 231-32)) (emphasis in original). After concluding that the defendant's case was "rich with circumstances that would move the reasonable individual to inquire of his duty to register in North Carolina such that [the] defendant's conduct was not wholly passive[,]" 359 N.C. at 568, 614 S.E.2d at 488, the Court rejected the defendant's constitutional challenge to N.C. Gen. Stat. § 14-208.11, holding that the "actual notice by South Carolina of [the defendant's] duty to register as a convicted sex offender" was "sufficient" to put the defendant "on notice to inquire into the applicable law of the state to which he relocated, in this instance North Carolina." *Id.* at 569, 614 S.E.2d at 489.

In the instant case, our review of the circumstances surrounding defendant's conviction for failure to register as a sex offender is limited by the posture of the issue. N.C. Gen. Stat. § 15A-1418(b) (2003) provides that, when a motion for appropriate relief is filed with this Court, we must decide "whether the motion may be determined on the basis of the materials before [us], or whether it is necessary to remand the case to the trial division for taking of evidence or conducting other proceedings." Here, the materials in defendant's motion for appropriate relief contain only his sworn affidavit, which alleges that he was not provided with actual notice during his prison sentence in Maine that he was required to register as a sex offender upon

his release, and that he was not instructed that he was required to notify the State of Maine upon a subsequent change in residence. Mindful that it is more within the province of a trial court rather than an appellate court to make factual determinations, we conclude that the materials in the instant case are insufficient to enable us to render a decision regarding defendant's motion. Accordingly, we dismiss that portion of defendant's motion for appropriate relief concerning the applicability of N.C. Gen. Stat. § 14-208.11, without prejudice to defendant to file a new motion for appropriate relief in the superior court. *See* N.C. Gen. Stat. § 15A-1418 (official commentary) ("It is possible that some factual matters could be decided . . . in the appellate division, but frequently they would require that the trial court hold an additional evidentiary hearing. Thus the appellate division is . . . given authority to remand the case to the trial division for a hearing. It is possible that the hearing could determine the disposition of the case and eliminate the necessity for going forward with the review."); *State v. Hurst*, 304 N.C. 709, 712, 285 S.E.2d 808, 810 (1982) (per curiam) (dismissing motion for appropriate relief where materials were insufficient to allow the Court to determine whether the defendant's conviction was unconstitutional).

[6] In addition to his challenge to N.C. Gen. Stat. § 14-208.11, defendant asserts that the trial court erred by aggravating his sentence for taking indecent liberties with a child. Defendant contends that the trial court was required to submit the aggravating factor to a jury prior to aggravating his sentence. We agree.

In *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), our Supreme Court recently reviewed 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 pertinent case law, the Court determined 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." *Allen*, 359 N.C. at 437, 615 S.E.2d at 264-65 (citing *Blakely*, 542 U.S. at 303-04, 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, and 15A-1340.17). The Court noted that its holding "appl[ied] 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[,]" thereby making it applicable to the instant case. 359 N.C. at 427, 615 S.E.2d at 258 (quoting *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001)); *see also* N.C. Gen. Stat. § 15A-1446(d)(19).

Here, the trial court found as an aggravating factor that the circumstances of defendant's conviction for indecent liberties with a child involved defendant taking advantage of a position of trust or confidence to commit the offense. The trial court found this factor unilaterally, thereby violating the Court's decision in *Allen* and the cases cited therein. The State contends that this error was nevertheless harmless, in that it introduced uncontroverted and overwhelming evidence to establish that defendant violated a position of trust in committing the offense. However, "[b]ecause 'speculat[ion] on what juries would have done if they had been asked to find different facts' is impermissible," our Supreme Court concluded in *Allen* that " '[h]armless error analysis cannot be conducted on *Blakely* Sixth Amendment violations.' " *Id.* at 448, 615 S.E.2d at 271-72 (quoting *State v. Hughes*, 158 Wash. 2d 118, 148, 110 P.3d 192, 208 (2005)). Therefore, in light of the Court's decision in *Allen*, we conclude that the trial court committed reversible error by aggravating defendant's sentence for taking indecent liberties with a child.[6] Accordingly, we allow that portion of defendant's motion for appropriate relief concerning the imposition of the aggravated sentence, and we remand the case for resentencing. As discussed above, that portion of defendant's motion for appropriate relief concerning the application of N.C. Gen. Stat. § 14-208.11 to the facts of this case is dismissed without prejudice to defendant to refile the motion at the trial court level.

In light of the foregoing conclusions, we hold that defendant received a trial free of prejudicial error in part, but we remand the case for resentencing.

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6. Defendant also contends that the trial court was prohibited from sentencing him in the aggravated range because the aggravating factor was not alleged in the indictment. However, we note that our Supreme Court specifically rejected the same argument by the defendant in *Allen*. 359 N.C. at 437-38, 615 S.E.2d at 265 (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 stating 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 *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, we overrule defendant's contention in the instant case.

No error at trial; remanded for resentencing.

Judges HUDSON and STEELMAN concur.

MICHAEL SWIFT, EMPLOYEE, PLAINTIFF v. RICHARDSON SPORTS, LTD. D/B/A CAROLINA PANTHERS, EMPLOYER, AND LEGION INSURANCE COMPANY (CAMERON M. HARRIS & COMPANY, ADJUSTING SERVICE), CARRIERS, DEFENDANTS

No. COA04-302-2

(Filed 6 September 2005)

1. Workers' Compensation— professional football player— compensable injury

The findings in a workers' compensation case supported the conclusion that a professional football player sustained a compensable injury by accident and there was competent evidence to support the findings.

2. Evidence— hearsay—testimony by declarant

A statement by an ex-professional football player in a workers' compensation case about why he was terminated from his last team was not hearsay. Hearsay is a statement other than one made by the declarant while testifying; the plaintiff here was testifying when he responded to the question.

3. Workers' Compensation— professional football player— number of weeks benefits awarded

There was competent evidence in a workers' compensation case to support the number of weeks of benefits awarded to a professional football player where plaintiff returned to football briefly with another team, but was released because of injuries with defendant.

4. Workers' Compensation— professional football player— injury protection payments made under contract—credit

A professional football team was entitled to a dollar-for-dollar workers' compensation credit for an injury protection payment made under contract to an injured player, and the decision of the Industrial Commission was reversed on this issue.

5. Workers' Compensation— attorney fees—findings—insufficient

An award of attorney fees was remanded in a workers' compensation case where the Commission's opinion contained no findings or conclusions on the issue and did not determine that a hearing had been brought, prosecuted, or defended without reasonable ground. N.C.G.S. § 97-88.1.

Appeal by defendants from opinion and award entered 10 October 2003 by the North Carolina Industrial Commission. Heard originally in the Court of Appeals 15 November 2004. Unpublished opinion, *Swift v. Richardson Sports Ltd.*, COA04-302, filed 5 April 2005. Reheard by the same panel pursuant to a 1 July 2005 Petition for Rehearing.

R. James Lore for plaintiff appellee.

Hedrick, Eatman, Gardner, & Kincheloe, L.L.P., by Hatcher Kincheloe and Shannon P. Herndon, for defendant appellants.

McCULLOUGH, Judge.

Defendants appeal from the opinion and award of the North Carolina Industrial Commission. Plaintiff Michael Swift was born on 28 February 1974. He graduated from high school and attended college at Austin Peay State, but did not graduate. Although he was not drafted as a professional football player, plaintiff made the San Diego Chargers as a free agent. Plaintiff worked primarily on special teams, but also played cornerback on defense. After playing two seasons with the Chargers, plaintiff signed with the Carolina Panthers and played the same positions. Plaintiff was a member of the Panthers' team in the years 1998-1999 and 1999-2000.

On or about 27 July 1999, plaintiff agreed to play for the Panthers in exchange for $325,000.00 which was paid in seventeen equal installments. Although the regular season consists of sixteen games, the season lasts seventeen weeks because every team receives a "bye," or one week in which there is no game.

During the fifteenth game of the regular season, during a special teams play, plaintiff intended to go around the opposing team's players and block an extra point attempt. However, the opposing team bobbled the ball, and the play broke down. When he attempted to get the ball, an opponent knocked plaintiff on the ground, and one or two

players fell on the back of plaintiff's leg. This resulted in a broken right fibula and severe tearing in the tendons of his ankle. At the time of the injury, plaintiff was taking all reasonable measures to protect himself from injury given the nature of the game.

On 27 December 1999, the Panthers' team doctor performed surgery and inserted hardware to repair plaintiff's leg and ankle. Plaintiff returned to Tennessee where he underwent physical therapy. The Panthers decided not to renew plaintiff's contract for the 1999-2000 season because plaintiff was still on crutches and was undergoing physical therapy for his ankle.

On or about 9 March 2000, the Panthers' team physician removed some of the hardware from plaintiff's leg. Afterwards, plaintiff returned to Memphis to continue his physical therapy.

Although his ankle had not fully recovered, plaintiff tried out for another team, the Jacksonville Jaguars. In spite of having continued symptoms, plaintiff made the team. However, the Jaguars released plaintiff after the first game because plaintiff's ankle injury impaired his speed and mobility.

Although several other teams asked plaintiff to participate in tryouts, plaintiff was unable to make a team because of the injury he sustained while working for the Panthers. Despite plaintiff's lengthy period of rehabilitation, the injury was career-ending.

Because he could no longer pursue a career in professional football, plaintiff worked a number of other jobs. From late November of 2000 until January of 2001, plaintiff worked as an analyst for Protein Technologies making twelve dollars per hour. From April of 2001 through October of 2002, plaintiff worked for Uniform People as a sales representative. There, he earned an annual salary of $35,000.00. Finally, plaintiff became self-employed in October of 2002. At that time, his anticipated income from selling used computer equipment was $40,000.00 per year. All of these jobs reflected plaintiff's attempt at reaching his wage earning capacity outside of the NFL.

In the NFL, a player's salary is based on his contract. In this case, the contract called for $325,000.00 to be paid in seventeen equal payments immediately after each of the sixteen games plus the bye-week during the seventeen-week season. Subsequent to 26 December 1999, the date of the injury, plaintiff had played in the fifteenth game of the season and had earned that check by the time he was injured.

The next week, plaintiff received his sixteenth and final check after the Panthers played the last game of the 1999-2000 season. Plaintiff received this $19,118.00 check under the injury protection provisions of paragraph 9 of the standard NFL Player Contract. Payments made under this disability provision are funded exclusively from the player's side, as opposed to the employer's side of the divided league revenue under the Collective Bargaining Agreement (CBA), the two portions together constitute "defined gross revenue."

On or about 31 December 2001, plaintiff received a $30,000.00 check for severance pay from the Panthers. This amount was based on the CBA and the number of years that plaintiff played in the NFL. Although plaintiff received this check after the injury, he had earned the entire amount before the injury because in the NFL, a player accrues a year of service once he plays in the third game of the season. During the 1999-2000 season, the third game had occurred prior to plaintiff's injury on 26 December 1999.

While playing for the Jacksonville Jaguars in September 2000, plaintiff received $22,647.00, which was 1/17 of his yearly contract. The payment was for playing in one regular season game; defendant received nothing thereafter. This amount reflects the one week that plaintiff had an earning capacity equal to or greater than he had while playing with the Panthers. The Jaguars made a number of other payments for things like travel expenses and training camp. These payments would still yield an entitlement that exceeds the maximum compensation rate of $560.00 that was in effect in 1999.

Plaintiff's average weekly wage is $6,476.90. This wage is calculated by dividing the yearly contract plus all other payments the Panthers paid for the season in which the injury occurred.

Based on those facts, the Full Commission made the following conclusions of law. First, plaintiff sustained a compensable injury by accident as a result of a compensable event arising out of and in the course of his employment with defendants on 26 December 1999. Second, plaintiff is entitled to partial disability compensation at the maximum rate of $560.00 per week (the rate that was in effect in 2000) and past and future medical treatment. Finally, defendants were permitted to deduct one weekly compensation payment at the maximum applicable rate of $560.00 from the 300 weeks of compensation otherwise due.

Based upon its findings of fact and conclusions of law, the Full Commission awarded plaintiff compensation at the rate of $560.00

per week for a period of 299 weeks with the accrued relating back to 27 December 1999. This amount was to be paid in one lump sum with the balance to be paid over the remainder of the 299-week period so long as plaintiff's yearly earnings were sufficient to yield the maximum compensation rate of $560.00 per week. Additionally, defendants had to pay a reasonable attorney fee of 25%, past and future medical expenses, and the costs of the appeal. Defendants appeal.

On appeal, defendants argue that the Full Commission erred by (1) finding that plaintiff sustained a compensable injury by accident arising out of and in the course of his employment on 26 December 1999, (2) allowing plaintiff to testify about the reason for his termination from the Jacksonville Jaguars, (3) awarding plaintiff 299 weeks of benefits, (4) incorrectly calculating the credit to which defendants were entitled, and (5) awarding attorney fees to plaintiff. We affirm in part and reverse in part the opinion and award of the Full Commission.

I. Compensable Injury

[1] Defendants contend that the Full Commission erred in finding that plaintiff sustained a compensable injury by accident arising out of and in the course of his employment on 26 December 1999.

The Workers' Compensation Act extends coverage only to an "injury by accident arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (2003). Injury and accident are separate concepts, and there must be an accident which produces the injury before an employee can be awarded compensation. *Jackson v. Fayetteville Area Sys. of Transp.*, 88 N.C. App. 123, 126-27, 362 S.E.2d 569, 571 (1987). Our Supreme Court has explained:

> An accident, as the word is used in the Workmen's Compensation Act, has been defined as "an unlooked for and untoward event which is not expected or designed by the injured employee." "A result produced by a fortuitous cause." "An unexpected or unforeseen event." "An unexpected, unusual or undesigned occurrence."

Edwards v. Publishing Co., 227 N.C. 184, 186, 41 S.E.2d 592, 593 (1947) (citations omitted). "[U]nusualness and unexpectedness are its essence." *Smith v. Creamery Co.*, 217 N.C. 468, 472, 8 S.E.2d 231, 233 (1940). "To justify an award of compensation, the injury must involve more than the carrying on of usual and customary duties in the usual way." *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 116,

292 S.E.2d 763, 766 (1982). "The issue of whether a particular accident arises out of and in the course of employment is a mixed question of fact and law, and this Court's review is limited on appeal to the question of whether the findings and conclusions are supported by competent evidence." *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982).

In its findings of fact, the Full Commission described how plaintiff sustained his injury:

> 8. In the 15th game of the 16-game regular season, while playing on special teams in a game against the Pittsburgh Steelers in Pittsburgh, Pennsylvania, plaintiff was lined up on the end of the line to attempt to get around the opposing team's players and block an extra point attempt. On that particular play, the opposing team bobbled the ball and the play broke down. In an attempt to get to the ball, Swift was knocked to the ground and at least one other player, and possibly two, fell on the back of his leg not only breaking his right fibula but also severely tearing the tendons in his ankle.

There is competent evidence in the record which supports this finding. Plaintiff testified that he sustained an injury while playing in the fifteenth game of the season against the Pittsburgh Steelers. Additionally, plaintiff's description of the incident is consistent with the Full Commission's finding. Plaintiff indicated that when he attempted to block an extra point, the opposing team bobbled the ball. When the play broke down, one or more players fell on the back of plaintiff's leg resulting in a broken right fibula and torn tendons in the ankle.

In determining that plaintiff sustained a compensable injury by accident, the Full Commission made the following important finding of fact:

> 9. It was unexpected and unusual for a player to fall on Swift in this way so as to break his fibula and cause such a tear in his ankle tendon. At the time of injury, Swift was taking all reasonable measures to protect himself from injury given the nature of the game. At the same time, Swift was required to do what he was doing when injured and had no choice but to do it as best he could notwithstanding the risk of injury.

Once again, there was competent evidence in the record to support this finding. First, the injury was unusual in that Swift attempted

to block numerous extra point attempts without sustaining a broken leg and torn tendons in his ankle. Second, it was unexpected that one or more players would fall on the back of plaintiff's leg causing a career-ending injury. Finally, Dr. J. Leonard Goldner testified that such an injury requires a force of 3000 pounds per square inch to occur. Because there is competent evidence to support the Full Commission's findings of fact and these findings support its conclusion of law that plaintiff sustained a compensable injury by accident, we overrule this assignment of error.

II. Hearsay Testimony

[2] Defendants argue that the Full Commission erred by allowing plaintiff to testify about the reason for his termination from the Jacksonville Jaguars. Defendants claim that the reason for the termination was outside of plaintiff's firsthand knowledge and was therefore hearsay. This argument is unpersuasive.

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003), hearsay "is a statement, *other than one made by the declarant while testifying at the trial or hearing*, offered in evidence to prove the truth of the matter asserted." (emphasis added). Here, plaintiff's attorney asked plaintiff why he was released from the Panthers. In response, plaintiff offered personal knowledge as to why he was released. He stated that he could not "perform as needed on the field." This statement does not meet the definition of hearsay because it occurred while plaintiff was testifying at the hearing. For these reasons, we overrule this assignment of error.

III. Amount Paid

[3] Defendants argue that the Full Commission erred by awarding plaintiff 299 weeks of benefits. Before addressing this contention, we recognize our limited standard of review in workers' compensation cases. In short, we must determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Full Commission is the "sole judge of the weight and credibility of the evidence[.]" *Id.* at 116, 530 S.E.2d at 553. An appellate court reviewing a workers' compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). "The court's duty goes no further than to determine whether

the record contains any evidence tending to support the finding." *Id.* at 434, 144 S.E.2d at 274. If there is any evidence at all, taken in the light most favorable to plaintiff to support it, the finding of fact stands, even if there is evidence going the other way. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). With these principles in mind, we turn to consider defendants' arguments regarding the amount paid.

Defendants claim that plaintiff should not have received 299 weeks of benefits because he returned to football with the Jacksonville Jaguars. The Full Commission did make a finding of fact addressing this issue. In finding of fact 13, the Full Commission stated:

> 13. Although his leg and ankle had not fully recovered, Swift, who had planned on making a career out of working in the NFL as a professional football player, tried out for another professional football team, the Jacksonville Jaguars. Although he had continued symptoms with his ankle, he made the team. After his first game with the Jaguars, on September 5, 2000 plaintiff was released from the team because of limitations of speed and ability to maneuver as a result of the impairment from the ankle injury sustained while working with the Carolina Panthers. Swift's compensable work-related limitations made him more likely to be dismissed from the team relative to his teammates for reasons of relative performance.

The record indicates that plaintiff did try out and make the Jacksonville Jaguars' football team. The record also reveals that plaintiff was released from the Jaguars on or around 5 September 2000. Plaintiff's own testimony, which we have already determined to be based on his own personal knowledge, tended to show that plaintiff was released because of limitations from the injury with the Panthers. Therefore, competent evidence in the record supports this finding of fact. We overrule this assignment of error.

IV. Award of a Credit

[4] Defendants disagree with the Full Commission's award of a credit for payments defendants made to plaintiff. Under N.C. Gen. Stat. § 97-42 (2003)

> [p]ayments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made,

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

N.C. Gen. Stat. § 97-42 is the only statutory authority which allows an employer in North Carolina to receive a credit from workers' compensation benefits that are due to an injured employee. *Effingham v. Kroger Co.*, 149 N.C. App. 105, 119, 561 S.E.2d 287, 296 (2002). "The decision of whether to grant a credit is within the sound discretion of the Commission." *Shockley v. Cairn Studios, Ltd.*, 149 N.C. App. 961, 966, 563 S.E.2d 207, 211 (2002), *appeal dismissed, disc. review denied*, 356 N.C. 678, 577 S.E.2d 887, 888 (2003). Thus, the Commission's decision to grant or deny a credit to the employer will not be reversed unless there is an abuse of discretion. *Id.*

Defendants argue that they are entitled to a dollar-for-dollar credit for amounts they paid after plaintiff's injury. First, they contend that this Court allowed a dollar-for-dollar credit in *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 540 S.E.2d 768 (2000), *aff'd per curiam*, 353 N.C. 520, 546 S.E.2d 87 (2001). Second, they claim that they are entitled to such a credit based on Paragraph 10 of the NFL Player Contract.

Our Court considered this exact issue in *Smith v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 620 S.E.2d 533 (2005) and remanded this issue to the Commission for further proceedings. There, the Court explained that *Larramore* did not actually decide whether an employer was entitled to a dollar-for-dollar credit for amounts an employer paid to an employee after his injury. *Smith*, 173 N.C. App. at 142, 620 S.E.2d at 539.

Instead, this Court remanded the injury protection payment issue to the Commission for further proceedings due to conflicting findings of fact where the Commission held that injured reserve payments were employer-funded while injury protection payments were

employee-funded despite the fact that both payments came from the portion of defined gross revenue under the CBA described on the "players revenue."

Subsequent to *Smith*, this Court has also decided the case of *Renfro v. Richardson Sports Ltd.*, 172 N.C. App. 176, 616 S.E.2d 176 (2005), where we affirmed a decision by the Industrial Commission holding that the defendant is entitled to a dollar-for-dollar credit under the terms of paragraph 10 of the CBA.

As there is no discernible difference between the payment made in *Renfro* and in the case at bar, defendant is entitled to a dollar-for-dollar credit under the same rationale as is set out in the *Renfro* case for the injury protection payment of $19,118. As noted earlier the severance pay was earned and not subject to a credit.

Therefore the decision of the Commission is reversed on this issue and remanded to the Commission for the entry of an appropriate award which allows for a dollar-for-dollar credit.

V. Attorney Fees

[5] Defendants object to the award of attorney fees. In their briefs, both parties contend that the Full Commission made the award pursuant to N.C. Gen. Stat. § 97-88.1 (2003). Under the statute, before making an award, the Commission must determine that a hearing "has been brought, prosecuted, or defended without reasonable ground." However, the actual opinion and award sheds no light whatsoever upon this question. It contains no findings of fact or conclusions of law pertaining to attorney fees. The only mention of attorney fees is in paragraph 2 of the award section of the order which states:

> A reasonable attorney fee in the amount of twenty-five percent (25%) of the compensation due plaintiff is approved and awarded to plaintiff's counsel as attorney's fees. This amount shall be paid as a part of the cost of this action and not deducted from Plaintiff's compensation. All sums that have accrued shall be paid in a lump sum.

We remand this issue to the Full Commission for the entry of additional findings of fact and conclusions of law on the issue of attorney fees. The Full Commission should also specifically state the statute it relied upon in making the award and should make the necessary findings of fact and conclusions of law supporting the award.

After careful consideration, the opinion and award is

Affirmed in part, reversed in part, and remanded.

Chief Judge MARTIN and Judge STEELMAN concur.

HARRY E. MUNN, JR., PLAINTIFF v. NORTH CAROLINA STATE UNIVERSITY, DEFENDANT

No. COA04-894

(Filed 6 September 2005)

Contracts— breach—damages—ready, willing and able to perform—new trial

The trial court should have granted a new trial for damages in a breach of contract action where a professor who agreed to give up tenure and work part time as part of a Phased Retirement Program presented evidence of the salary he would have earned but for the breach. Defendant contends that plaintiff was not ready, willing, and able to perform the contract, but the jury was never instructed on this issue.

Judge JACKSON dissenting.

Appeal by plaintiff from an order entered 19 December 2003 by Judge J. B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 March 2005.

Unti & Lumsden, L.L.P., by Michael L. Unti and Sharon L. Smith, for plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorneys General John P. Scherer II and Kimberly D. Potter, for defendant-appellee.

HUNTER, Judge.

Harry E. Munn, Jr. ("plaintiff") appeals the trial court's denial of his motion for judgment notwithstanding the verdict or for a new trial based upon a jury award of inadequate damages. After careful review, we vacate the judgment below and remand for a new trial on damages only.

The pertinent facts tend to indicate that plaintiff was an associate professor in the Department of Communications at North Carolina State University ("NCSU") for twenty-eight years. In November 1998, plaintiff agreed to enter into the NCSU Phased Retirement Program. Under this plan, plaintiff would relinquish his tenured status, enter into a contractual relationship with NCSU, and work for NCSU on a part-time basis for three academic years. In exchange, NCSU would pay plaintiff one-half of the salary he earned during his last nine or twelve month term prior to entering the phased retirement program. The reemployment agreement stated in pertinent part:

> Upon the acceptance of my application to participate in the Program, NC State University is obligated to offer me reemployment for a term of three (3) years. My reemployment shall be on a half-time basis (or the equivalent thereof). Compensation during the period of reemployment shall be one-half the salary I was earning during my last 9- or 12-month term of full-time employment prior to entering the Program. I will continue to be subject to performance reviews on reemployment. Subject to any limitations imposed by the State Retirement System, I will be eligible for salary increments and merit pay increases based on annual evaluations.
>
> The specific duties which I shall perform under this agreement are as follows:
>
> 1999-2000 PRP FALL TERM: TWO 3 SEMESTER HOUR CLASSES
>
> 1999-2000 PRP SPRING TERM: ONE 3 SEMESTER HOUR CLASS
>
> 2000-2001 PRP FALL TERM: THREE 3 SEMESTER HOUR CLASSES
>
> 2001-2002 PRP FALL TERM: THREE 3 SEMESTER HOUR CLASSES
>
> *The department will make every effort to meet Dr. Munn's teaching requests as it does for all of its faculty members.
>
> . . .
>
> I will remain subject to The Code of The University of North Carolina.

The reemployment agreement was signed by plaintiff on 21 November 1998. The department head signed the agreement on 23 November 1998, the Dean signed the agreement on 4 January 1999

and the Provost and Vice Chancellor signed the agreement on 5 January 1999.

At the end of the Fall 1998 semester, before the agreement was signed by all parties, a student complaint was lodged against plaintiff alleging sexual harassment by inappropriate comments to the complainant and inappropriate statements to other female students in the class. While the investigation into the complaint was proceeding, the reemployment agreement was signed. After the agreement was signed, plaintiff received a letter indicating his conduct during the Fall 1998 class was highly inappropriate and unprofessional. The letter also indicated that a procedure would be implemented to monitor his classes. Another student complaint was lodged against plaintiff after the Spring 1999 semester. This student complained about her grade and also indicated plaintiff made inappropriate comments during the class.

Instead of implementing a monitoring procedure, NCSU decided to remove plaintiff from the classroom and offered plaintiff an alternative assignment in which he would compile information for an alumni database. Plaintiff declined the alternative assignment and NCSU did not allow plaintiff to teach any classes during the 1999-2000 term. However, plaintiff received his salary for that year. During the 1999-2000 term, plaintiff moved to Florida. He testified he did not intend to return to North Carolina except to teach his classes. During the summer of 2000, NCSU notified plaintiff that he would no longer receive his salary, but that if he accepted the alternative assignment, his salary would be reinstated.

Plaintiff sued NCSU for breach of contract and provided evidence of $43,228.00 in damages, the total amount he would have been paid during years two and three of the reemployment agreement. At trial, the jury decided NCSU breached the reemployment agreement, but only awarded $1.00 in damages. Plaintiff filed a motion for judgment notwithstanding the verdict or for a new trial based upon an award of inadequate damages. NCSU also moved for a judgment notwithstanding the verdict or for a new trial on the issue of breach of contract. The trial court denied both motions. Plaintiff appeals; however, NCSU did not appeal.

Plaintiff contends the trial court abused its discretion in denying his motion for judgment notwithstanding the verdict or for a new trial because he proved damages of $43,228.00 by a preponderance of the evidence.

> A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict. Like a motion for directed verdict, a motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence to take the case to the jury. The motion for judgment notwithstanding the verdict "shall be granted if it appears that the motion for directed verdict could properly have been granted." G.S. 1A-1, Rule 50(b). Accordingly, the test for determining the sufficiency of the evidence is the same under both motions.
>
> In considering a motion for judgment notwithstanding the verdict, all the evidence must be considered in the light most favorable to the nonmoving party. The nonmovant is given the benefit of every reasonable inference that may legitimately be drawn from the evidence and all contradictions are resolved in the nonmovant's favor. If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict and any subsequent motion for judgment notwithstanding the verdict should be denied.

Ace Chemical Corp. v. DSI Transports, Inc., 115 N.C. App. 237, 241-42, 446 S.E.2d 100, 102-03 (1994) (citations omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 50(b) (2003).

In contrast, "[a] motion for a new trial on the grounds of inadequate damages is addressed to the sound discretion of the trial court . . . ." *Pelzer v. United Parcel Service*, 126 N.C. App. 305, 311, 484 S.E.2d 849, 853 (1997). Reversal on "any ground" should be limited to "those exceptional cases where an abuse of discretion is clearly shown." *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982) (emphasis omitted). "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E.2d at 605.

"In order to prevail on a claim for breach of contract, a plaintiff's evidence must show a valid contract existed between the parties, the defendant breached the terms of the contract, the facts constituting the breach, and damages resulted from the breach." *Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 10, 545 S.E.2d 745, 751 (2001). The jury determined NCSU breached the contract, and NCSU did not appeal. Accordingly, the only issue

before us is whether the trial court erroneously denied plaintiff's motions for judgment notwithstanding the verdict or for a new trial on the issue of damages.

> "The general rule is that a party to a contract, who has been injured by the breach, is entitled as compensation therefor to be placed, in so far as this can be done by money, in the same position he would have occupied if the contract had been performed, and where the breach of contract consists in preventing its performance, the party injured, on proper proof, may recover the profits he would have realized had the contract not been breached.["]
>
> " 'The amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed.' *Machine Co. v. Tobacco Co.*, 141 N.C. 284, 53 S.E. 885."

Tillis v. Cotton Mills and Cotton Mills v. Tillis, 251 N.C. 359, 365-66, 111 S.E.2d 606, 612 (1959) (citations omitted).

Plaintiff presented evidence that pursuant to the reemployment agreement, he was to be paid one-half of his salary for three years. He testified that his salary prior to entering into the phased retirement program was approximately $42,000.00 per year. Plaintiff also presented as evidence a 28 July 1999 letter from the Provost and Vice Chancellor for Academic Affairs that indicated his salary during the three-year contract would be $21,614.00 per year. NCSU did not present any evidence contradicting these amounts. As plaintiff received his salary for the 1999-2000 school term, he contended and provided proof that he would be entitled to damages of $43,228.00 for the remaining two years of the contract. Therefore, plaintiff contends the jury erroneously awarded nominal damages and the trial court should have either granted the motion for judgment notwithstanding the verdict or for a new trial.

NCSU contends the trial court properly denied plaintiff's motions because plaintiff did not prove he was ready, willing, and able to per-

form his teaching duties, and therefore, he was not entitled to substantial damages. As explained by our Supreme Court in *Tillis*:

> Where the action is for gains prevented by breach of contract, the plaintiff must show by the greater weight of the evidence that he was ready, willing and able to perform on his part and if he fails to do so, he may not recover substantial damages but may recover only nominal damages.

Id. at 366, 111 S.E.2d at 612.

The evidence indicates that plaintiff moved to Florida during the 1999-2000 school term. He testified that he did not intend to move back to North Carolina, but that he would have returned to NCSU to perform his teaching duties. Based upon this evidence, the jury could have determined whether plaintiff was ready, willing, and able to perform the contractual duties. However, the jury was not instructed on this issue and this Court does not make factual determinations regarding the amount of damages to which a party is entitled. *Tillis*, 251 N.C. 359, 111 S.E.2d 606. Depending upon the jury's resolution of this issue, plaintiff would have been entitled to either substantial or nominal damages. Thus, this case should be remanded for a new trial on the issue of damages.

The dissent argues, however, that this case should not be remanded because plaintiff neither objected to nor assigned error to the jury instructions. This appeal does not challenge the jury instructions. Rather, N.C. Gen. Stat. § 1A-1, Rule 59 provides that a new trial may be granted for:

> (5) Manifest disregard by the jury of the instructions of the court;
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]

N.C. Gen. Stat. § 1A-1, Rule 59(a)(5)-(7) (2003). Thus, the issue before this Court is not whether the trial court correctly stated the law. Rather, the issue for review is whether the jury manifestly disregarded the instructions of the trial court. Indeed, plaintiff does not contend the jury instructions were incorrect. Plaintiff argues that he presented uncontradicted evidence of actual damages and that pursuant to the jury instructions given to the jury, he was entitled to $43,228.00 in damages.

The dissent also states that plaintiff should have requested an instruction regarding whether he was ready, willing, and able to perform under the contract. Defendant presented this argument as a reason for affirming the judgment below. However, because the jury did not consider this issue, we cannot affirm the judgment on this basis. As explained, pursuant to our Supreme Court's decision in *Tillis*, this case should be remanded for a new trial on the issue of damages. As indicated earlier in this opinion, the jury should consider plaintiff's uncontradicted evidence of actual damages and defendant's contentions regarding whether plaintiff was ready, willing, and able to perform the contract.

In sum, plaintiff presented evidence of the salary he would have earned under the reemployment contract but for NCSU's breach of contract. As explained:

> "The general rule is that a party to a contract, who has been injured by the breach, is entitled as compensation therefor to be placed, in so far as this can be done by money, in the same position he would have occupied if the contract had been performed, and where the breach of contract consists in preventing its performance, the party injured, on proper proof, may recover the profits he would have realized had the contract not been breached.["]

Tillis, 251 N.C. at 365, 111 S.E.2d at 612. However, NCSU contends defendant was not ready, willing, and able to perform the contract, and therefore, an award of nominal damages was appropriate. Depending upon the jury's resolution of this issue, plaintiff would be entitled to either nominal or substantial damages. Thus, we conclude the trial court abused its discretion in not awarding a new trial on damages.

Vacated and remanded for a new trial on damages only.

Judge CALABRIA concurs.

Judge JACKSON dissents in a separate opinion.

JACKSON, Judge, dissenting.

For the reasons stated below, I respectfully dissent from the majority opinion.

As a preliminary matter, it must be noted that plaintiff has failed to comply with Rule 10(c) of our Rules of Appellate Procedure in preserving his assignments of error. Rule 10(c)(1) provides, in relevant part:

> A listing of the assignments of error which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made with clear and specific record or transcript references.

Plaintiff's two assignments of error read in their entirety as follows:

1. The award of nominal damages by the jury was contrary to law and the instructions of the Court, on the grounds that evidence of Plaintiff's damages under the Phased Retirement Program contract was admitted by the Court in the Plaintiff's Case-in-Chief, constituted a sum certain under the contract, and no evidence was introduced by the Defendant to dispute that amount.

2. Denial of Plaintiff's Motion for Judgment Notwithstanding the Verdict on the ground that the jury disregarded the Court's instructions on contract damages.

Plaintiff makes no attempt to direct the attention of this Court to any portion of the record on appeal or to the transcript with any references thereto. As such his appeal must be dismissed for failure to follow our mandatory Rules of Appellate Procedure. *State v. Buchanan*, 170 N.C. App. 692, 695, 613 S.E.2d 356, 357 (2005) ("[O]ur Supreme Court [has] stated that this Court may not review an appeal that violates the Rules of Appellate Procedure even though such violations neither impede our comprehension of the issues nor frustrate the appellate process.") *See Viar v. N.C. Dep't of Transportation*, 359 N.C. 400, 610 S.E.2d 360, 360-61 (2005).

In addition, Rule 10(c)(2) sets forth the specific requirements that a party must follow when challenging the instructions given to the jury. Plaintiff has made no such challenge in this instance, yet the majority has undertaken to opine that:

> the trial court had a duty, without any specific request by the parties, to instruct the jury on the law as it applies to the substantive features of the case arising from the evidence. " 'This means, among other things, that the judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties.' "

Shields v. Metric Constructors, Inc., 106 N.C. App. 365, 370, 416 S.E.2d 597, 600 (1992) (citations omitted). However, as distinguished from the instant case, in *Shields*, the jury instructions were the central focus of this Court's inquiry. *Id.* at 367, 416 S.E.2d at 599.

The issue of the jury instructions raised by the majority is squarely on point with our Supreme Court's ruling in *Durham v. Quincy Mutual Fire Insurance Company*, 311 N.C. 361, 317 S.E.2d 372 (1984). In *Durham*, as in this case, the plaintiff failed to raise any objection to the court's jury instructions at trial. Nor did the plaintiff in either case "make any assignment of error to the jury charge as given." *Id.* at 367, 317 S.E.2d at 377. As noted by the Court, "[i]n order to preserve an issue for appellate review, there must be an exception in the record and the exception must be brought forward in an appropriate assignment of error." *Id.* (citing N.C.R. App. P. 10). In contrast to the instant case, in which the majority has taken up this issue upon its own initiative, in *Durham* the jury instruction issue was raised at oral argument as an issue that merited "plain error" review. The Court explicitly declined to apply the doctrine of plain error in civil cases, a practice we have followed since the *Durham* decision. *Id.*; *see In the Matter of L.M.C.*, 170 N.C. App. 676, 678, 613 S.E.2d 256, 257 (2005); *Surratt v. Newton*, 99 N.C. App. 396, 407, 393 S.E.2d 554, 560 (1990); *Harris v. Scotland Neck Rescue Squad, Inc.*, 75 N.C. App. 444, 450, 331 S.E.2d 695, 700 (1985); *Wachovia Bank & Trust Company, N.A. v. Guthrie*, 67 N.C. App. 622, 626, 313 S.E.2d 603, 606 (1984).

In this case, out of the presence of the jury, the trial judge reviewed with counsel his proposed jury instructions and provided counsel for both parties with an opportunity to object and to request additional instructions. In relevant part, the colloquy between the court and plaintiff's counsel reads as follows:

> THE COURT: Does the plaintiff have any objection to what I said I would give?
>
> MR. UNTI: Your Honor, our only question is the amount of the damages, because we think that the one half salary totals—

MS. SMITH: According to the document that Dr. Zahn testified about.

THE COURT: I was taking him at his word. That's what he testified.

MS. SMITH: The exact amount is $42,228.

THE COURT: Well, I will strike it. I will say that he contends that they owed him for the second and third year in a substantial sum, all right?

MR. UNTI: All right, your Honor.

THE COURT: With that is there any objection to what I have said I would give?

MR. UNTI: Not from the plaintiff.

. . .

THE COURT: Does the plaintiff wish to hand up any additional written instructions to what I said I would give?

MR. UNTI: Not additional instructions, your, Honor.

Thus, plaintiff's sole concern about the instructions to be tendered by the court was resolved by the trial judge prior to the jury instructions being given in the presence of the jury. Moreover, plaintiff made no suggestion that the court add anything to the proposed instructions. As such and for all the reasons stated above, plaintiff may present no issue on the adequacy of the jury instructions before this Court.

IN RE: T.W., L.W., E.H.

No. COA04-1204

(Filed 6 September 2005)

1. Termination of Parental Rights— failure to appoint guardian ad litem to parent—mental illness

The trial court erred in a termination of parental rights case by failing to appoint respondent mother a guardian ad litem under N.C.G.S. § 7B-1111(a)(6) when she has a diagnosis of bipolar affective disorder with possible psychotic disorder, because: (1) the trial court referenced respondent's mental well-

being and its concern that respondent was unable to raise the minor children without assistance repeatedly in its written orders before and after receiving respondent's psychological evaluations; (2) it was the court's repeated findings that respondent was incapable of parenting her minor children based upon her mental illness in addition to respondent's own motion that triggered the requirement for appointment of a guardian ad litem; and (3) while respondent may be competent for some purposes, including her ability to assist counsel and maintain employment, it does not necessarily follow that she is not debilitated by her mental illness when it comes to parenting her children.

2. Termination of Parental Rights— extraordinary delay in entering order—prejudicial error

The trial court erred in a termination of parental rights case by delaying entry of an order until almost one year after completion of the hearing even though N.C.G.S. §§ 7B-1109(e) and 7B-1110(a) set the deadline no later than thirty days following the completion of the hearing, and the case is reversed, because: (1) the Court of Appeals has been apt to find prejudice in delays more than six months or more; (2) the need to show prejudice diminishes as the delay between the termination hearing and the date of entry of the order terminating parental rights increases; and (3) respondent continued to pay child support for her children during the delay yet was deprived of the opportunity to see them or bond with them in any way.

Judge WYNN concurring in result only.

Appeal by respondent-mother from order entered 18 February 2004 by Judge Jim Love, Jr. in Harnett County District Court. Heard in the Court of Appeals 10 May 2005.

Richard E. Jester, for respondent-appellant.

Eddie E. Winstead, III and Elizabeth Boone, Attorney Advocates for Guardian ad Litem.

E. Marshall Woodall, for Petitioner Harnett County Department of Social Services.

JACKSON, Judge.

Respondent is the mother of three minor children, L.W., T.W., and E.H. On 21 February 2001, L.W. and T.W. reported to school officials

that they had been sexually abused by their father. When this report was made, L.W. was seven years old, T.W. was five years old, and E.H. was four months old. After an investigation, respondent and her three minor children were removed from the home pursuant to a protection agreement (the "agreement") with a social worker from the Department of Social Services ("DSS"). The agreement provided that the father would have no contact with the minor children.

Doctor V. Denise Everett ("Dr. Everett") and Ms. Nivien I. Carey ("Carey"), a social worker, saw L.W. and T.W. on three separate occasions. Dr. Everett's report stated that there were no physical findings of sexual abuse as to L.W., however, T.W. had tested positive for Chlamydia Trachomatis, a sexually transmitted disease. Dr. Everett concluded that the Chlamydia Trachomatis was indicative of sexual abuse.

On 13 March 2001, DSS filed juvenile petitions alleging sexual abuse and neglect of L.W. and T.W. by their father. After non-secure orders were issued, L.W. and T.W. were placed in DSS custody. In Carey's first and second evaluations with L.W. and T.W., there were no disclosures regarding any sexual abuse. However, during the 4 April 2001 session, both L.W. and T.W. disclosed sexual abuse acts by their father.

On 27 April 2001, an adjudication hearing was held for L.W. and T.W. The parties stipulated at this hearing to the introduction of Carey's and Doctor Everett's reports. The parties also stipulated that the court could make findings from those evaluations and petitions. The court adjudicated L.W. and T.W. sexually abused and neglected, and at the dispositional hearing, awarded DSS custody over L.W. and T.W. for placement and care.

Subsequently, the father was placed in the Harnett County Jail for committing sexual offenses against L.W. and T.W. On 27 July 2001, the father was acquitted on the incest charge and a jury was unable to reach a unanimous verdict on the charge of taking indecent liberties with a minor. The father was granted a twelve thousand dollar bond on the condition that he not associate with the minor children without an adult present.

Prior to the 24 July 2001 adjudication and disposition order, respondent moved for appointment of a guardian ad litem. The court made note of this motion in its order, but declined to appoint a guardian ad litem prior to respondent's undergoing a psychological

evaluation. Respondent's evaluation was conducted over a series of sessions between 10 April 2001 and 11 May 2001. The evaluation, conducted by D. Robert Aiello, Ph.D. ("Dr. Aiello"), concluded that respondent had a diagnosis of Bipolar Affective Disorder, Mixed, Severe, with Possible Psychoactive Behavior. With respect to her Bipolar Disorder, Dr. Aiello specifically noted in his "Impressions and Recommendations" that respondent:

> requires continuous, daily access to a fully competent individual (i.e., an individual or guardian for whom there are no concerns about cognitive limitations, psychiatric problems, physical problems, substantive use/abuse problems and/or abusive or neglectful behaviors towards children) upon whom she can rely for support with reference to her daily decision-making, particularly as it applies to any children for whom she is responsible. . . . [Respondent] is expected to require this type of support or guardianship for indefinite future."

Dr. Aiello reiterated his statement about respondent's need for "support or guardianship" again in a subsequent paragraph of his "Impressions and Recommendations."

On 24 August 2001, the court conducted adjudication and dispositional hearings for E.H. and conducted a review hearing as to the custody of L.W. and T.W. The reports of respondent's psychological evaluation were introduced into evidence. The guardian ad litem reports and Carey's reports also were introduced into evidence. The court subsequently adjudicated E.H as neglected and awarded custody of her to DSS but failed to take up respondent's motion for appointment of a guardian ad litem. The court ceased all efforts by DSS to reunite E.H. with her parents and ceased further visitation rights by the parents.

After the review hearings for L.W. and T.W., the court reviewed the DSS and guardian ad litem reports, respondent's psychological evaluation, and Carey's testimony. The court found that it was adverse to the minor children's welfare to be placed back in their parents' home and that continuation of reunification efforts would be futile. The court, therefore, found that DSS would maintain custody over L.W. and T.W. and that reunification efforts and parental visitation should cease.

After a permanency planning hearing on 21 September 2001, the court entered an order reaffirming its previous findings and conclusions, stating that it was adverse to the minor children's welfare to

return to the parents' home. The court established a plan of adoption as their permanent goal and directed DSS to begin termination proceedings. A second permanency planning hearing was held on 24 May 2002, at which time the parents urged the court to return their children home. The court found that respondent continued to live with the father and that she supported him. Accordingly, the court entered an order that stated the minor children would remain in DSS's custody, that DSS should continue the minor children's plan of adoption, and that DSS should begin termination proceedings.

On 19 August 2002, DSS filed a motion to terminate parental rights. A permanency hearing was then held on 8 November 2002, and the court entered an order continuing DSS's custody over the minor children. On 17 February through 19 February 2003, the court presided over a three day special session to hear motions for termination of parental rights. Subsequently, the trial court entered the order terminating parental rights to the three minor children on 18 February 2003, signed nunc pro tunc 17 February 2004, almost one year after completion of the hearing on the matter.

[1] Preliminarily, we must address respondent's contention that the trial court erred in failing to appoint her a guardian ad litem upon her motion when she has a diagnosis of Bipolar Affective Disorder with possible psychotic disorder. We agree.

It is well-settled that a parent has the " ' "fundamental right . . to make decisions concerning the care, custody, and control of their children." ' " *In re S.B.*, 166 N.C. App. 488, 492, 602 S.E.2d 691, 693 (2004) (quoting *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (quoting *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000)). Accordingly, the judicial system has a distinct obligation to ensure that parental rights are protected. *Id.* at 492, 602 S.E.2d at 693 (quoting *Corum v. University of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)). In the instant case, we conclude that it would be a grave injustice were we to find the trial court properly disregarded respondent mother's request for appointment of a guardian ad litem.

North Carolina General Statutes section 7B-1111(a)(6) (2003) provides that the trial court may terminate a parent's parental rights if:

> the parent is *incapable* of providing for the proper care and supervision of the juvenile . . . and . . . there is a reasonable probability that such incapability will continue for the foreseeable

> future. Incapability under this subdivision may be the result of . . . mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

Based on North Carolina General Statutes section 7B-1101, the trial court ***shall*** appoint a guardian ad litem to a parent "[w]here it is alleged that a parent's rights should be terminated pursuant to [North Carolina General Statutes section] 7B-1111(6), and the incapability to provide proper care and supervision pursuant to that provision is the result of . . . mental illness, organic brain syndrome, or another similar cause or condition." N.C. Gen. Stat. § 7B-1101 (2004).

Here, the trial court referenced respondent's mental well-being and its concern that respondent was unable to raise the minor children without assistance repeatedly in its written orders before **and after** receiving respondent's psychological evaluation.

In its 25 July 2001 order, based upon the 27 April 2001 hearing which occurred prior to respondent's psychological evaluation, the court included in its Findings of Fact that it was "concerned about the mother's ability to raise these children in light of her mental health and her current medications." The court went on to state that it expected DSS to "take appropriate action, including removing the children from the home" if there were further "concerns over the mother's mental health stability . . . ." Again, in its 13 December 2001 Adjudication and Disposition Order regarding E.H., based upon the 24 August 2001 hearing, the court found that "the []mother exhibited mental health instability." Similarly, in its Review Order of 13 December 2001 regarding T.W. and L.W., also based upon the 24 August 2001 hearing, the court found as a fact that "the psychological evaluations indicates [sic] [respondent] cannot adequately parent on her own." The court reiterated this identical finding in its 13 December 2001 Permanency Planning Order for all three children based upon its 21 September 2001 hearing.

Finally, in its order Terminating Parental Rights, the court made the following finding of fact:

> The mother has been diagnosed with bipolar affective disorder with possible psychotic disorder. She is on medication for these ailments, but testified that she could take the medication at her pleasure and when she feels an "episode" coming on. She testi-

> fied she has been given approval by her physician for this behavior. This testimony is beyond belief and shows a lack of insight by her into her mental status and ability to raise children.

Clearly, the foregoing findings demonstrate the court's awareness of respondent's severe limitations in the ability to parent her children based upon her mental illness. Therefore, notwithstanding the fact that the court did not refer to North Carolina General Statutes section 7B-1111(a)(6) specifically in its order terminating respondent's parental rights, it was the court's repeated findings that respondent was incapable of parenting her minor children based upon her mental illness in addition to respondent's own motion that triggered the requirement for appointment of a guardian ad litem. *In re B.M.*, 168 N.C. App. 350, 357, 607 S.E.2d 698, 702 (2005).

In *In re B.M.*, DSS filed a motion for termination of parental rights pursuant to North Carolina General Statutes section 7B-1111. DSS stated that "the parents [were] incapable of providing for the proper care and supervision of the juveniles . . . and that there [was] a reasonable probability that such incapability will continue for the foreseeable future." *Id.* at 357, 607 S.E.2d at 703 (citation omitted). In concluding that the trial court erred in not appointing the respondent a guardian ad litem, this Court stated that "[i]t is the use of the term 'incapable' which triggers the requirement of N.C. Gen. Stat. § 7B-1101 for the appointment of a guardian *ad litem*." *Id.* By definition, incapability encompasses respondent's mental illness as presented repeatedly by the court. N.C. Gen. Stat. § 7B-1111(a)(6). While we are cognizant that this Court's reasoning applied to DSS's failure to "specifically cite to N.C. Gen. Stat. § 7B-1111(a)(6)" in their motion to terminate parental rights, we find this case to be instructive. *Id.* at 357, 607 S.E.2d at 703.

Here, respondent moved for appointment of a guardian ad litem prior to the 24 July 2001 hearing. The trial court, in considering respondent's motion for appointment of a guardian ad litem stated that "[t]he Court holds that motion in abeyance at present until psychological evaluations can be performed on her." However, the court never revisited that motion during the entirety of the ensuing proceedings.

After reviewing the evidence in the record, including all orders set forth by the trial court, it is clear that respondent's mental instability and her incapacity to raise her minor children were central factors in the court's decision to terminate her parental rights.

Accordingly, the trial court erred when it failed to appoint respondent a guardian ad litem after reviewing her psychological evaluation on 24 August 2001, yet still considered respondent's mental illness as a factor in terminating her parental rights. The "failure to appoint a guardian *ad litem* in [this case] . . . requires reversal of the order terminating parental rights, remand for appointment of a guardian *ad litem*, and a new trial." *Id.* at 357, 607 S.E.2d at 703 (citing *In re Estes*, 157 N.C. App. 513, 518, 579 S.E.2d 496, 499, *disc. rev. denied*, 357 N.C. 459, 585 S.E.2d 390 (2003)).

The guardian ad litem's brief in support of appellee, DSS, suggests that respondent's ability to carry out normal daily activities, including testifying coherently on at least two occasions, understanding her surroundings, comprehending issues before the court, and recognizing consequences of her actions, necessarily means that respondent is neither incompetent nor debilitated by her mental illness. We disagree. The definitions section of the North Carolina Mental Health, Developmental Disabilities and Substance Abuse Act of 1985 is helpful to our understanding. It defines mental illness as follows:

> "Mental illness" means: (i) when applied to an adult, an illness which so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control; and (ii) when applied to a minor, a mental condition, other than mental retardation alone, that so impairs the youth's capacity to exercise age adequate self-control or judgment in the conduct of his activities and social relationships so that he is in need of treatment.

N.C. Gen. Stat. § 122C-3(21). *See Gregory v. Kilbride*, 150 N.C. App. 601, 614, 565 S.E.2d 685, 695 (2002) (it was not an abuse of discretion for the trial court to take judicial notice of the "mental illness" definition found in N.C.G.S. 122C-3(21)), *disc. rev. denied*, 357 N.C. 164, 580 S.E.2d 365 (2003). According to respondent's psychological report and findings of fact listed in numerous court orders, it is clear that the trial court believed respondent was unable to care for or parent the minor children due, in part, to her mental illness. And, while respondent may be competent for some purposes, including her ability to assist counsel and maintain employment, it does not necessarily follow that she is not debilitated by her mental illness when it comes to parenting her children.

[2] As a final matter, we note with great concern the inexcusable time lapse between the hearing on the Motions to Terminate Parental Rights in this matter over the 17-19 February 2003 Special Term of Juvenile Court and entry of the Order on the matter on 17 February 2004—almost one year after completion of the hearing. North Carolina General Statutes section 7B-1109(e) requires that:

> [t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent. The adjudicatory order shall be reduced to writing, signed and entered no later than 30 days following the completion of the termination of parental rights hearing.

In addition, North Carolina General Statutes section 7B-1110(a) provides that:

> Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated. Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

This Court recently has addressed these statutory mandates concluding that although "earlier holdings determined that noncompliance with statutory time lines did not warrant a new termination hearing, absent a showing of prejudice . . . our Court's more recent decisions have been apt to find prejudice in delays of six months or more." *In re C.J.B.*, 171 N.C. App. 132, 134, 614 S.E.2d 368, 369 (2005) (internal citations omitted) (citing *In re T.L.T.*, 170 N.C. App. 430, 431-32, 612 S.E.2d 436, 437-38 (2005); *In re L.E.B.*, 169 N.C. App. 375, 379, 610 S.E.2d 424, 426, *disc. rev. denied*, 359 N.C. 632, 616 S.E.2d 538 (2005)).

Here, the delay was just short of one full year. As noted by the court in *In re C.J.B.*, the need to show prejudice diminishes as the delay between the termination hearing and the date of entry of the order terminating parental rights increases. At more than ten times the permissible time for entry of the order, the need to show prejudice here is necessarily diminished exponentially. Respondent

argues that during the time of delay, she continued to pay child support for her children's benefit, yet was deprived of the opportunity to see them or bond with them in any way. In this case, this is sufficient to show prejudice to warrant reversal based upon the extraordinary delay of entry of the order terminating parental rights.

In light of the foregoing, we need not address respondent's additional assignments of error.

Reversed and remanded.

Judge WYNN concurs in result only.

Judge BRYANT concurs.

STATE OF NORTH CAROLINA v. HEMANT RAGHUNATH BORKAR

No. COA04-1159

(Filed 6 September 2005)

1. Stalking— motion to dismiss—sufficiency of evidence—in victim's presence without legal purpose—intent to cause reasonable fear of harm

The trial court did not err by denying defendant's motion to dismiss the charge of stalking because, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which the jury could find that defendant followed or was in the presence of the victim on more than one occasion without legal purpose, and with the intent to place her in reasonable fear of her personal safety.

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

Although defendant contends the trial court erred in a solicitation of murder, stalking, and carrying a concealed weapon case by admitting a witness's pretrial statement in its entirety without redaction, this assignment of error is dismissed, because defendant failed to preserve this issue for appeal when he did not specifically object to the incompetent portions of the prior consistent statement.

3. Criminal Law— failure to give limiting instruction—prior statement offered for corroborative purposes

The trial court erred in a solicitation of murder, stalking, and carrying a concealed weapon case by denying a limiting instruction as to a prior statement offered for corroborative purposes and the case is remanded for a new trial, because defendant was entitled, upon request, to have the evidence limited to the purpose for which it was competent.

Appeal by defendant from judgment entered 3 September 2003 by Judge C. Philip Ginn in Swain County Superior Court. Heard in the Court of Appeals 11 May 2005.

Attorney General Roy A. Cooper, III, by Solicitor General Christopher G. Browning, Jr., for the State.

Glover & Petersen, P.A., by James R. Glover and Ann B. Petersen, for defendant-appellant.

HUNTER, Judge.

Hemant Raghunath Borkar ("defendant") appeals from a judgment dated 3 September 2003 entered consistent with a jury verdict finding him guilty of solicitation of murder, stalking, and carrying a concealed weapon. As we find prejudicial error in the trial court's failure to provide a limiting instruction, we reverse and remand for a new trial.

The evidence tends to show that defendant met Tabitha Zimmerman ("Tabitha") in 1998 when both were first-year students at the University of North Carolina School of Medicine ("Medical School"). Defendant and Tabitha initially had a friendly relationship, often studying together, although Tabitha rebuffed defendant's attempts at a romantic relationship.

In 1999, incidents occurred where defendant expressed anger or irritation at Tabitha for small comments or actions in front of classmates and also expressed anger that Tabitha had not told him she was dating a classmate. Defendant offered Tabitha gifts from a summer trip to India in 1999, some of which she refused to accept. Defendant told Tabitha he could no longer be friends with her at the conclusion of their second year, resulting in a confrontation in which defendant grabbed Tabitha's arm and waved a fist in her face.

Relations between defendant and Tabitha remained strained. While assigned to a rotation together in Chapel Hill, defendant confronted Tabitha in a hospital hallway and told her she was a " 'goddamn bitch.' " Tabitha reported defendant's past behavior and name-calling to the Medical School, who met with both parties and arranged for limited contact between them for the remaining two years of the program.

Prior to graduation on 19 May 2002, Tabitha visited her family's home in Bryson City. On 10 May 2002, defendant also visited Bryson City and spent four days hiking. Graduation for the Medical School was held on the weekend of 19 May 2002 and both defendant and Tabitha attended. At one of the social events related to graduation, defendant approached Tabitha and apologized for their difficulties, explaining it had been difficult for him to "get over" his romantic feelings for her. Defendant also mentioned his trip to Bryson City and asked Tabitha to have coffee with him. She declined the offer.

Following graduation, Tabitha returned to Bryson City to prepare for her move to Virginia for her residency program. Tabitha mentioned her concerns regarding defendant to a friend who was married to a local law enforcement officer, David Southards ("Deputy Southards").

On 29 May 2002, defendant returned to Bryson City. Defendant had obtained a map from the Internet to locate the Zimmerman home and asked for permission to park at a nearby church. Defendant testified that he hiked over the next few days in the national park, but after recognizing a moving van from Chapel Hill, hiked into the woods towards the Zimmerman home where the van was parked. Defendant used his binoculars to read the car tags of the vehicles parked at the residence and made notations of the information. Defendant then returned to town and stopped at the local library to check his e-mail. Tabitha entered the library while defendant was there and contacted the police as soon as she saw defendant.

Defendant then left the library, decided to cut short his weekend, and returned to Chapel Hill. As a result of reports by Tabitha and an individual who had seen defendant walk up the road into the woods leading to the Zimmerman home on three consecutive days, a "be on the lookout" order was issued to local law enforcement. The following day, Tabitha moved to Virginia.

On 7 June 2002, defendant returned to Bryson City and again went hiking in the national park. While traveling on a road near the

Zimmerman residence, defendant was spotted by Deputy Southards, who pulled defendant over in a parking lot after following him for a short distance. Deputy Southards asked defendant if he had any weapons in the vehicle. When defendant replied that he had weapons under the backseat, Deputy Southards arrested defendant. Defendant was charged with carrying a concealed weapon and stalking, and taken to the Swain County jail.

While in the county jail, defendant shared a cell with Joseph Barron ("Barron"). Barron testified defendant told him that Tabitha had disgraced him in medical school in front of their class and had him reprimanded by the dean, and that he had come to Bryson City to kill her. Defendant told Barron about watching Tabitha and her family from the road and from a church, and about how he had written down their tag numbers. Barron testified defendant offered to pay him $10,000.00 to kill Tabitha, and to pay additional sums for killing other members of her family. Upon release from jail, Barron shared this information with Tabitha's father, David Zimmerman ("Dr. Zimmerman"), who had treated Barron for previous panic attacks by prescribing prescription medication for him. Defendant was subsequently also charged with solicitation of murder.

On 3 September 2003, the jury found defendant guilty of solicitation to commit murder, stalking, and carrying a concealed weapon. The trial court consolidated the charges and sentenced defendant in the aggravated range to a minimum of seventy-three months and a maximum of ninety-seven months.

I.

[1] Defendant contends the trial court erred in denying defendant's motion to dismiss for insufficient evidence as to the charge of stalking. We disagree.

In reviewing challenges to the sufficiency of the evidence, the question for this Court is whether there is substantial evidence of each essential element of the offense charged. *State v. Thompson*, 157 N.C. App. 638, 642, 580 S.E.2d 9, 12 (2003). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (citation omitted). This Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences, and allowing all contradictions and discrepancies in the evidence to be resolved by the jury. *Id.*

> The misdemeanor offense of stalking occurs
>
> if the person willfully on more than one occasion follows or is in the presence of, or otherwise harasses, another person without legal purpose and with the intent to . . . :
>
> (1) Place that person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.

N.C. Gen. Stat. § 14-277.3(a)(1) (2003). Defendant argues the State failed to present sufficient evidence that defendant was in the presence of Tabitha without legal purpose, and with the intent to cause her to be in reasonable fear of harm.

In the case of *State v. Thompson*, the defendant charged with stalking similarly argued that insufficient evidence was presented to show that he was in the victim's presence without legal purpose and had the necessary intent to cause her emotional distress. *Thompson*, 157 N.C. App. at 642-43, 580 S.E.2d at 12. There, the evidence showed that the defendant had frequented the victim's workplace, had been seen going up and down the dead-end road in front of the victim's house, had verbally confronted and threatened the victim, and had made threats that he intended to "blow away" the victim to a third party. *Id.* at 643, 580 S.E.2d at 13. *Thompson* found that such evidence was sufficient to survive a motion to dismiss for the charge of stalking. *Id.* at 643-44, 580 S.E.2d at 13.

Here, the State presented evidence tending to show that during medical school, defendant called Tabitha a " 'goddamn bitch,' " grabbed her, and shook his fist in her face. Tabitha testified that she was rattled and made uncomfortable by these incidents. Special arrangements were made regarding Tabitha and defendant's rotation schedules due to these concerns, and defendant was advised by the Medical School to have no contact with Tabitha. Plainclothes escorts were also provided by the Medical School to protect Tabitha during her graduation ceremony.

Dr. Zimmerman testified that his family was "very alarmed" and had "a good deal of apprehension" about Tabitha's safety. Dr. Zimmerman further testified that just prior to graduation, Tabitha "was convinced that there was a very real threat to her of possible physical harm[.]"

Defendant traveled to Bryson City on three occasions in May and June of 2002, downloaded a map from the Internet in an attempt

to locate the Zimmerman home, watched the Zimmerman home from the woods, and wrote down license plate numbers of each vehicle parked there. Defendant admitted he hid in the woods and watched the Zimmerman home. Multiple witnesses testified to seeing defendant or his Jeep parked a short distance from the Zimmerman home on several different occasions. Defendant was also seen by Tabitha at the Bryson City public library, prompting her to immediately call the Swain County Sheriff's Department and relay concerns about her safety.

On 7 June 2002, only a short distance away from the Zimmerman home, defendant was stopped by Deputy Southards, who searched defendant's vehicle and discovered a riot shotgun, a .357 magnum, a .45 caliber revolver, and hundreds of rounds of ammunition. Defendant was arrested, and while in jail, confessed to Barron that he had been watching Tabitha, that he wanted her, and that he intended to kill her and her family.

Viewing the evidence in the light most favorable to the State, we conclude that there was sufficient evidence from which the jury could find that defendant followed or was in the presence of Tabitha on more than one occasion without legal purpose, and with the intent to place her in reasonable fear of her personal safety. The trial court, therefore, properly denied the motion to dismiss.

II.

Defendant next contends the trial court erred in admitting a witness's pretrial statement in its entirety without redaction, and further contends the trial court erred in denying a request for limiting instructions as to the statement. We agree that the trial court erred in failing to give the requested limiting instruction.

A. Redaction of Prior Statement

[2] We first address defendant's contention that the trial court's failure to redact portions of Barron's statement was reversible error. As defendant did not identify at trial the specific portions of the statement that were not competent, we find defendant failed to properly preserve this issue for appeal.

"In a noncapital case, where portions of a statement corroborate and other portions are incompetent because they do not corroborate, the defendant must specifically object to the incompetent portions." *State v. Harrison*, 328 N.C. 678, 682, 403 S.E.2d 301, 304 (1991).

Here, the prosecutor sought to corroborate Barron's testimony with a prior consistent statement given to Jenny Hyatt ("Deputy Hyatt"), a deputy sheriff of the Swain County Sheriff's Department. Defendant made only a general objection that the statement was hearsay and did not move to strike or exclude any portion alleged to be incompetent. Although defendant was given an opportunity to conduct a *voir dire* of Deputy Hyatt, the *voir dire* did not focus on whether portions of Barron's statement corroborated his earlier testimony. Defendant later renewed his motion to suppress the statement, but did not object to specific portions of the statement as it was read. Additionally, defendant concedes that portions of Barron's prior consistent statement do corroborate Barron's testimony. Because defendant failed to specifically object to the incompetent portions of Barron's prior consistent statement, we find this issue was not properly preserved for appeal.

B. Limiting Instruction as to Prior Statement

[3] We next address defendant's contention that the trial court's failure to give the requested limiting instruction was reversible error. We agree.

Before reaching the substantive issue, we address the State's contention that defendant failed to properly request the limiting instruction. Following Deputy Hyatt's reading of Barron's statement and the State's request that the statement be submitted into evidence for corroborative purposes, defendant's attorney stated: "Your Honor, I would like a limited instruction rule of the Court that it doesn't corroborate."

Although we note that defendant's statement was awkwardly worded, it was nonetheless sufficiently clear that defendant's request was for a limited instruction regarding corroboration by prior statement. The limiting instruction for corroboration by prior statement, as set out in 1 N.C.P.I.—Crim. 105.20 (1986), states in pertinent part:

> When evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent . . . with his testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. *If you believe that such earlier statement was made, and that it is consistent . . . with the testimony of the witness* at this trial, then you may consider this, together with all other facts and

> circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve his testimony at this trial.

Id. (emphasis added). Thus, as the language of the requested instruction itself directs the jury to make a finding as to whether the statement is corroborative when considering a prior statement, we find defendant's request, ruled on by the trial court, to have properly preserved this issue for our review.

"Evidence of prior consistent statements is admissible for the limited purpose of affirming a witness's credibility, and upon proper request a defendant is entitled to both a limiting instruction at the time of its admission and a jury instruction as to its limited purpose." *State v. Ferebee*, 128 N.C. App. 710, 715, 499 S.E.2d 459, 462 (1998). "Furthermore, 'prior consistent statements' are admissible only when they are in fact consistent with the witness's trial testimony." *State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 447 (1984) (citations omitted). However, "an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such an instruction." *State v. Smith*, 315 N.C. 76, 82, 337 S.E.2d 833, 838 (1985). "Defendant was entitled, upon request, to have the evidence limited to the purpose for which it was competent." *State v. Erby*, 56 N.C. App. 358, 361, 289 S.E.2d 86, 88 (1982) (holding that the trial court committed reversible error when it denied defendant's request for a limiting instruction and failed to give the requested limiting instruction).

Here, defendant objected to the reading of the prior statement by Deputy Hyatt on the grounds that the statement contained information which was not corroborative. Without examining the statement, the trial court overruled the objection, and allowed Deputy Hyatt to read the entire statement to the jury. After the statement was admitted into evidence, defendant asked the trial judge to give a limiting instruction. The motion for a limiting instruction was denied and no limiting instruction was given to the jury that Barron's prior statement was introduced solely for the purpose of corroborating his trial testimony and not as substantive evidence.

An examination of the record shows that Barron's testimony was the only evidence presented to establish the elements of the charge of conspiracy to commit murder. Further, Barron's testimony, as discussed *supra*, was critical in establishing the charge of stalking. Finally, Barron's testimony as to defendant's intentions to harm

Tabitha and her family provided evidence as to defendant's intent in the charge of carrying concealed weapons. Thus, Barron's credibility was critical in establishing evidence for each of defendant's charges. We also note that during jury deliberations, the jury specifically requested and was permitted to review the entire contents of the prior consistent statement with no limiting instruction as to the competency of the evidence.

Defendant was entitled, upon request, to have evidence concerning Barron's prior consistent statement limited to a purpose for which it was competent, that is, corroboration. *See State v. Norkett*, 269 N.C. 679, 681, 153 S.E.2d 362, 363 (1967) (holding failure to give requested limiting instruction that evidence was competent only as to the defendant's credibility as a witness was prejudicial error requiring new trial); *Erby*, 56 N.C. App. at 361, 289 S.E.2d at 88. We find, therefore, that the trial court's denial of defendant's request for a limiting instruction constitutes reversible error.

As we find prejudicial error in the trial court's denial of a limiting instruction as to a prior statement offered for corroborative purposes, we reverse and remand for a new trial on all charges. We therefore do not reach defendant's final contention regarding errors in sentencing.

New trial.

Judges HUDSON and GEER concur.

AMERICAN TREASURES, INC., PLAINTIFF AND TREASURED ARTS, INC., PLAINTIFF/INTERVENOR V. STATE OF NORTH CAROLINA, GOVERNOR MICHAEL EASLEY, IN HIS OFFICIAL CAPACITY; NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY; SECRETARY OF CRIME CONTROL AND PUBLIC SAFETY BRYAN E. BEATTY, IN HIS OFFICIAL CAPACITY; ALCOHOL LAW ENFORCEMENT DIVISION; DIRECTOR OF ALCOHOL LAW ENFORCEMENT DIVISION JOHN D. SMITH, III, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA04-1065

(Filed 6 September 2005)

1. Declaratory Judgments— jurisdiction—equity

The trial court had jurisdiction to determine a declaratory judgment action concluding that prepaid phone cards with an attached game piece sold by plaintiff are not an impermissible

form of gambling, and it was not required to apply the criminal law to lotteries to be litigated in criminal court, because: (1) equity may be invoked as an exception and may operate to interfere, even to prevent criminal prosecutions, when this is necessary to protect effectually property rights and to prevent irremediable injuries to the rights of persons; (2) the Court of Appeals has previously reviewed a trial court's consideration of a prayer for declaratory judgment and injunctive relief concerning the applicability of North Carolina's bingo statutes to a charitable sales promotion without indicating the existence of any jurisdictional bar; and (3) the declaratory judgment procedure is the only way plaintiff can protect its property rights and prevent Alcohol Law Enforcement from foreclosing the sale of its product in convenience stores.

2. Gambling— prepaid phone cards—attached game piece— not game of chance

The trial court did not err in a declaratory judgment action by declaring that plaintiff's prepaid phone cards that had an attached game piece were not an illegal method of gambling, a lottery, or a game of chance, because: (1) the purchase of the phone cards is made to obtain a valuable commodity, the sale of which is promoted by a process that is common in many promotional and sweepstakes type contests; (2) plaintiff's phone card provides the purchaser with a long-distance rate that is not merely competitive, but one of the best in the industry; (3) plaintiff's prepaid phone card is sufficiently compatible with the price being charged and has sufficient value and utility to support the conclusion that it, and not the associated game of chance, is the object being purchased; (4) consumers may receive free game pieces without purchasing the prepaid phone card via written request, which is some evidence that those who purchase the phone cards are doing so to receive the phone card and not the accompanying promotional game piece; and (5) states that permit lotteries do not give out free entries upon written request.

3. Injunctions— permanent—no interference with sale of prepaid phone cards

The trial court did not err by permanently enjoining defendants from interfering with the sale of plaintiff's phone cards with an attached game piece by any retail establishment even though the portion of the permanent injunction prohibiting defendants from making statements that the phone cards constitute an illegal

gambling arrangement, lottery, or game of chance no longer functions in any meaningful capacity when the Court of Appeals held plaintiff's promotion and game cards are not an illegal gambling arrangement, lottery, or game or chance, because: (1) at the time this prohibition was issued, the factual circumstances indicated that Alcohol Law Enforcement agents were threatening the alcohol licenses of stores selling plaintiff's phone cards on the ground that they were illegal; and (2) the language of the injunction, in this factual setting, was intended to and operated to preclude such conduct.

Appeal by defendants from judgment entered 17 February 2004 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 24 March 2005.

No brief filed by plaintiff, American Treasures, Inc.

Everett, Gaskins, Hancock & Stevens, L.L.P., by Hugh Stevens, for plaintiff-intervenor, Treasured Arts, Inc.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, and Assistant Attorney General Stacey T. Carter, for the State.

CALABRIA, Judge.

Defendants appeal from a judgment of the trial court (1) determining the pre-paid phone cards sold by Treasured Arts, Inc. ("plaintiff") are not an impermissible form of gambling and (2) permanently enjoining defendants from interfering with the sale of the phone cards by any retail establishment and/or indicating that they constitute an illegal gambling arrangement, lottery, or game of chance. We affirm.

Plaintiff is in the business of selling long-distance pre-paid phone cards. Plaintiff purchases bulk telephone time from companies that provide long-distance connections throughout the United States. Based upon the average length of a long-distance telephone call, plaintiff splits the bulk time up into two-minute increments, which it sells on phone cards for one dollar. The two-minute increments were chosen by plaintiff for its pre-paid phone cards because it was a niche market with less competition. The card is used by dialing a provided 800 number on any phone and entering a PIN number unique to each card sold. When the time on the card is completely

used, the customer has the option of calling the company and adding additional time to the card. The record indicates without contradiction that the long-distance rate of fifty cents per minute is "one of the lowest priced prepaid phone cards on the market" when compared with other rates that have no connection charge. Plaintiff, in fact, testified Consumer Reports indicated the best price was fifty-cents per minute.

Attached to each phone card is a free promotional game piece in which the consumer may win a prize based on what is revealed under a scratch-off area. Plaintiff included this with the purchase of the phone card at the recommendation of a national advertising consulting firm in order to facilitate their entry into the market. In appearance, plaintiff's product consists of a larger card perforated into a phone card portion and a game portion. Multiple versions of the phone card and promotion exist, but generally speaking, the following observations can be made: the phone card portion includes representations that plaintiff is "one of the nation's largest pre-paid phone companies[,]" the card is a pre-paid phone card and entitles the consumer to two minutes for one dollar, and the card encourages the consumer to "save cash on long distance calls[.]" The game portion varies with the prize that can be won but generally provides two chances for the purchaser to win monetary amounts up to $50,000 (along with smaller increments) or prizes such as a Corvette.

If customers wish to participate in the game promotion without actually purchasing a pre-paid phone card, they may do so by sending a written request and a stamped self-addressed envelope to plaintiff's designated address. Each written request entitles the sender to one game piece, and the number of requests for a free game piece is not limited. Those who receive a game piece without purchasing a phone card "have the exact, same opportunity as a person who buys a phone card and gets one free one in the store." Since the beginning of the promotion in 1995 until the time of the hearing, plaintiff sent out free game pieces to 11,664 individuals, and the promotional game produced winnings for approximately 8,000 people.

Since plaintiff commenced sales of phone cards to which were attached the game pieces, the State has not brought or threatened criminal action against plaintiff. Plaintiff sold its pre-paid phone cards primarily through convenience stores. Sometime in 2001 or 2002, plaintiff started receiving reports that agents with the Alcohol Law Enforcement Division ("ALE") were threatening to take action against the convenience stores' licenses to sell beer and other alco-

holic beverages ("alcohol license") on the grounds that the sale of plaintiff's phone cards was illegal. Plaintiff moved and was allowed to intervene in a declaratory judgment action brought against defendants by American Treasures, Inc. Plaintiff's action for declaratory and injunctive relief was subsequently severed from that of American Treasures, Inc., and only plaintiff's appeal is presented.

On 8 March 2002, the trial court entered an order finding, in pertinent part, the following: (1) plaintiff's phone card entitled purchasers to make two minutes of long-distance phone calls anywhere in the continental United States pursuant to a tariff filed with and approved by the North Carolina Utilities Commission; (2) plaintiff encouraged the sale of the pre-paid phone cards by awarding prizes through a premium award system, which could be entered irrespective of the purchase of the pre-paid phone cards; (3) ALE announced its intention to require retail facilities selling alcoholic beverages to remove plaintiff's pre-paid phone cards or face prosecution, resulting in many retailers refusing to continue to sell plaintiff's cards; (4) plaintiff was suffering irreparable injury of incalculable losses of sales and profits and, due to the doctrine of sovereign immunity, no adequate remedy existed at law; and (5) plaintiff had preliminarily demonstrated that the use of the promotion was not an illegal gambling arrangement, lottery, or game of chance and was likely to prevail on the merits at trial whereas no serious harm would be sustained by the State or its citizens if the status quo were maintained. Accordingly, the Honorable Howard E. Manning, Jr., issued a preliminary injunction against defendants from interfering with the alcohol licenses or sale of plaintiff's pre-paid phone cards by retail establishments and from issuing statements that plaintiff's phone cards were illegal.

The matter was heard in superior court on 14 and 15 January 2004. Judge Robert H. Hobgood entered a declaratory judgment (with findings similar to those in the preceding order) declaring that plaintiff's phone cards were not an illegal method of gambling, a lottery, or a game of chance and converted the preliminary injunction into a permanent injunction. Defendants appeal.

I. Jurisdiction

[1] In their first assignment of error, defendants assert that the trial court should have dismissed the case and allowed the issue of applying the criminal law to lotteries to be litigated in criminal court and that no justiciable controversy exists. We disagree.

It is a well settled principle of law that courts of equity are without jurisdiction to "interfere by injunction to restrain a criminal prosecution . . . for [the] violation of statutes . . . [and] th[is] rule applies[] whether the prosecution is by indictment or by summary process [and whether it has been] merely threatened or . . . ha[s] already been commenced." *State v. R.R.*, 145 N.C. 495, 519, 59 S.E. 570, 578 (1907). *See also Thompson v. Town of Lumberton*, 182 N.C. 260, 262, 108 S.E. 722, 723 (1921) (observing that it has "been uniformly held that an injunction will not be granted to restrain the enforcement of the criminal law except when it is necessary to prevent irrevocable injury to, or destruction of, property or to protect the defendant from oppressive and vexatious litigation"). The rationale for this rule is that the enforcement of a criminal statute may properly be "challenged and tested only by way of defense to a criminal prosecution based thereon" and the "legal remedies of 'trial by jury, *habeas corpus*, motion, and plea are abundant safeguards' " when balanced against the " 'serious consequences likely to follow the arbitrary tying of the hands of those entrusted with the enforcement of penal statutes.' " *D & W., Inc. v. Charlotte*, 268 N.C. 577, 582, 151 S.E.2d 241, 245 (1966). Additionally, declaratory judgments should not be used to determine criminal issues; however, a court is not without authority to grant a declaratory judgment merely because a questioned statute relates to penal matters. *Jernigan v. State*, 279 N.C. 556, 560-61, 184 S.E.2d 259, 263-64 (1971).

Our Supreme Court considered these principles in *McCormick v. Proctor*, 217 N.C. 23, 6 S.E.2d 870 (1940). In *McCormick*, law enforcement officers interfered with an owner's possession of certain slot machines on the grounds that such machines were illegal. *Id.*, 217 N.C. at 24, 6 S.E.2d at 871. The trial court declined to restrain the interference on the grounds that the officers were engaged in the enforcement of criminal law and refused to hear evidence or find facts regarding the legality of the machines. *Id.* Citing the above principles, our Supreme Court reversed, holding that equity may nevertheless be invoked as an exception to those principles and may operate to "interfere, even to prevent criminal prosecutions, when this is necessary to protect effectually property rights and to prevent irremediable injuries to the rights of persons." *Id.*, 217 N.C. at 29, 6 S.E.2d at 874. Moreover, this Court has previously reviewed a trial court's consideration of a prayer for declaratory and injunctive relief concerning the applicability of North Carolina's bingo statutes to a charitable sales promotion without indicating the existence of any

jurisdictional bar. *Animal Protection Society v. State of North Carolina*, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

We hold the trial court's exercise of jurisdiction under the facts of the instant case was proper. First, we find *McCormick* and *Animal Protection Society* are sufficiently similar to the facts of the instant case and are controlling on the issue of the trial court's jurisdiction. Second, the declaratory judgment procedure is the only way plaintiff can protect its property rights and prevent ALE from foreclosing the sale of its product in convenience stores. There is no indication in the record that a prosecution is pending against plaintiff, nor is one necessary in light of the State's ability to curtail the sale of plaintiff's product by threatening retail stores with the loss of their alcohol licenses upon failure to cease such sales. The likelihood of criminal prosecution against the retail stores, while threatened, is likewise remote. The evidence at trial illustrates the sale of 120 cards only produces approximately sixteen dollars of income to the store. That relatively meager profit would not justify a convenience store carrying plaintiff's product and risking the loss of revenue from its alcohol license. Accordingly, without seeking a declaratory judgment, plaintiff would be unable to effectively protect its property rights. Defendants' jurisdictional argument is overruled.

II. Injunction and Order

[2] Having determined the trial court had jurisdiction to hear and decide the declaratory judgment action brought by plaintiff, we now turn to the merits of the trial court's order. Defendants asserted plaintiff's promotional game was an illegal lottery or form of gambling under Article 37 of Chapter 14 of the North Carolina General Statutes. The trial court disagreed and entered declaratory judgment in favor of plaintiff.

Part 1 of Chapter 14, Article 37 of our General Statutes, entitled "Lotteries and Gaming," prohibits lotteries and other forms of gambling. N.C. Gen. Stat. §§ 14-289 to 14-309.20 (2003). A lottery has been defined as "any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine." *State v. Lipkin*, 169 N.C. 265, 271, 84 S.E. 340 (1915). It is the character and substance of an activity and not the denomination or form that determines whether it is prohibited by law. *Animal Protection Society*, 95 N.C. App. at 268, 382 S.E.2d at 807; *Lipkin*, 169

N.C. at 271, 84 S.E. at 343 (noting the law "will strip the transaction of all its thin and false apparel and consider it in its very nakedness [and] look to the substance and not to the form of [the transaction] in order to disclose its real elements . . ."). The analysis in *Lipkin* and the cases cited therein make clear that where one, in order to secure a chance to win something of greater value, purchases a token for small consideration or a trivial price or pays more than the value of an item, the transaction is prohibited.

This conclusion is further bolstered by this Court's analysis in *Animal Protection Society*. In that case, we considered a charitable sales promotion in which participants paid five dollars or one dollar for, respectively, a comb valued at nineteen cents or a piece of candy valued at one cent. *Animal Protection Society*, 95 N.C. App. at 261, 382 S.E.2d at 802-03. Participants also received "free" bingo cards regardless of whether they "purchased" a comb or candy; however, the number of cards the participant received increased with what and how much the participant bought. *Id.*, 95 N.C. App. at 261, 382 S.E.2d at 803. This Court characterized the "charitable sales promotion" scheme with "absolutely free bingo" as a "mere subterfuge" for a bingo game operated in violation of our statutes. *Id.*, 95 N.C. App. at 268, 382 S.E.2d at 807. This Court also contrasted that scheme with "an advertising promotion directed at increasing sales of a legitimate product or service offered in the free marketplace by a business regularly engaged in the sale of such goods or services." *Id.*, 95 N.C. App. at 268, 382 S.E.2d at 807. In like manner, the issue, with respect to the pre-paid phone cards and accompanying game pieces, is whether plaintiff's activities, in character, constitute a lottery scheme or the sale of a legitimate product.

The trial court, in pertinent part, set out both the value and utility of the minutes purchased on the phone card. The trial court further noted that the accompanying game pieces was merely a marketing system which promoted and encouraged the sale of the phone cards. Such findings and conclusions adhere to the appropriate legal standard and properly address that the purchase is made to obtain a valuable commodity, the sale of which is promoted by "a process that is common in many promotional and sweepstakes type contests." *Mississippi Gaming Commission v. Treasured Arts, Inc.*, 699 So.2d 936 (1997) (examining similar phone cards, also sold by plaintiff, under the laws of Mississippi prohibiting lotteries and determining the promotions were not barred).

After careful review of the record evidence, we agree with the trial court's determination for two reasons. First, this type of promotion is, as noted *supra*, commonly used to encourage the sale of numerous consumer items. Defendants, ostensibly, proceed under the theory that the use of this promotion to encourage sales of other products is permissible because the consumer pays for the product and not the associated game promotion. Defendants are of the opinion that the phone card lacks sufficient value to entitle plaintiff to utilize the same promotional methods. We agree with defendants that there are situations where it is clear that the product being "sold" is merely ancillary and incidental to the accompanying game of chance, *see*, *e.g.*, *Animal Protection Society*, 95 N.C. App. at 268, 382 S.E.2d at 807; however, the evidence before the trial court and on appeal indicates without contradiction that plaintiff's phone card provides the purchaser with a long-distance rate that is not merely competitive, but one of the best in the industry. This fact certainly supports the proposition that the average consumer would purchase the pre-paid phone card in order to take advantage of plaintiff's proffered rate.[1] Thus, based on the record evidence, plaintiff's pre-paid phone card is sufficiently compatible with the price being charged and has sufficient value and utility to support the conclusion that it, and not the associated game of chance, is the object being purchased.

A second reason supporting the validity of plaintiff's promotional scheme is that consumers may receive free game pieces without purchasing the pre-paid phone card via written request, which is some evidence that those who purchase the phone cards are doing so to receive the phone card and not the accompanying promotional game piece.[2] As plaintiff rightly points out, lotteries (in states where permitted) do not give out free entries upon written request. We hold the

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1. Defendants argue that plaintiff markets the pre-paid phone card to those who do not have phone service and must use pay phones, which sometimes requires the additional payment of up to thirty-five cents. The charge associated with using a pay phone, however, is distinct from the purchase of long-distance time on plaintiff's card and has no bearing on the value of the product sold by plaintiff or whether that value would prompt the consumer to purchase the product.

2. Defendants argue a game piece received by written request is not free because the consumer must pay postage as well as incidental and minimal fees for the envelope and paper on which the request is made. Using such costs to assert the game piece is not free; however, it is akin to including the cost of gas in traveling to the store as part of the purchase price of the goods bought therein. Such expenses neither accrue to the benefit of the person to whom the mail is delivered nor the store which the consumer patronizes. Neither, in the instant case, does the postage paid accrue to the benefit of plaintiff and cannot be said to constitute the "cost" of the game piece.

price paid for and the value received from the pre-paid phone cards is sufficiently commensurate to support the determination that the sale of the product is not a mere subterfuge to engage in an illegal lottery scheme, whereby consideration is paid merely to engage in a game of chance. Defendants proffered that alternative or additional findings of fact were not pertinent to the resolution reached by the trial court of the issues; thus, the trial court did not err in refusing to make non-material findings of fact. *Accord Green Tree Financial Services Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999). Entry of declaratory judgment in favor of plaintiff by the trial court was not erroneous, and this assignment of error is overruled.

III. Scope of Injunction

[3] Finally, defendants attack the scope of the conduct enjoined by the trial court, notwithstanding whether injunctive relief was appropriately granted. The portion of the injunction appealed prohibited "[m]aking or issuing any statement[s] outside the proceedings in this case alleging or contending that [plaintiff's] phone cards constitute an illegal gambling arrangement, lottery, or game of chance." At the time this prohibition was issued, the factual circumstances indicate ALE agents were threatening the alcohol license of stores selling plaintiff's phone cards on the grounds that they were illegal. The language of the injunction, in this factual setting, was intended to and operated to preclude such conduct. Having held plaintiff's promotion and phone cards are not an illegal gambling arrangement, lottery, or game of chance, it stands to reason that such allegations or contentions by defendants are obviated, and this portion of the permanent injunction no longer functions in any meaningful capacity.

Affirmed in part and vacated in part.

Judges TIMMONS-GOODSON and GEER concur.

PROPERTY RIGHTS ADVOCACY GROUP, ON BEHALF OF ITS MEMBERS AND OTHER SIMILARLY SITUATED REAL PROPERTY OWNERS AND TAXPAYERS OF AND IN THE TOWN OF OAK ISLAND, NORTH CAROLINA AND HONORABLE JAMES W. BETTER, INDIVIDUALLY, PLAINTIFFS v. TOWN OF LONG BEACH, A FORMER NORTH CAROLINA MUNICIPAL CORPORATION AND BODY POLITIC, NOW KNOWN AND REFERRED TO AS TOWN OF OAK ISLAND, A NORTH CAROLINA MUNICIPAL CORPORATION AND BODY POLITIC, AND SUCCESSOR IN INTEREST TO THE FORMER TOWN OF LONG BEACH; TOWN OF OAK ISLAND, A NORTH CAROLINA MUNICIPAL CORPORATION AND BODY POLITIC; THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA04-1374

(Filed 6 September 2005)

1. Appeal and Error— lack of justiciable case or controversy—mootness

Plaintiffs' appeal from a declaratory judgment entered 28 May 2004 declaring that neither the Long Beach Act authorizing the Town of Long Beach to pass ordinances providing for the development and operation of parks on municipal streets that dead-end on beaches, waterways, and at the ocean, nor the local ordinance designating as public parks all streets that dead-end into waterways in the Town of Long Beach, violated the North Carolina Constitution is dismissed, because: (1) the town's repeal of the local ordinance removes it as an issue for consideration by the Court of Appeals, and the constitutionality of the Long Beach Act is thus no longer before the Court of Appeals since there is no justiciable case or controversy concerning the Act; (2) a second local ordinance enacted by the town did not create any public parks or close any public streets, and is not the subject of this litigation; (3) notwithstanding plaintiffs' generalized concern that the municipality may, in the future, rely upon the Long Beach Act in such a way as to adversely affect their constitutional rights, such hypothetical circumstances do not constitute a justiciable case or controversy and (4) the constitutionality of the Long Beach Act, standing alone on the present facts, is not a cause for the courts.

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

Although plaintiffs contend the trial court erred by awarding costs solely on the grounds that there was no motion before the court asking for costs and that the court had no statutory authority to tax costs to plaintiffs, this assignment of error is dismissed,

because: (1) plaintiffs did not argue either issue in their brief; and (2) questions raised by assignments of error but not discussed in a party's brief are deemed abandoned under N.C. R. App. P. 28(a).

Judge HUNTER dissenting.

Appeal by plaintiffs from judgment entered 28 May 2004 by Judge Robert F. Floyd, Jr., in Brunswick County Superior Court. Heard in the Court of Appeals 14 June 2005.

Hedrick & Morton, L.L.P., by G. Grady Richardson, Jr., for plaintiffs-appellants.

Roger Lee Edwards for defendant-appellee Town of Long Beach, now Town of Oak Island.

Attorney General Roy Cooper, by Assistant Attorney General V. Lori Fuller, for defendant-appellee State of North Carolina.

LEVINSON, Judge.

Plaintiffs appeal from declaratory judgment entered 28 May 2004. For the reasons that follow, their appeal is dismissed.

In August 1998 the North Carolina General Assembly enacted Session Law 1998-83 ("Long Beach Act"), authorizing the Town of Long Beach to "pass ordinances providing for the development and operation of parks on municipal streets . . . that dead-end on beaches, waterways, and at the ocean." Thereafter, the Town of Long Beach enacted an ordinance ("first local ordinance"), designating as "public parks" all street ends that "dead-end into waterways in the Town of Long Beach."

On 17 June 2002 plaintiffs filed a complaint against defendants, alleging, *inter alia*, that both the Long Beach Act and the first local ordinance violated N.C. Const. Art. II, § 24. Plaintiffs sought a declaratory judgment in accord with their legal position, and a permanent injunction prohibiting the Town from developing public street-end parks. Defendants denied that the Long Beach Act or the first local ordinance were unconstitutional.

On 31 January 2003, the trial court entered an order declaring in pertinent part that neither the Long Beach Act nor the local ordinance violated the North Carolina Constitution. Plaintiffs' appeal to this Court was dismissed as interlocutory, *see Prop. Rights Advocacy v. Beach*, 163 N.C. App. 205, 592 S.E.2d 619 (2004) (unpublished opin-

ion). Plaintiffs then filed a motion for a permanent injunction and a declaratory judgment, both pertaining to the first local ordinance. In an order entered 28 May 2004 the trial court denied plaintiffs' motion for a permanent injunction, declared both the Long Beach Act and the first local ordinance to be constitutional, and awarded costs to defendants. Plaintiffs timely appealed from this order.

On 13 July 2004, while plaintiffs' appeal was pending, the Town repealed the first local ordinance, replacing it with a new ordinance ("second local ordinance"). The second local ordinance recognized the Town's duty to follow relevant statutory and administrative procedures, and did not close any streets or create street-end public parks. Defendants later sought dismissal of plaintiffs' appeal, arguing that it was rendered moot by repeal of the first local ordinance. Plaintiffs have opposed dismissal.

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[1] The issue of whether plaintiffs' appeal should be dismissed implicates interconnected issues of jurisdiction, standing, and mootness. Plaintiffs argue that several issues regarding the constitutionality of the Long Beach Act, and the determination of their rights if the town creates street-end parks in the future, "remain ripe before this Court." We disagree.

"Jurisdiction in North Carolina depends on the existence of a justiciable case or controversy." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001). " 'To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough.' " *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc.*, 149 N.C. App. 656, 658, 562 S.E.2d 60, 62-63 (2002) (quoting *Wendell v. Long*, 107 N.C. App. 80, 82-83, 418 S.E.2d 825, 826 (1992)).

Standing is another prerequisite to jurisdiction. "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 (citing *Neuse River Found., Inc. v. Smithfield Foods*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002)), *disc. review denied*, 359 N.C. 632, 613 S.E.2d 688 (2005). " 'Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter.' " *Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) (quoting *American*

Woodland Industries v. Tolson, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002)). Accordingly, "[s]tanding to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or is likely to suffer, a direct injury as a result of the law's enforcement." *Maines v. City of Greensboro*, 300 N.C. 126, 130-31, 265 S.E.2d 155, 158 (1980).

"Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978). Repeal of a challenged law generally renders moot the issue of the law's interpretation or constitutionality. *See State v. McCluney*, 280 N.C. 404, 407, 185 S.E.2d 870, 872 (1972) (holding that "repeal of [statute] renders moot the question of its constitutionality" and that "constitutionality of the [new] Act does not arise on this appeal[, and] . . . will be decided if and when it is presented.").

The parties agree that the Town's first local ordinance is no longer before this Court. Defendants argue that the relief sought by plaintiffs, a declaration that the first local ordinance is unconstitutional, "may not be granted in a declaratory judgment action where the ordinance no longer exists." Plaintiffs concede the "Town's repeal of the First ordinance removes it as an issue for consideration by this Court." We conclude that issues pertaining to the first local ordinance are no longer before us.

We also conclude that the constitutionality of the Long Beach Act is not before us because there is no justiciable case or controversy concerning the Long Beach Act.

As discussed, the first local ordinance is no longer an issue. As the parties have conceded, the validity of the first ordinance necessarily relied upon the validity of the Long Beach Act. The second local ordinance does not create any public parks or close any public streets, and is not the subject of this litigation. Notwithstanding plaintiffs' generalized concern that the municipality may, in the future, rely upon the Long Beach Act in such a way as to adversely affect their constitutional rights, such hypothetical circumstances do not constitute a justiciable case or controversy. And we are unpersuaded that the constitutionality of the Long Beach Act, standing alone, is, on the present facts, a cause for the courts. We conclude that there is no

longer a justiciable case or controversy between the parties. Accordingly, this Court lacks subject matter jurisdiction to review the constitutionality of the Long Beach Act.

[2] Finally, we conclude that the trial court's award of costs was not preserved for appellate review. Plaintiffs assigned error to the award of costs solely on the grounds that there was no motion before the court asking for costs, and that the court had "no statutory authority" to tax costs to plaintiffs. Plaintiffs did not argue either issue in their appellate brief. "Questions raised by assignments of error . . . [but not] discussed in a party's brief, are deemed abandoned." N.C.R. App. P. 28(a).

For the reasons discussed above, we conclude that plaintiffs' appeal must be

Dismissed.

Judge McGEE concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

I respectfully dissent from the majority opinion as there remains an actual case and controversy as to whether the Long Beach Act is a constitutionally impermissible local act. Having so concluded, this appeal is justiciable and should be reviewed by this Court.

Defendants contend and the majority holds that plaintiffs' challenge to the Long Beach Act as a constitutionally impermissible local act does not constitute a justiciable case or controversy between the parties.[1] As the determination of the constitutionality of the Act is a threshold issue which would have a practical effect on the existing controversy, I disagree.

Plaintiffs seek a declaratory judgment as to the constitutionality of the statute on its face, contending that the statute violates Article II, Section 24 of the North Carolina Constitution, which prohibits certain local laws. "The purpose of the Declaratory Judgment Act is, 'to

1. As the majority's analysis focuses on the lack of a justiciable controversy, I address the issue of plaintiffs' standing only to note that as it is uncontested plaintiffs are property owners likely to suffer direct injury if the statute is enforced, plaintiffs have standing to initiate this action. *See Maines v. City of Greensboro*, 300 N.C. 126, 130-31, 265 S.E.2d 155, 158 (1980).

settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations. . . .' It is to be liberally construed and administered." *Insurance Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964) (citations omitted). Plaintiffs' original complaint challenged both the constitutionality of the Long Beach Act as an impermissible local act, as well as the ordinance passed pursuant to that statute by the Town of Long Beach. Plaintiffs have conceded that the first ordinance, repealed by the Town, is no longer before this Court. *See generally State v. McCluney*, 280 N.C. 404, 407, 185 S.E.2d 870, 872 (1972) (holding that repeal of a statute moots the issue of its constitutionality). However, they contend that their challenge to the constitutionality of the statute remains justiciable, as the Long Beach Act has not been repealed. Therefore, the critical question is whether the constitutionality of a statute is justiciable when the action the statute authorizes has not yet been implemented. Our Supreme Court addressed a case with a similar procedural posture in *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978).

In *Adams*, our Supreme Court considered an appeal by landowners as to the validity of the Coastal Area Management Act of 1974 ("CAMA"). The plaintiffs first challenged the constitutionality of CAMA as an impermissible local law, and made additional claims of alleged unconstitutional takings and searches by the implementing authority. *Id.* at 685-86, 249 S.E.2d at 404.

The Supreme Court first considered the challenge to the constitutionality of CAMA, stating:

> " 'It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.' "

Adams, 295 N.C. at 689, 249 S.E.2d at 406 (quoting *Glenn v. Board of Education*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)). " 'If there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.' " *Id.* at 690, 249 S.E.2d at 406 (citation omitted). The Court in *Adams* then concluded that the

statute in question was a general rather than local law. *Id.* at 696, 249 S.E.2d at 410.

The Court then addressed the plaintiffs' contentions that CAMA authorized an unconstitutional taking of land and warrantless search in violation of the Fourth Amendment. *Id.* at 702-03, 249 S.E.2d at 413. Those challenges arose from CAMA's authorization of the implementing authority to pass certain regulations and carry out certain investigations; however, such actions had not yet occurred at the time of the plaintiffs' suit. *Id.* at 704-05, 249 S.E.2d at 414-15. The Supreme Court found the plaintiffs' contentions that they would be denied land use permits and thus suffer a decrease in their land value, or would be subject to warrantless searches were speculative and premature. *Id.* at 705, 249 S.E.2d at 415. The Court, noting that " 'an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute[,]' " *id.* at 703, 249 S.E.2d at 413-14 (citation omitted), determined that the plaintiffs' claims as to the taking and search issues presented no justiciable controversy entitling the plaintiffs to relief under the Declaratory Judgment Act. *Id.* at 704, 249 S.E.2d at 415.

"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) (citation omitted). Here however, as the majority notes, both parties have conceded that the validity of the ordinance necessarily relies on the validity of the Long Beach Act. Without the authority of the Long Beach Act, defendants would be prohibited from creating parks on dead-end streets. *See Scronce v. Town of Long Beach*, 133 N.C. App. 190, 520 S.E.2d 609 (1999) (unpublished) (holding that the Town of Long Beach may not establish parks on dedicated street ends). We note that here, as in *Adams*, the determination of whether the statute is an impermissible local act is a threshold issue, and if this Court were to determine that the Act is unconstitutional on this ground, plaintiffs' additional claims as to the authorized ordinance would be effectively resolved. Thus, a determination of the constitutionality of the statute would have a practical effect on the existing controversy.

Adams clearly illustrates that our appellate courts have a duty to determine the rights and liabilities or duties of the litigants before it when there is a conflict between a statute and the Constitution, because the Constitution is the superior rule of law in that situation.

Adams, 295 N.C. at 690, 249 S.E.2d at 406. Therefore, as there remains an actual case and controversy between the parties as to the constitutionality of the statute, I respectfully dissent from the majority and find that this appeal is justiciable and should be reviewed before this Court.

STATE OF NORTH CAROLINA v. KUNTA KINTE WINDLEY

No. COA04-588

(Filed 6 September 2005)

1. Homicide— first-degree murder—instructiona—acting in concert

The trial court erred by instructing the jury on acting in concert with respect to the charge of first-degree murder, and defendant is entitled to a new trial on this charge, because: (1) the State presented evidence tending to show that defendant was the perpetrator of the acts; (2) the State presented no evidence that defendant acted with others in killing the victim or that anyone other than defendant shot and killed the victim; and (3) although defendant was found guilty of first-degree murder on the basis of felony murder as well as premeditation and deliberation, the trial court erroneously informed the jury that it could convict defendant of first-degree murder on the basis of acting in concert in its instructions under both theories.

2. Constitutional Law— right to confrontation—nontestimonial evidence—law enforcement fingerprint card

The trial court did not violate defendant's Sixth Amendment right to confrontation by admitting into evidence law enforcement record cards allegedly bearing his fingerprint and defendant is not entitled to a new trial on the conspiracy to traffic in cocaine conviction, because the fingerprint card created upon defendant's arrest and contained in the Automated Fingerprint Identification System database was a business record and therefore nontestimonial.

Appeal by defendant from judgments entered 9 October 2003 by Judge Henry E. Frye, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 6 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

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

MARTIN, Chief Judge.

Defendant appeals from judgments imposing a sentence of life imprisonment without parole upon his conviction of murder in the first degree and a concurrent sentence of not less than 175 months nor more than 219 months upon his conviction of conspiracy to traffic in cocaine. After careful review, we find no error in defendant's conviction of conspiracy to traffic in cocaine, but conclude defendant must be granted a new trial upon the charge of first-degree murder.

The State presented evidence at trial tending to show that defendant shot and killed Jamel Morehead ("Morehead") during a dispute over a cocaine transaction. Michael Branch ("Branch") and Willie Dowd, Jr. ("Dowd") testified for the State that on 19 January 2002, defendant met with them and Morehead at a residence in Kernersville, North Carolina, in order to exchange twenty thousand dollars for a kilogram of cocaine. Defendant gave the twenty thousand dollars to Morehead, who then departed the residence and returned approximately forty-five minutes later. Branch and Dowd remained with defendant. When Morehead returned, he gave defendant a small package wrapped in duct tape. When defendant opened the package, he discovered it contained cornstarch instead of cocaine. Morehead and defendant began arguing. Morehead told defendant he had never dealt cocaine before, did not realize the package contained cornstarch, and that he would reimburse defendant the twenty thousand dollars. Defendant removed a nine-millimeter handgun from the waistband of his pants, followed Morehead into a bedroom, and shot him numerous times.

Defendant's fingerprint was found on the frame of the door of the Kernersville residence. Bullets and bullet casings recovered from the scene and from Morehead's body matched bullet casings seized at the scene of a 20 March 2001 shooting incident between defendant and another individual in Beaufort, North Carolina.

Defendant testified that he was acquainted with Branch and knew him to be a drug dealer. According to defendant, he followed Branch to the Kernersville residence on 19 January 2002 in order to purchase

marijuana. Inside the residence, he observed two other men, but did not know who they were and was not introduced to them. Branch informed defendant that it would take at least thirty minutes for the individual with the marijuana to arrive. However, defendant left before the marijuana arrived because he had to pick up his girlfriend at the bus station. Defendant, his brother, and his girlfriend drove to New York the following morning in order to attend the funeral of a friend. Defendant's brother and defendant's girlfriend both corroborated his testimony, testifying that they drove to New York with defendant. Defendant denied having ever met Morehead and denied shooting him. Defendant also denied conspiring with anyone to purchase cocaine. Defendant admitted to the 20 March 2001 exchange of gunfire in Beaufort, but stated he fired his weapon in self-defense. Defendant testified he sold his gun to Branch several months after the 20 March 2001 shooting.

Following the presentation of evidence, the State requested the trial court to instruct the jury on the theory of acting in concert as a part of the murder and conspiracy to traffic in cocaine charges. Defendant objected to the instruction on the ground that there was no evidence of acting in concert. The trial court initially expressed some reservation as to the applicability of the doctrine:

> Let me tell you what my concerns are on that . . . . when I look at the formation of why in the legal field I ought to use acting in concert is if you have other people who do any of the acts and because, just like we had the bank robbery case, the bank robber goes in and actually does the robbery, and you have the person as a lookout, you've got the one in the car, so you create acting in concert, and when you have the actual perpetrator because of all of the elements that I look at, they always refer to everybody except for the perpetrator since they do all the acts necessary. And at this point I don't think acting in concert would apply for this particular case since all of the evidence is from the State is that this is the person who did the shooting. The only thing you have to consider is the other two people what their participation was.

The trial court eventually overruled defendant's objection, however, and instructed the jury it could convict defendant of first-degree murder on the theories of both premeditation and deliberation and felony murder if it found he acted in concert with others.

[1] Defendant contends the trial court erred when it instructed the jury on the legal doctrine of acting-in-concert with respect to the charge of first-degree murder. He argues the State failed to present substantial evidence that he acted with another person in perpetrating the offense. After careful review of the evidence, we agree there was no evidence from which a reasonable jury could find that defendant acted in concert with others in the murder of Morehead.

The doctrine of acting in concert may be summarized 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 pursuance of the common purpose . . . or as a natural or probable consequence thereof.' "

State v. Mann, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). Under the doctrine, "[a] person is constructively present during the commission of a crime if he or she is close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime." *Id.* (quoting *State v. Willis*, 332 N.C. 151, 175, 420 S.E.2d 158, 169 (1992)).

In *State v. Brown*, 80 N.C. App. 307, 311, 342 S.E.2d 42, 44 (1986), this Court granted a new trial where the trial court erroneously instructed the jury on the theory of acting in concert. The State presented evidence tending to show the victim was beaten by a number of people during an altercation. Although the defendant was present at the scene, he was not involved in the altercation. The victim pulled out a gun and fired shots into the ceiling. Several people began struggling with the victim for possession of the gun. The victim was wrestled to the floor, where he fired several more shots. For the next several minutes a group, variously estimated at between six and fifteen people, kicked, stomped and struck the victim with various objects including chairs, pool cues and their feet. The defendant was not observed among this group of people. Following the beating, the victim was left unconscious on the floor and the defendant was observed with a bullet wound to his leg.

Emergency response teams arrived at the scene and started to transport the injured to area hospitals. The victim and the defendant were placed in the same ambulance. Once inside the ambulance, the

defendant beat the prone victim, resulting in his death. At trial, the court instructed the jury it could find the defendant guilty upon a theory of acting in concert. The jury found the defendant guilty of voluntary manslaughter.

On appeal, the defendant argued the acting in concert instructions permitted the jury to convict him on the theory that he aided and abetted the other persons involved in the beating of the victim, a theory unsupported by the evidence. The *Brown* Court agreed, stating that

> [t]here is no evidence that defendant acted as an aider and abettor to other persons in beating [the victim]. All the evidence shows that defendant acted independently of the others in his assault on the victim. Thus, there was no basis in the evidence for the court to instruct the jury on the law of aiding and abetting.

Id. at 311, 342 S.E.2d at 44. The Court noted that "[i]t is generally error, prejudicial to defendant, for the trial court to instruct the jury upon a theory of a defendant's guilt which is not supported by the evidence." *Id.*

As was the case in *Brown*, the State presented evidence in the present case tending to show that defendant was the perpetrator of the acts. The State presented no evidence, however, that defendant acted with others in killing Morehead, or that anyone other than defendant shot and killed Morehead. The trial court's error in instructing the jury requires a new trial for defendant.

The State argues that even if there was no evidence of concerted action, the trial court's instruction nevertheless did not prejudice defendant in that the jury found him guilty of first-degree murder, not only on the basis of felony murder but also on the basis of premeditation and deliberation. Citing *State v. Mays*, 158 N.C. App. 563, 577, 582 S.E.2d 360, 369 (stating that "any error in allowing a jury to consider felony murder does not require a new trial if the jury also found the defendant guilty based on premeditation and deliberation"), *disc. review denied*, 357 N.C. 510, 588 S.E.2d 379 (2003), *cert. denied*, 358 N.C. 547, 599 S.E.2d 913 (2004), and *State v. McKeithan*, 140 N.C. App. 422, 434, 537 S.E.2d 526, 534 (2000) (same), *appeal dismissed and disc. review denied*, 353 N.C. 392, 547 S.E.2d 35 (2001), the State contends that any error in the instructions for felony murder was harmless, because the evidence supported the conviction based on premeditation and deliberation. The State's position would be correct

if the flawed concerted action instructions were addressed to the felony murder charge only. In *Mays* and *McKeithan*, the error in instructing on the felony murder charge was harmless in that the jury properly found the defendant guilty on the basis of premeditation and deliberation. Here, however, the trial court erroneously informed the jury it could convict defendant of first-degree murder on the basis of acting in concert in its instructions under both the felony murder *and* premeditation and deliberation theories. The trial court clearly instructed the jury that the acting in concert doctrine could be used to apply to the premeditation and deliberation charge:

> Now Members of the Jury, for a person to be guilty of a crime it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit conspiracy to traffic by possession of four hundred grams of cocaine, each of them, if actually present or constructively present is not only guilty of that crime if the other person commits the crime, he is also guilty of any other crime committed, that being murder by the other in pursuance of a common purpose . . . to commit conspiracy to possess four hundred grams or more of cocaine, or as a natural or probable consequence thereof.
>
> . . . .
>
> Members of the Jury, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant acting either by himself *or acting together with others*, acted with malice, killed the victim with a deadly weapon, thereby proximately causing the victim's death, and the Defendant intended to kill the victim, and that the Defendant acted after premeditation and deliberation, it would be your duty to return a verdict of guilty of first-degree murder on the basis of malice, premeditation and deliberation.
>
> . . . .
>
> Again I read to you, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant *acting either by himself or acting together with others* committed conspiracy to possess four hundred grams or more of cocaine, and that while committing conspiracy to posses[] four hundred grams or more of cocaine the Defendant *or acting together with others* killed the victim, and the Defendant's act

> was a proximate cause of the victim's death, it would be your duty to return a verdict of guilty of first-degree murder under the felony murder rule.

Because the trial court's instructions for felony murder and murder based on premeditation and deliberation were both flawed, the jury's conviction of defendant for first-degree murder based on premeditation and deliberation is equally flawed. Defendant must be granted a new trial as to the murder conviction.

[2] Defendant further argues he must be granted a new trial as to the conspiracy conviction. He contends the trial court violated his Sixth Amendment right to confrontation by admitting into evidence law enforcement record cards allegedly bearing his fingerprints. Defendant argues the fingerprint cards were "testimonial" evidence as defined by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). We disagree.

Sergeant Darrell Hicks of the Forsyth County Sheriff's Office testified as an expert in the field of latent fingerprint lifting and fingerprint identification. Sergeant Hicks testified he obtained several latent fingerprints at the Kernersville residence crime scene and compared them to fingerprints contained in a computer system database known as "AFIS" or "Automated Fingerprint Identification System." Sergeant Hicks stated the AFIS consists "of a known database of fingerprints of criminal arrest cards of people [who've] been arrested in the state." Using the database, Sergeant Hicks received a reference to defendant. Sergeant Hicks then compared one of the latent fingerprints he obtained at the crime scene to the actual fingerprint card containing defendant's fingerprints. Sergeant Hicks testified that such fingerprint cards were kept in the normal course of business in the police record files. According to Sergeant Hicks, the fingerprint obtained from the door of the Kernersville residence matched the fingerprint card containing defendant's fingerprints. Defendant objected to the admission of the fingerprint card, but the trial court admitted the card as a business record. Defendant argues that admission of the fingerprint card, without testimony by the police officer who made the fingerprint card, violated his confrontation rights under *Crawford*. We do not agree.

"Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 158 L. Ed. 2d at 203. Under *Crawford*, we must determine: "(1) whether the evidence

admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217, *disc. review denied*, 358 N.C. 734, 601 S.E.2d 866 (2004). Notably, the *Crawford* Court indicated that business records are nontestimonial. *Crawford*, 541 U.S. at 56, 158 L. Ed. 2d at 195.

In the instant case, we conclude the fingerprint card created upon defendant's arrest and contained in the AFIS database was a business record and therefore nontestimonial. *See State v. Carroll*, 356 N.C. 526, 574, 573 S.E.2d 899, 913 (2002) (stating that fingerprint cards are "clearly admissible" under the business records exception to the hearsay rule), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003); *State v. Arita*, 900 So.2d 37, 45 (La. App. Ct. 2005) (stating that a latent fingerprint admitted pursuant to public record and report exception to the hearsay rule "was clearly non-testimonial"). We overrule this assignment of error.

In view of our decision, we deem it unnecessary to address defendant's remaining assignments of error.

First Degree Murder—New Trial.

Conspiracy to Traffic in Cocaine—No Error.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. VONDERICK LANGLEY

No. COA04-1100

(Filed 6 September 2005)

1. Appeal and Error— plain error—properly presented

Defendant argued an assignment of error in compliance with Appellate Rule 28(b)(6) where he argued in his brief that the trial court committed plain error by failing to dismiss the charge against him ex mero motu and asked for application of Appellate Rule 2.

2. Firearms and Other Weapons— possession of firearm by felon—category of gun—variance

There was a fatal variance between the indictment and the evidence where the indictment charged possession of a handgun by a felon and the evidence showed possession of a sawed-off shotgun. The Felony Firearms Act, N.C.G.S. § 14-415.1(a), banned possession of categories of firearms by convicted felons; when an indictment alleges possession of a handgun rather than a firearm, the State must prove the essential element that defendant possessed a handgun.

3. Constitutional Law— effective assistance of counsel—tactical decision by counsel

Defendant received effective assistance of counsel where his attorney made a tactical decision to present a theory of defense based upon defendant's own statements to police. The defenses of necessity or justification, about which defense counsel did not request instructions, were inconsistent with those statements.

Appeal by defendant from judgment entered 24 March 2004 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 11 May 2005.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

Lemuel W. Hinton for defendant-appellant.

ELMORE, Judge.

Vonderick Langley (defendant) was indicted for possession of a weapon of mass death and destruction, assault by pointing a gun, assault on an officer, resisting arrest, and possession of a firearm by a felon.

The State's evidence at trial tended to show that Mary Barrett (Barrett) became engaged in a fight with Tonya, an acquaintance of defendant. Tonya then fled from Barrett, but Barrett began chasing Tonya as she walked toward a car parked on the street. Defendant, who was sitting in the front seat of the parked car, jumped out to unlock the back door for Tonya to get inside. As Barrett approached the car, defendant pointed a gun at Barrett and said, "You ain't going to 'f' with my cousin."

Barrett testified that she backed away and that defendant placed the gun in the car and then began walking away. Approximately 15 to 20 seconds later, Barrett flagged down a passing police vehicle. Officer W.L. Terry of the Greenville Police Department (GPD) testified that after he got out of his vehicle, Barrett yelled at him that defendant had pulled a gun on her. Officer Terry yelled for defendant to stop walking away, at which point defendant stated that Barrett had a knife and that he did not have a gun. Defendant then pulled down his pants and underwear and said, "See, I ain't got no gun." Defendant pulled his pants back up and started to walk away. After defendant ignored his demands to stop walking away, Officer Terry attempted to restrain defendant by grabbing his arms from behind. Defendant hit Officer Terry in the mouth with his right elbow as he shook him off. Defendant then grabbed Officer Terry by the shirt, and the two men started struggling in the street.

Upon the arrival of Officer Jay Carlton of the GPD, defendant put his hands up and was taken into custody. Officer Carlton testified that he found a gun, with the hammer cocked back, under the right front passenger seat of the car driven by defendant. Defendant, after being read his Miranda rights, gave a verbal statement to Officer Terry. Defendant said that he had taken his mother's car without her permission around 4:00 a.m. that morning and that there was no gun in the car. He stated that Barrett had a knife or a meat fork, changing between the two items several times during his account. Defendant stated that Barrett threw the knife or fork down beside the car as the police arrived. However, officers could not find either at the scene. Defendant did not present any evidence at trial. The jury found defendant guilty on all charges. From the judgment entered on 24 March 2004, defendant appeals.

[1] First, defendant argues that there was a fatal variance between the indictment and the evidence at trial such that the charge of possession of a firearm by a felon should have been dismissed. The State's evidence at trial tended to show that defendant possessed a firearm with barrel length less than 18 inches and overall length less than 26 inches, a sawed-off shotgun, but the indictment states that he was in felonious possession of a "handgun." We note that, although defendant failed to make a motion to dismiss the charge at the close of all evidence at trial, he has otherwise properly preserved this issue under our Rules of Appellate Procedure. In his brief, defendant argues that the trial court committed plain error by failing to dismiss, *ex mero motu*, the possession of a firearm by a felon charge where a

fatal variance existed between the indictment and the State's evidence. Additionally, defendant asks this Court to apply Rule 2 to the issue. Thus, defendant has argued the assignment of error in compliance with Rule 28(b)(6). *Cf. Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401-02, 610 S.E.2d 360, 361 (2005) (appellant failed to provide argument in support of assignment of error in violation of Rule 28(b)(6); appeal dismissed for Rule violations). We believe it necessary to apply Rule 2 and consider the merits of defendant's argument in order to prevent manifest injustice.

[2] "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (internal quotation omitted). A variance between the offense alleged in the indictment and the evidence presented at trial is not always fatal. *See State v. Poole*, 154 N.C. App. 419, 423, 572 S.E.2d 433, 436 (2002), *cert. denied*, 356 N.C. 689, 578 S.E.2d 589 (2003). "It is only 'where the evidence tends to show the commission of an offense not charged in the indictment [that] there is a fatal variance between the allegations and the proof requiring dismissal.' " *Id.* (quoting *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981)). Accordingly, the defendant must show a variance with respect to an essential element of the offense. *Pickens*, 346 N.C. at 646, 488 S.E.2d at 172.

In order to determine whether the averment of a "handgun" was a material and essential element of the offense charged in the indictment, we look to the language of the Felony Firearms Act. N.C. Gen. Stat. § 14-415.1 provides that

> [i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c). . . .

N.C. Gen. Stat. § 14-415.1(a) (2003). In enacting the Felony Firearms Act, the General Assembly did not ban *all* firearms from being possessed by convicted felons. Instead, the General Assembly prohibited three different categories of weapons: (1) handguns; (2) firearms with a barrel length of less than 18 inches or an overall length of less than 26 inches; and (3) weapons of mass death and destruction. A

handgun is a category of firearm, but it is distinct from the class of "other firearms" of certain measurements stated in the Felony Firearms Act. The consequence of the legislature's distinction is that felony possession of a handgun requires different proof at trial than felony possession of a firearm. In *State v. Cloninger*, 83 N.C. App. 529, 531, 350 S.E.2d 895, 896-97 (1986), this Court interpreted N.C. Gen. Stat. § 14-415.1 and concluded that the proof of a prohibited firearm requires that the gun conform to the measurements stated in the statute, whereas the proof of a handgun need not include these measurements applicable to firearms. Thus, when an indictment alleges possession of a handgun rather than a firearm, the State must prove the essential element that defendant possessed a handgun.

Here, the State produced evidence that defendant possessed a firearm with barrel length less than 18 inches and overall length less than 26 inches. This evidence of a sawed-off shotgun was not evidence of a handgun. A handgun is defined as "[a] pistol, revolver, or other gun that has a short stock and is designed to be held and fired by the use of a single hand." *See* N.C. Gen. Stat. § 14-409.39(3) (2003). If a sawed-off shotgun were considered to be a handgun, then it could legally be possessed by a felon in his own home or by a person who is not a convicted felon. *See State v. McNeill*, 78 N.C. App. 514, 516, 337 S.E.2d 172, 173 (1985) (recognizing exception in N.C. Gen. Stat. § 14-415.1 permitting felon to possess handgun in his own home). This cannot be true, as the General Assembly intended that possession of a sawed-off shotgun be illegal except in certain limited and specific circumstances. *See* N.C. Gen. Stat. § 14-288.8; *State v. Fennell*, 95 N.C. App. 140, 143-44, 382 S.E.2d 231, 233 (1989) (a sawed-off shotgun, a weapon of mass death and destruction, is an especially dangerous firearm); *United States v. Walker*, 39 F.3d 489, 491 (4th Cir. 1994) ("With limited and specific exceptions, no one in North Carolina, ex-felon or otherwise, may possess, store or acquire a sawed-off shotgun for any reason or under any circumstance.").

The State argues nonetheless that describing the category of firearm in the indictment was surplusage, citing to *State v. Pickens*, 346 N.C. 628, 488 S.E.2d 167 (1997). In *Pickens*, the indictment alleged that the defendant "did discharge a shotgun, a firearm, into the dwelling house . . . while it was actually occupied." *Id.* at 646, 488 S.E.2d at 172. The evidence at trial established that the defendant discharged a handgun. *Id.* at 645, 488 S.E.2d at 171-72. This Court found that the averment of the shotgun in the indictment was mere surplusage because the indictment alleged a firearm and the essential

element of the offense stated in N.C. Gen. Stat. § 14-34.1(2) is "to discharge . . . [a] firearm." *Id.* at 646, 488 S.E.2d at 172. We find *Pickens* distinguishable from the instant case. The defendant in *Pickens* was charged with the offense of discharging a firearm into occupied property in violation of N.C. Gen. Stat. § 14-34.1(2). As N.C. Gen. Stat. § 14-34.1(2) broadly covers *all* firearms, a firearm is the essential element of the offense. It is inconsequential which type of firearm the State alleged in the indictment, as it also alleged a "firearm." The proof at trial was of a type of firearm, and this proof conformed to the allegations of the essential elements stated in the indictment. In the instant case, the State's proof at trial was of a specific category of firearm, a sawed-off shotgun. The indictment, however, specified an entirely different category of firearm prohibited by the statute. Unlike the statute at issue in *Pickens*, N.C. Gen. Stat. § 14-415.1(a) narrowly prohibits three classes of weapons: handguns; firearms with barrel length less than 18 inches or overall length less than 26 inches; and weapons of mass death and destruction. The averment of a handgun cannot be surplusage, as the category of weapon is an essential element of the offense stated in N.C. Gen. Stat. § 14-415.1(a).

The State's decision to allege the possession of a handgun required that it produce evidence of this essential element at trial. As the State failed to produce evidence of a handgun, we hold that there was a fatal variance between the indictment and the evidence. Accordingly, we vacate defendant's conviction for possession of a firearm by a felon. *See State v. Smith*, 155 N.C. App. 500, 513, 573 S.E.2d 618, 627 (2002) (vacating judgment on defendant's conviction where fatal variance existed between indictment and evidence at trial), *disc. review denied*, 357 N.C. 255, 583 S.E.2d 287 (2003).

[3] Next, defendant contends that he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution.

> To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. . . . First, he must show that counsel's performance fell below an objective standard of reasonableness. . . . Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Blakeney, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000) (internal citations omitted), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001).

Defendant argues that his attorney's failure to request jury instructions on the defenses of necessity and justification with respect to the charge of assault by pointing a gun resulted in ineffective assistance of counsel. "The decision whether or not to develop a particular defense is a tactical decision that is part of trial strategy. Such decisions are generally not second-guessed by courts [when reviewing a claim of ineffective assistance of counsel]." *State v. Lesane*, 137 N.C. App. 234, 246, 528 S.E.2d 37, 45 (citation omitted), *disc. review denied*, 352 N.C. 154, 544 S.E.2d 236 (2000); *see also State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001) ("Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear."), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). In the closing argument, defense counsel argued that the State had failed to prove beyond a reasonable doubt that defendant possessed the gun. In his statement to police, defendant denied possession or use of the gun during the altercation with Barrett. Defendant's denial of his pointing of any gun was inconsistent with the defenses of necessity or justification. Defendant's attorney made a tactical decision to present a theory of defense based upon defendant's own statements to police. As such, defense counsel's decision not to request jury instructions on these defenses cannot be ineffective assistance of counsel.

We have reviewed defendant's remaining assignments of error and determined that they are without merit. We hereby vacate defendant's conviction for possession of a firearm by a felon. We find no error in defendant's other convictions.

Vacated in part; No error in part.

Judges McGEE and CALABRIA concur.

CITY OF CONCORD, PLAINTIFF v. ALAN R. STAFFORD, AND WIFE KATHERINE L. STAFFORD, DEFENDANTS

No. COA04-1540

(Filed 6 September 2005)

1. Eminent Domain— traffic median—separation of lanes of travel—traffic regulation—police power

The trial court did not err in a condemnation case as a matter of law by granting partial summary judgment in favor of plaintiff city even though defendant property owners contend the construction of a median in front of their property was done for aesthetic rather than public safety purposes and was therefore an exercise of eminent domain rather than an exercise of the city's police power, because separation of lanes of travel is a valid traffic regulation and an exercise of a governmental agency's police power. Consequently, injury to a landowner's remaining property resulting from it is noncompensable.

2. Eminent Domain— traffic median—public safety purposes—aesthetic purposes—police power

The trial court did not err in a condemnation case as a matter of law by granting partial summary judgment in favor of plaintiff city even though defendant property owners contend a genuine issue of material fact was created by evidence that the construction of a median in front of defendants' property was done for aesthetic rather than public safety purposes, because: (1) even taking the statement in an affidavit from defendants' consultant as true that the median was not incorporated into the design primarily for safety, this bare statement fails to establish that the median did not serve a public safety purpose; and (2) the evidence presented by defendants in this case also does not support the contention that the median serves no public purpose, but instead supports the argument that public safety is not its primary purpose.

3. Eminent Domain— traffic median—police power—reasonable means

The means used to accomplish plaintiff city's legitimate police power to construct a traffic median in front of defendants' property were reasonable, because defendants still have free ingress and egress to their property by use of crossover inter-

sections located in the same block as their property and the property has not been deprived of all reasonable value by the exercise of this police power.

4. Eminent Domain— value of property—diminution caused by construction of median

The trial court did not err by entering final judgment in favor of defendants in the amount of $12,290.81 representing the value of that portion of defendants' property taken by plaintiff, because defendants were not entitled to compensation for the diminution of value of their property due to the construction of a median.

Appeal by defendants from a partial summary judgment entered 16 June 2003 by Judge Albert Diaz and an order entered 28 September 2004 by Judge Larry G. Ford in Cabarrus County Superior Court. Heard in the Court of Appeals 9 June 2005.

City of Concord by Deputy City Attorney Robert E. Cansler, for plaintiff-appellee.

Ferguson, Scarbrough & Hayes, P.A., by James E. Scarbrough, for defendants-appellants.

JACKSON, Judge.

Defendant appeals from an order granting partial summary judgment in favor of plaintiff entered on 16 June 2003 and entry of a final judgment by the Superior Court of Cabarrus County on 27 September 2004 in favor of defendants in the amount of $12,290.81.

Plaintiff, City of Concord, is a municipal corporation organized and existing under the laws of the State of North Carolina and is vested with the power of eminent domain pursuant to North Carolina General Statutes section 160A-240.1 (2003). Plaintiff commenced a condemnation proceeding against defendants on 14 November 2001 pursuant to its power of eminent domain seeking temporary and permanent rights of way for a road widening project. Plaintiff estimated the just compensation for the taking to be $6,675, which amount was deposited with the Clerk of Superior Court of Cabarrus County when the complaint was filed. Defendants answered the complaint, admitting all allegations except the value of the just compensation.

The road widening project for which the portion of defendants' property was condemned consisted of increasing the number of

travel lanes comprising Lake Concord Road on which defendants' property abutted. The purpose of this project was to accommodate the increased traffic flow safely along the roadway resulting from the expansion plan of the nearby regional hospital. The initial plan consisted of widening the roadway to two travel lanes in each direction with a center turn lane allowing access to each side of the roadway from either direction of travel. The configuration that ultimately was put in place, however, consisted of two travel lanes in each direction with a center median in front of defendants' property. This configuration prevented access to defendants' property from the southbound traffic lanes. Access to or from the southbound traffic lanes was available at crossover intersections located within the same block as defendants' property.

Defendants presented an appraisal that showed the reduction in value of their property due to the road widening project to be $103,890. The majority of this amount ($98,665) was attributable to the restriction of access to lanes in only one direction of travel by the median. The trial court entered partial summary judgment in favor of plaintiff. Defendants appealed to this Court and filed a petition for writ of certiorari. The petition for writ of certiorari was denied and the appeal dismissed as interlocutory. On remand, plaintiff and defendants stipulated to the evidence and requested an entry of final judgment. Final judgment was entered in favor of defendants in the amount of $12,290.81 on 27 September 2004. Defendants timely appealed.

Defendants argue: (1) the trial court erred as a matter of law in granting partial summary judgment to plaintiff; (2) the trial court erred in granting partial summary judgment to plaintiff as there were genuine issues of material fact; and (3) the trial court erred in entering judgment in favor of plaintiff (as to the amount of compensation). Plaintiff cross-assigns as error the trial court's failure to rule on its objection to the consideration of the affidavit of Jerry Newton based upon his lack of qualification as an expert.

[1] Defendants first contend that the trial court erred as a matter of law in granting partial summary judgment in favor of plaintiff as the construction of the median was done for aesthetic, rather than public safety, purposes and was therefore an exercise of eminent domain and not an exercise of the city's police power. Summary judgment is proper where there exists no genuine issue of material fact and a party is entitled to judgment as a matter of law. N.C. Gen. Stat.

§ 1A-1, Rule 56(c) (2003); *Raybon v. Kidd*, 147 N.C. App. 509, 512, 555 S.E.2d 656, 658 (2001).

" 'If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable.' " *Department of Transp. v. Harkey*, 308 N.C. 148, 153, 301 S.E.2d 64, 68 (1983) (quoting *Barnes v. North Carolina State Highway Com.*, 257 N.C. 507, 514, 126 S.E.2d 732, 739 (1962) (internal quotations and citations omitted)). The separation of lanes of travel is a valid traffic regulation and an exercise of a governmental agency's police power, consequently, injury to a landowner's remaining property resulting from it is non-compensable. *Barnes*, at 518, 126 S.E.2d at 740.

The facts in *Barnes* are substantially similar to those in the case *sub judice*. In *Barnes*, as here, a portion of the property owner's land was taken as part of a road improvement project which included physically dividing the existing roadway into separate lanes of travel. As in the instant case, the result of this separation was to leave the property owner with direct access from his remaining property only to the lanes of travel in one direction with access to or from the opposite lanes of travel available via crossovers located a short distance before and after his property. In *Barnes*, our Supreme Court discussed the reasoning of the Supreme Court of Washington that "[property owners] have no property right in the continuation or maintenance of the flow of traffic past their property. . . . Circuity of route, resulting from an exercise of the police power, is an incidental result of a lawful act. It is not the taking or damaging of a property right." *Id.* at 516, 126 S.E. 2d at 738-39 (quoting *Walker v. State*, 295 P.2d 238 (Wash. 1956)). Ultimately, the *Barnes* Court concluded that the property owner was not entitled to compensation for the diminution in value of his remaining property attributable to the presence of the median.

Defendants urge us to adopt the position taken by the South Carolina Supreme Court allowing for the recovery of diminution of value resulting from the construction of medians included in larger road projects. *South Carolina State Highway Dep't v. Wilson*, 175 S.E.2d 391 (S.C. 1970); *Hardin v. S.C. DOT*, 597 S.E.2d 814 (S.C. Ct. App. 2004). We see no significant distinction between the instant case and *Barnes* that would justify a departure from the precedents of the courts of North Carolina—precedents by which we are bound. Accordingly, we decline to adopt the position urged by defendants.

The trial court found no basis to distinguish the facts of the current case from the precedent existing under *Barnes* that separation of lanes of traffic is an exercise of the police power. As injury to property as a result of the exercise of the police power is not compensable, we hold that the trial court did not err as a matter of law in granting partial summary judgment in favor of plaintiff. This assignment of error is overruled.

[2] Defendants next argue that the trial court erred in granting partial summary judgment in favor of plaintiff as there were genuine issues of material fact. Defendants contend a genuine issue of material fact was created by evidence that the construction of the median was done for aesthetic, rather than public safety, purposes.

As discussed *supra*, an exercise of eminent domain requires just compensation while an exercise of a police power does not. An "ends-means" analysis is used to determine whether a governmental action is a legitimate exercise of the police power. *Eastern Appraisal Servs. v. State*, 118 N.C. App. 692, 696, 457 S.E.2d 312, 314 (1995) (citing *Responsible Citizens in Opposition to Flood Plain Ordinance v. Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983)). The first step of this analysis is to determine whether the goal of the action is within the police power and the second step is to determine whether the means of achieving this goal is reasonable. *Id.* If either step of the analysis fails, then a compensable taking results. *Id.* (citing *Weeks v. North Carolina Dep't of Natural Resources & Community Dev.*, 97 N.C. App. 215, 388 S.E.2d 228, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990)).

The scope of the police power generally includes the protection of the public health, safety, morals and general welfare. *Id.* The means used to accomplish a goal within the scope of the police power are unreasonable when they deprive an owner of all practical use of the property or they cause the property to lose all reasonable value. *Weeks*, 97 N.C. App. at 225, 388 S.E.2d at 234.

On appeal defendants argue that the median serves no public safety purpose and therefore fails to fall within the scope of the police power. In support of this argument defendants rely on the affidavit of their consultant Jerry Newton ("Newton"), who evaluated the median in question and its purpose. In his affidavit Newton states, without providing any basis for his opinion, that the "median was not incorporated into the design *primarily* for safety." (Emphasis

added). Even when taken as true, this bare statement fails to establish that the median did not serve a public safety purpose.

Our Supreme Court specifically has stated, "[a] median strip, completely separating traffic moving in opposite directions on [the roadway], and preventing left turns except at intersections, is an obvious safety device clearly calculated to reduce traffic hazards." *Gene's, Inc. v. Charlotte*, 259 N.C. 118, 121, 129 S.E.2d 889, 892 (1963). Defendants attempt to distinguish both *Barnes* and *Gene's* from the instant case by pointing out, as the Supreme Court did in *Gene's*, that in neither of those cases did the property owner allege that the median strip failed to serve a public safety purpose. Nonetheless, the evidence presented by defendants in the case *sub judice* does not support the contention that the median serves no public safety purpose either. Defendants' evidence supports only the argument that public safety is not its primary purpose. We find that the median in this case serves, at least in part, to promote public safety and therefore falls within the police power.

[3] We now turn to the question of whether the means used to accomplish this legitimate police power objective were reasonable. The evidence in the record establishes that defendants still have free ingress and egress to their property and the property has not been deprived of all reasonable value by the exercise of this police power. Accordingly, the means used to accomplish this exercise of the police power were reasonable.

We hold that there was no genuine issue of material fact whether the construction of the traffic median by plaintiff was a valid exercise of the police power. Consequently, the trial court did not err in granting partial summary judgment on that issue in favor of plaintiff. This assignment of error is overruled.

[4] Finally, defendants assign as error that the trial court erred in granting judgment in favor of plaintiff. It appears that defendants actually are attempting to assign error to the amount of the final judgment as the trial court did not grant judgment in favor of plaintiff. The final judgment was entered in favor of defendants in the amount of $12,290.81, an amount representing the value of that portion of defendants' property taken by plaintiff. As discussed *infra*, defendants were not entitled to compensation for the diminution of value resulting from the construction of the median. Accordingly, we find no error in the trial court's final entry of judgment.

As we have found no error in the trial court's denial of compensation to defendants for the diminution of value of their property due to the construction of the median, it is unnecessary to reach plaintiff's cross-assignment of error regarding the trial court's failure to rule on its objection to the consideration of Newton's affidavit.

Affirmed.

Judges HUDSON and STEELMAN concur.

DEBORAH FREEMAN, PLAINTIFF v. FOOD LION, LLC, BUDGET SERVICES, INC., AND FRANK'S FLOOR CARE, DEFENDANTS

No. COA04-1570

(Filed 6 September 2005)

1. Appeal and Error— preservation of issues—failure to raise issue in complaint

Although plaintiff contends the trial court erred in a premises liability case by entering summary judgment in favor of defendants when there was a genuine issue of material fact as to whether the person who injured her was an employee, agent, or independent contractor of defendants, this issue is dismissed because plaintiff failed to raise this issue in her complaint or to base her theory of recovery from defendants on vicarious liability.

2. Premises Liability— open and obvious danger—summary judgment—failure to allege agents

The trial court did not err in a premises liability case by granting summary judgment in favor of two of the defendants even though plaintiff contends the danger created by the high-speed buffing machine that caused her injury was not so open or obvious that as a matter of law defendants were relieved of their duty to protect visitors from or to warn visitors about such a dangerous condition, because: (1) these defendants did not own or operate the store in which plaintiff's injury occurred; and (2) plaintiff failed to allege in her complaint that either of these two defendants were agents of defendant grocery store.

3. Premises Liability— duty to keep premises safe and warn of hidden dangers—summary judgment—genuine issue of material fact

The trial court erred by granting summary judgment in favor of defendant grocery store in plaintiff's action to recover for injuries received when she was struck by a buffer machine in the store because: (1) defendant as owner and operator of the store owed a duty to plaintiff to keep its premises safe and to warn her of any hidden dangers on its premises; and (2) there was more than one inference that could be drawn from the facts presented on the issues of negligence and contributory negligence.

Appeal by plaintiff from orders entered 30 August 2004 and 31 August 2004 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 16 June 2005.

Washington & Pitts, P.L.L.C., by Marshall B. Pitts, Jr., for the plaintiff-appellant.

Stephenson & Stephenson, LLP, by Dena White Waters, for Budget Services, Inc. and Frank's Floor Care, defendants-appellees.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Julie L. Bell and Lori P. Jones, for Food Lion, LLC, defendant-appellee.

JACKSON, Judge.

On 22 December 2000, Deborah Freeman ("plaintiff") was a patron at Delhaize America, Inc. ("Food Lion") in Fayetteville, North Carolina. At approximately 11:30 p.m., plaintiff was walking in one of the store aisles when she was struck by a buffer machine being operated by an individual wearing headphones. The buffer machine ran over plaintiff's right foot entangling it in the machine and causing serious and permanent injury to it. There were orange cones located at the front of the grocery store that allegedly had been knocked down by John Robinson ("Robinson"), a person hired by Amron Janitorial to service the Food Lion store floors. However, there were no caution signs, warning signs, hazard signs, or orange cones on the aisle in which plaintiff was walking when the buffer machine ran over her foot. No store managers were on duty at the time of the accident. Plaintiff filled out an accident report form but received no copy of the report.

On 18 December 2003, plaintiff filed a complaint against (1) Food Lion, the owner and operator of the store in which she was injured; (2) Budget Services, who contracted with Food Lion to maintain the floors of the Food Lion store; (3) Frank's Floor Care, who contracted with Budget Services to maintain the floors of Food Lion; and (4) Amron Janitorial, who contracted with Budget Services to maintain the floors of Food Lion and who hired Robinson[1] to operate the buffer machine that subsequently injured plaintiff. Plaintiff sought to recover compensatory damages in excess of ten thousand dollars ($10,000.00) from each of defendants.

On 22 July 2004, defendant Food Lion moved for entry of summary judgment. On 16 August 2004, approximately three weeks later, defendants Budget Services and Frank's Floor Care also filed a joint motion for summary judgment. Defendants Food Lion, Budget Services, and Frank's Floor Care supported their motions for summary judgment with an affidavit executed by Robinson.

On 23 August 2004, the trial court heard arguments in support of the summary judgment motions in the instant case. On 26 August and 31 August 2004, the trial court entered two separate orders, one granting summary judgment in favor of Food Lion and the other granting summary judgment in favor of Budget Services and Frank's Floor Care. Plaintiff appeals from these two orders.

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Roumillat v. Simplistic Enter., Inc.*, 331 N.C. 57, 62, 414 S.E.2d 339, 342 (1992); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003).

The movant has the burden of showing that there are no triable issues that exist. *Id.* at 62-63, 414 S.E.2d at 341-42 (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985)); see also *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

> The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

1. Robinson was dismissed voluntarily from the case due to plaintiff's inability to effectuate service of process on him.

Roumillat, 331 N.C. at 63, 414 S.E.2d at 342 (citing *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974)). After the moving party satisfies its burden of proof, the nonmovant then must " 'produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.' " *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342 (quoting *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

It is well-established that upon examining whether a movant should be granted summary judgment, "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant." *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342 (citing *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427). While all inferences are drawn in favor of the nonmovant, however, "it is only after it becomes clear to the court that the facts are established or admitted, and the issue of negligence has been reduced to a mere question of law that courts should grant such extreme remedies." *Osborne v. Annie Penn Mem'l Hosp., Inc.* 95 N.C. App. 96, 99, 381 S.E.2d 794, 796 (1989) (citing *Kiser v. Snyder*, 17 N.C. App. 445, 194 S.E.2d 638, *cert. denied*, 283 N.C. 257, 195 S.E.2d 689 (1973)).

[1] Plaintiff contends the trial court erred by entering summary judgment in favor of defendants, Food Lion, Budget Services, and Frank's Floor Care because there existed genuine issues of material fact. Specifically, plaintiff asserts that there were genuine issues as to whether the person who injured her was an employee, agent, or independent contractor of defendants. Plaintiff alleges in her brief that Robinson should be considered an agent of defendants—not an independent contractor—and therefore defendants should be held vicariously liable for her injuries.

Generally, employers are not held vicariously liable for the negligent acts of an independent contractor. *Gordon v. Garner*, 127 N.C. App. 649, 658, 493 S.E.2d 58, 63 (1997), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 86 (1998). However, plaintiff failed to raise the issue of whether Robinson was an agent, employee, or independent contractor of defendants in her complaint or base her theory of recovery from Food Lion, Budget Services, or Frank's Floor Care on vicarious liability. Therefore, we conclude that whether or not plaintiff can hold Food Lion, Budget Services, or Frank's Floor Care vicariously liable is not an issue properly before this Court. *See Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("the law does not permit parties to swap horses between courts in order to get a better mount

in . . . [this Court]"); *Ellis-Don Const., Inc., v. HNTB Corp.*, 169 N.C. App. 630, 632, 610 S.E.2d 293, 295 (2005) ("We limit our review to those arguments asserted in the pleadings before the trial court and properly preserved for review."); N.C. Gen. Stat. § 1A-1, Rule 12(b) (6) (2004). Accordingly, this assignment of error is overruled.

[2] Plaintiff next asserts that the trial court erred by granting summary judgment in favor of defendants Food Lion, Budget Services, and Frank's Floor Care because the danger created by the high-speed buffing machine was not so open or obvious that, as a matter of law, defendants were relieved of their duty to protect visitors from, and to warn visitors about, such a dangerous condition.

It is not this Court's intention to place on owners and occupiers of land an "unwarranted burden[] in maintaining their premises. Rather, we impose upon them only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). Therefore, failure by "[a] store . . . to exercise ordinary care to keep its premises in a reasonably safe condition and to warn of any hidden dangers of which it knew or should have known" constitutes negligence. *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 137, 539 S.E.2d 331, 333 (2000) (citing *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990); *Roumillat*, 331 N.C. 57 at 64, 414 S.E.2d at 342-43)). There is a presumption, however, that a reasonable person will be "vigilant in the avoidance of injury" when faced with a "known and obvious danger." *Id.* (quoting *Roumillat*, 331 N.C. at 66, 414 S.E.2d at 344); *see Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162-63, 516 S.E.2d 643, 646-47 (1999) ("As a general proposition, there is no duty to protect a lawful visitor against dangers which are either known to him or so obvious and apparent that they reasonably may be expected to be discovered.")[2]

In the instant case, plaintiff contends that "Food Lion, its agents and anyone performing a service contract at Food Lion were under a duty to exercise reasonable care to provide for [plaintiff's] safety while she was lawfully on its premises.

Because neither Budget Services nor Frank's Floor Care owned nor operated the store in which plaintiff's injury occurred and be-

2. "Although this 'no duty' rule for obvious dangers bears a strong resemblance to the doctrine of contributory negligence, . . . it in fact negates the defendant's duty of care and eliminates any occasion for reliance on the defense of contributory negligence." *Lorinovich*, 134 N.C. App. at 163 n.1, 516 S.E.2d at 647 (internal quotation omitted) (internal citation omitted).

cause plaintiff has failed to allege in her complaint that Budget Services or Frank's Floor Care were agents of Food Lion, we hold that they had no duty to plaintiff and that, therefore, they may not be held liable under a theory of premises liability. Accordingly, we proceed forward addressing the issue of whether the trial court erred in granting summary judgment in favor of only defendant Food Lion on the issue of premises liability.

[3] In the instant case, Food Lion, as owner and operator of the store in which plaintiff was injured, owed a duty to plaintiff to keep their premises safe and to warn her of any hidden dangers on their premises. Based on the "pleadings, depositions, answers to interrogatories, and admissions on file" there was more than one inference that could be drawn from the facts presented. *Roumillat*, 331 N.C. at 57, 414 S.E.2d 339. These genuine issues of material fact should have been submitted for resolution by the jury—not this Court, *id.* at 139, 539 S.E.2d at 334—such as whether (1) Food Lion properly warned plaintiff about the cleaning service buffing the floor nearby; (2) Food Lion failed to use ordinary care in providing a safe premise for plaintiff to shop; (3) plaintiff contributed to her own injury by failing to exercise the use of ordinary care; (4) the buffer machine presented an obvious danger to plaintiff; and (5) a reasonably prudent person exercising ordinary care would have, and should have, noticed the buffer prior to the collision and avoided the dangers of such machinery. When considered in the light most favorable to plaintiff, we decline to grant defendant Food Lion in this case an extreme or drastic remedy such as summary judgment.

Accordingly, there were genuine issues of material fact pertaining to defendant Food Lion's negligence and plaintiff's duty to exercise ordinary care and the trial court erred in precluding plaintiff and defendant from submitting those issues to the jury. Therefore, we reverse and remand this issue to the trial court for additional findings consistent with this opinion.

Affirmed in part; Reversed and remanded in part.

Judges HUDSON and STEELMAN concur.

CHARTER MEDICAL, LTD., PLAINTIFF v. ZIGMED, INC., DEFENDANT

No. COA04-1337

(Filed 6 September 2005)

Jurisdiction— personal—minimum contacts

Defendant New Jersey corporation did not have sufficient minimum contacts with North Carolina to permit a court in this state to exercise personal jurisdiction over defendant in plaintiff Delaware corporation's action arising from plaintiff's purchase of a blood bag manufacturing machine developed and manufactured by defendant in New Jersey and shipped to plaintiff's new office in North Carolina because: (1) the contract was formed in New Jersey between two out-of-state corporations and only after invitation from plaintiff did defendant acquiesce to shipping a machine to North Carolina instead of to New Jersey as designated in the contract; (2) there was no attempt by defendant to benefit from the laws of North Carolina by entering the market here; and (3) although part of plaintiff's alleged damages arise from the incomplete installation by defendant, an action that occurred in North Carolina, plaintiff is claiming that the machine was defective when shipped and not upon installation, and thus, the substantial portion of the cause of action covers actions performed completely in New Jersey.

Appeal by plaintiff from order entered 10 August 2004 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 18 May 2005.

Norman L. Sloan for plaintiff-appellant.

Randolph M. James for defendant-appellee.

ELMORE, Judge.

This appeal arises from the trial court's order dismissing plaintiff's complaint for failure to appropriately allege that North Carolina had personal jurisdiction over defendant. Plaintiff, a Delaware corporation with offices in New Jersey and North Carolina, entered into a purchase order agreement for a blood bag manufacturing machine with defendant, a New Jersey corporation with offices solely in that state. When the machine was delivered to its North Carolina location, plaintiff alleges it was not operational and is seeking damages that

include, among other things, costs associated with getting the machine in working order.

Defendant filed a motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2), lack of personal jurisdiction. The trial court heard defendant's motion, and at the request of plaintiff, issued its decision in a written order containing findings of fact and conclusions of law. The trial court determined that defendant did not have sufficient minimum contacts with North Carolina such that subjecting defendant to suit in this state would offend defendant's due process rights. Plaintiff appealed.

There is no dispute that plaintiff is a Delaware corporation with a new office in North Carolina and defendant is a New Jersey corporation. Although not disputed, it is not entirely clear which party initiated the contact; but, pursuant to previous negotiations, defendant sent a proposal to plaintiff's Winston-Salem, North Carolina office quoting pricing, design, manufacturing, and shipment of a blood bag manufacturing machine. The price included in the proposal was in part based on installing the machine in plaintiff's New Jersey facility. Plaintiff, in response, prepared a purchase order that modified the agreement but incorporated the essential elements of defendant's proposal including the delivery and installation point in New Jersey. Plaintiff's purchase order contains a clause that stated: "[t]his Purchase Order, when accepted, shall be a contract made in the state shown in Charter's address on the face of this Purchase Order and governed by the laws of that State." Defendant accepted the purchase order and began manufacturing the machine. The trial court found that, pursuant to the purchase order, plaintiff "paid partially for the . . . machine by sending checks drawn on a Fleet Bank Hartford Connecticut account showing both a Winston-Salem, North Carolina address for plaintiff and a Hartford Connecticut address for plaintiff." At some point, plaintiff asked defendant to ship the machine to its North Carolina facility instead of its New Jersey facility. Defendant, without additional compensation in the contract and without plaintiff's written modification of the purchase order, agreed to the new shipping and installation address in North Carolina. Then, after delivery of the machine, defendant sent four of its technicians to North Carolina for eight days to install the machine.

The trial court concluded that:

> Defendant sending four (4) technicians to North Carolina for eight (8) days to install the . . . machine does not constitute suffi-

> cient minimum contacts to subject defendant to suit in North Carolina when the substantial portion of the work was performed in New Jersey and the parties agreed the machine was to be delivered in New Jersey with defendant gratuitously agreeing to change the delivery location from New Jersey to North Carolina at plaintiff's expense.

Based on the evidence in the record supporting the trial court's findings of fact, we agree.

When determining issues of personal jurisdiction, the trial court is to engage in a two-step inquiry: first, determine whether "a basis for jurisdiction exist[s] under the North Carolina 'long-arm' statute, N.C. Gen. Stat. Sec. 1-75.4 (1983); and [second,] if so, will the exercise of this jurisdiction over the defendant comport with constitutional standards of due process[.]" *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 283, 350 S.E.2d 111, 113 (1986). On appeal from a trial court's order determining personal jurisdiction, our review is limited to "whether the findings 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). Notably, despite requesting findings of fact, plaintiff has not excepted to any of the trial court's findings. And while we could end our inquiry here, *see, e.g. Saxon v. Smith*, 125 N.C. App. 163, 169, 479 S.E.2d 788, 792 (1997) (absent exception to findings in order regarding personal jurisdiction, the findings are deemed correct), we will nonetheless review the trial court's decision in order to determine whether there was an error of law.

Here, the trial court determined that jurisdiction under the long-arm statute was satisfied due to the fact that defendant shipped its product to North Carolina via common carrier. *See* N.C. Gen. Stat. § 1-75.4(5)(e) (2003) ("A court of this State . . . has jurisdiction over a person served . . . [i]n any action which: [r]elates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred."). A large portion of plaintiff's brief is dedicated to arguing the applicability of our long-arm statute; however, defendant concedes in his brief that because the statute is to be read broadly, and there is apparent applicability, that "the inquiry turns to whether the defendant has the minimum contact with North Carolina necessary to meet the requirements of due process." Because defendant concedes the long-arm statute is applicable, we

will not address it, but instead consider only the second step of personal jurisdiction analysis—due process.

"[D]ue process prohibits our state courts from exercising [personal] jurisdiction unless the defendant has had certain 'minimum contacts' with the forum state such that 'traditional notions of fair play and substantial justice' are not offended by maintenance of the suit." *Cameron-Brown*, 83 N.C. App. at 284, 350 S.E.2d at 114 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945)).

> Where the action arises out of defendant's contacts with the forum state, the issue is one of 'specific' jurisdiction. . . . To establish specific jurisdiction, the court analyzes the relation among the defendant, cause of action, and forum state. . . . Although a contractual relationship between a North Carolina resident and an out-of-state party does not automatically establish the necessary minimum contacts with this state, a single contract may be sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this state. . . . . In determining whether a single contract may serve as a sufficient basis for the exercise of *in personam* jurisdiction, 'it is essential that there be some act by which defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.' . . . For only then will the non-resident have acted in such a way such that 'he can reasonably anticipate being haled into court there.' . . . Otherwise, exercise of *in personam* jurisdiction over a nonresident would violate standards of 'fair-play and substantial justice.'

CFA Medical, Inc. v. Burkhalter, 95 N.C. App. 391, 394-95, 383 S.E.2d 214, 216 (1989) (internal quotations and citations omitted). Although a determination of minimum contacts may vary with each case, there are several factors a trial court typically evaluates:

> (1) quantity of the contacts between the defendant and the forum state, (2) quality and nature of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest in the forum state, and (5) convenience of the parties.

Cameron-Brown, 83 N.C. App. at 284, 350 S.E.2d at 114.

Here, the trial court found that defendant had no previous contacts with North Carolina save for this contract. Plaintiff, citing to

Collector Cars of Nags Head, Inc. v. G.C.S. Electronics, 82 N.C. App. 579, 347 S.E.2d 74 (1986), argues that one contract is enough for minimum contacts. It is true that a single contract with a "substantial connection" to North Carolina can satisfy due process, *Id.* at 582, 347 S.E.2d at 76; however, "the mere act of entering a contract with a forum resident does not provide the necessary contacts when all elements of the defendant's performance are to occur outside the forum." *Cameron-Brown*, 83 N.C. App. at 286, 350 S.E.2d at 115 (citation omitted). Our decision in *Collector Cars* relied on *W. Conway Owings & Assoc. v. Karman, Inc.*, 75 N.C. App. 559, 331 S.E.2d 279 (1985). In *Collecter Cars* we stated:

> We found minimum contacts in *Conway Owings* under the following circumstances: the North Carolina plaintiff purchased goods from the defendant in Colorado, as it had on one other occasion; the contract expressly stated it was made pursuant to Colorado law; the goods were shipped to North Carolina and then immediately sent to Germany without being opened; and the Colorado corporation had no other contact with North Carolina. We found in *Conway Owings*, as we do in the present case, that the demands of due process were satisfied since the suit was based on a contract with substantial connection to North Carolina.
>
> G.C.S. purposely entered into a contract with Collector Cars promising to ship its product to North Carolina through a carrier. Collector Cars' president called G.C.S. from North Carolina to make the offer. G.C.S. mailed the contract to North Carolina, accepted payment mailed from North Carolina, and mailed a confirmation of the contract to North Carolina. These acts manifest a willingness by G.C.S. to conduct business in North Carolina.

Collector Cars, 82 N.C. App. at 582, 347 S.E.2d at 76.

In both *Collector Cars* and *Conway Owings*, the defendants did more to avail themselves of North Carolina than did defendant here: mainly, they solicited business from North Carolina. And "in cases of contract disputes, 'the touchstone in ascertaining the strength of the connection between the cause of action and the defendant's contacts is whether the cause of action arises out of attempts by the defendant to benefit from the laws of the forum state by entering the market in the forum state.' " *Cameron-Brown*, 83 N.C. App. at 287, 350 S.E.2d at 115 (quoting *Phoenix America Corp. v. Brissy*, 46 N.C. App. 527, 532,

265 S.E.2d 476, 480 (1980)). This contract was formed in New Jersey between two out-of-state corporations. Only after invitation from plaintiff did defendant acquiesce to shipping a machine to North Carolina. From the record before us, there is no attempt by defendant to benefit from the laws of North Carolina by entering the market here. Although part of plaintiff's alleged damages arise from the incomplete installation by defendant—an action that occurred in North Carolina—plaintiff is claiming that the machine was defective when shipped, not upon installation. Thus, the substantial portion of the cause of action covers actions performed completely in New Jersey.

Here, plaintiff availed itself of the willingness of defendant to alter the shipping and installation point in a contract. Defendant, a New Jersey company, did not purposely initiate any contact with North Carolina, but instead formed a contract in New Jersey, for a product developed and manufactured in New Jersey, and designated to be shipped within New Jersey. We affirm the trial court's order dismissing plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2).

Affirmed.

Judges McGEE and CALABRIA concur.

LEE ANN WHITINGS, Plaintiff v. WOLFSON CASING CORP., Defendant

No. COA04-1242

(Filed 6 September 2005)

Employers and Employees— wrongful discharge—failure to assert legally protected activity

The trial court did not err by dismissing pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's claim of wrongful discharge in violation of public policy, because: (1) it is the filing of a workers' compensation claim that triggers the statutory and common law protection against employer retaliation in violation of public policy instead of asking an employer to pay for a doctor's visit or other medical services; and (2) plaintiff has not alleged that she filed a claim seeking workers' compensation benefits in connec-

tion with her injury at any time either prior or subsequent to her discharge, and thus, failed to show that she was fired for engaging in a legally protected activity.

Appeal by plaintiff from order entered 30 June 2004 by Judge William C. Gore, Jr. in Bladen County Superior Court. Heard in the Court of Appeals 11 May 2005.

Faith Herndon for plaintiff-appellant.

Ferris & McCall, PC, by Craig T. McCall, and Frank & Associates, PC, by Saul D. Zabell, for defendant-appellee.

ELMORE, Judge.

Lee Ann Whitings (plaintiff) appeals an order of the trial court dismissing her complaint. Because this Court's review of an order granting a Rule 12(b)(6) motion to dismiss requires that we accept the facts alleged in the pleadings as true, we recite the facts stated in plaintiff's complaint. Plaintiff was hired by Wolfson Casing Corporation (defendant) as a shift supervisor in August of 2001. Plaintiff was responsible for supervising employees who were pullers and machine operators. In March of 2002 David McDowell (McDowell), the manager of plaintiff's facility, told plaintiff that she needed to demonstrate her ability to operate the machines being used by her shift employees. McDowell assigned plaintiff to operate a finishing machine, rather than perform her routine duties of supervising shift employees. On or about 13 March 2002, plaintiff experienced pain and swelling in her hands while operating the machine. On 16 March 2002 plaintiff told McDowell that her hands were hurting and asked that defendant pay for her to see the company doctor. McDowell directed her to get back on the machine, but plaintiff refused to do so. Thereafter, McDowell suspended plaintiff for three working days without pay because she refused to continue operating the finishing machine.

On 18 March 2002 an employee of defendant authorized plaintiff to see a doctor for her hand and arm problems. Plaintiff was evaluated by Dr. Laura Matthews-Thompson, and defendant paid for this doctor's visit. Dr. Matthews-Thompson diagnosed plaintiff with work-related tendinitis and wrote a note stating that plaintiff could not work on the finishing machine. On 21 March 2002, when plaintiff was scheduled to return to work following her suspension, McDowell called plaintiff at home and told her to resume operating the finishing

machine. When plaintiff declined to continue operating the machine, McDowell informed plaintiff that she was terminated.

On 18 April 2002 plaintiff filed an employment discrimination charge with the North Carolina Department of Labor (NCDOL). The NCDOL issued plaintiff a right-to-sue letter on 6 March 2003. On 10 December 2003 plaintiff filed a complaint in Bladen County Superior Court. Plaintiff alleged two causes of action: (1) violation of N.C. Gen. Stat. § 95-240 *et seq.*, the North Carolina Retaliatory Employment Discrimination Act (REDA); and (2) wrongful discharge in violation of North Carolina public policy protecting employees against retaliatory discharge for asserting their legal rights under Chapter 97 of the General Statutes, the Workers' Compensation Act. Defendant attempted to remove the action to federal court, but the U.S. District Court for the Eastern District of North Carolina ultimately determined that removal was improper and remanded the action to Bladen County Superior Court.

On 24 May 2004 defendant filed a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendant asserted that plaintiff's statutory claim under REDA was time-barred because plaintiff failed to file her complaint within 90 days of the date that the right-to-sue letter was issued. *See* N.C. Gen. Stat. § 95-243 (2003) ("A civil action under this section shall be commenced by an employee within 90 days of the date upon which the right-to-sue letter was issued . . . ."). Judge William C. Gore, Jr. conducted a hearing on the motion on 1 June 2004. After hearing oral arguments and reviewing the materials submitted by the parties, the trial court found that plaintiff's claim under REDA was time-barred. The court also found that plaintiff failed to plead the elements of the common law claim of wrongful discharge in violation of North Carolina public policy. Accordingly, the court ordered that plaintiff's complaint be dismissed in its entirety. From this order entered 30 June 2004, plaintiff appeals.

Plaintiff does not challenge the court's dismissal of her claim under REDA. Plaintiff's sole argument on appeal is that the trial court erred in dismissing her claim of wrongful discharge in violation of public policy. The trial court found that plaintiff's complaint alleging wrongful discharge in violation of public policy failed to state a claim upon which relief can be granted for two reasons: (1) plaintiff refused to return to work when requested by defendant; and (2) plaintiff's employment was not terminated by defendant for filing a workers'

compensation claim. We now consider whether either of these grounds will uphold the trial court's dismissal of plaintiff's claim.

In North Carolina, the employer-employee relationship is governed by the at-will employment doctrine, which states that "in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997), *reh'g denied*, 347 N.C. 586, 502 S.E.2d 594 (1998). However, our Supreme Court has recognized a cause of action for wrongful discharge in violation of the public policy of North Carolina. *See Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989).

> There is no specific list of what actions constitute a violation of public policy. . . . However, wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employer's request, . . . (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy[.]

Ridenhour v. IBM Corp., 132 N.C. App. 563, 568-69, 512 S.E.2d 774, 778 (internal citations omitted), *disc. review denied*, 350 N.C. 595, 537 S.E.2d 481 (1999).

This Court has stated that "[p]ursuing one's rights under the Workers' Compensation Act, G.S. §§ 97-1 *et seq.* (2003), is a legally protected activity. . . . Therefore, a plaintiff may state a claim for wrongful discharge in violation of public policy where he or she alleges the dismissal resulted from an assertion of rights under the Workers' Compensation Act." *Brackett v. SGL Carbon Corp.*, 158 N.C. App. 252, 259-60, 580 S.E.2d 757, 762 (2003). The plaintiff has the burden of pleading that the dismissal was causally related to the protected activity. *See Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003).

Plaintiff argues that she has met her burden of alleging that her termination was causally related to a protected activity. In her complaint, plaintiff alleged that "Defendant refused to pay Plaintiff any disability benefits arising from her lost time from work when she could no longer operate the finishing machine, including any disability benefits that might have been due Plaintiff under the North

Carolina Workers' Compensation Act, N.C. Gen. Stat. § 97-1 et seq." Plaintiff further alleged that "Defendant's conduct in discharging Plaintiff constitutes a wrongful discharge in violation of North Carolina public policy protecting individuals against retaliatory discharge for asserting their legal rights under Chapter 97 of the General Statutes of North Carolina[.]" Essentially, plaintiff contends that she engaged in a protected activity when she requested that her employer pay for a medical evaluation of a work-related injury. We cannot agree.

The public policy exception to the at-will employment doctrine is confined to the express statements contained within our General Statutes or our Constitution. *See Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 320-21, 551 S.E.2d 179, 184, *aff'd per curiam*, 354 N.C. 568, 557 S.E.2d 528 (2001). Both the Workers' Compensation Act and the Retaliatory Employment Discrimination Act (REDA) are sources of policy establishing an employee's legally protected right of pursuing a workers' compensation claim. An action pursuant to REDA is a supplemental remedy to the common law claim of wrongful discharge. *See Salter*, 155 N.C. App. at 695-96, 575 S.E.2d at 53. This Court has repeatedly stated that REDA prohibits discrimination against an employee who has *filed* a workers' compensation claim. *See, e.g., Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 186, 594 S.E.2d 809, 811 (2004); *Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 510, 593 S.E.2d 808, 812, *disc. review denied*, 358 N.C. 739, 603 S.E.2d 126 (2004); *Salter*, 155 N.C. App. at 690, at 575 S.E.2d at 50; *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 139 N.C. App. 676, 681, 535 S.E.2d 357, 361 (2000), *disc. review improvidently allowed*, 357 N.C. 570, 597 S.E.2d 670 (2003). In enacting REDA and its predecessor statute, N.C. Gen. Stat. § 97-6.1, the General Assembly intended to prevent employer retaliation from having a chilling effect upon an employee's exercise of his or her statutory rights under the Workers' Compensation Act. *See Conklin v. Carolina Narrow Fabrics Co.*, 113 N.C. App. 542, 543-44, 439 S.E.2d 239, 240 (1994). Thus, the exercise of one's rights under the Act is the legally protected activity. Asking an employer to pay for a doctor's visit or other medical services is merely an abstract assertion and not an assertion of rights under the Act. Rather, it is the filing of a workers' compensation claim that triggers the statutory and common law protection against employer retaliation in violation of public policy.

Plaintiff has not alleged that she filed a claim seeking workers' compensation benefits in connection with her injury. We conclude

that by failing to allege the filing of a workers' compensation claim *at any time* either prior or subsequent to her discharge, plaintiff has failed to plead that she engaged in a legally protected activity. *Cf. Tarrant*, 163 N.C. App. at 509, 593 S.E.2d at 812 (reversing trial court's dismissal of common law wrongful discharge claim where "[p]laintiff's allegations of the events regarding her hiring and firing tend to show that she was fired because she filed a workers' compensation claim"). As plaintiff has not alleged that she was fired for engaging in a legally protected activity, she has failed to plead all elements of a claim for wrongful discharge in violation of public policy. We, therefore, affirm the order of the trial court below.

Affirmed.

Judges McGEE and CALABRIA concur.

STEPHEN GORSUCH, PETITIONER v. LESLEY ARLYS DEES, AND A.B.D., A MINOR CHILD, RESPONDENTS

No. COA04-1413

(Filed 6 September 2005)

1. Termination of Parental Rights— attempt to legitimize child after parental rights terminated

The trial court did not err by concluding that petitioner had no standing or right under the law to legitimate a minor child after petitioner's parental rights as to the child had been terminated several years prior, because: (1) petitioner's rights and responsibilities as a biological, putative, or any other category of father ceased upon the termination of his parental rights which completely and permanently terminated all rights and obligations of the parent to the juvenile, N.C.G.S. § 7B-1112; and (2) petitioner's argument that the "permanent" termination of his parental rights could allow for modification and restoration is without merit.

2. Appeal and Error— preservation of issues—failure to cite authority

Although petitioner contends the Assistant Clerk of Court erred and abused her discretion in setting aside her prior legitimation order, this assignment of error is dismissed, because: (1)

petitioner failed to cite any authority for this argument as required by N.C. R. App. P. 28(b)(6) and merely "reasserts Argument I;" and (2) petitioner's first argument was found to be without merit and likewise this argument is without merit.

Appeal by Petitioner from orders entered 18 December 2003 and 26 April 2004 by Lynne D. Murray, Assistant Clerk of Superior Court, Wake County, and Judge Evelyn W. Hill in Superior Court, Wake County. Heard in the Court of Appeals 13 June 2005.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, for petitioner-appellant.

Sally H. Scherer, for respondent-appellees.

WYNN, Judge.

"An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile . . . ." N.C. Gen. Stat. § 7B-1112 (2004). Petitioner Stephen Gorsuch argues that, despite having had his parental rights as to A.B.D. terminated, he nevertheless had standing to legitimate the minor child. Because a prior termination order completely and permanently terminates a parent's rights and responsibilities, we affirm the trial court's ruling that Petitioner had no standing to legitimate A.B.D.

Petitioner's parental rights were terminated as to A.B.D on 16 November 1999 under an order stating: "The biological father, Stephen D. Gorsuch, has willfully abandoned the minor child . . . in that he has had only minimal contact with the minor child since her birth and he has withheld his love, his care, his affection and has neglected and refused to perform his natural and legal obligations of parental care and support of the minor child[;]" and that "[i]t is in the minor child's best interests that all parental rights of Stephen D. Gorsuch, the biological father of the minor child, A.B.D., be terminated."

Petitioner did not appeal from the order of termination.[1] Instead, after his parental rights had been terminated, Petitioner brought an

1. Petitioner moved to set aside the termination order on 8 December 2003. From the denial of that motion on 16 February 2004, Petitioner appealed to this Court. The opinion in that matter is being filed simultaneously with this opinion. *In re A.B.D.* —— N.C. App. ——, —— S.E.2d —— (filed 6 September 2005). Because we hold in *In re A.B.D* that the termination order was void, the issue on appeal here would appear to be moot. Nevertheless, as this appeal presents a novel issue of law, we address it.

action for custody and support of the minor child. On 13 October 2000, Petitioner and Respondent (natural mother of A.B.D.) entered into a Consent Order For Custody And Child Support "effectuating their agreements[.]" In the consent order, the parties agreed that "it is in the best interest of the minor child that she remain in the custody of [Respondent] but that [Petitioner] have regular visitation and play an active role in the child's life."

On 13 November 2002, Petitioner brought this action to legitimate A.B.D. The Assistant Clerk of Court entered a legitimation order on 5 February 2003, ordering "that said child is legitimated" and "that North Carolina Vital Records amend birth certificate to reflect father's name . . . ." However, on 18 December 2003, the Assistant Clerk of Court set aside the legitimation order, stating that the legitimation order "was improvidently granted because of the lack of information regarding the termination of parental rights, and the order would not have been issued or granted had the undersigned known of the termination." Petitioner appealed to Superior Court, Wake County, which, on 26 April 2004 issued an order setting aside the legitimation order. The trial court found that "[a]s a result of the termination, Petitioner has no standing or right to bring an action to legitimate A.B.D., and the Clerk correctly set aside the legitimation order which she had entered before knowing about the termination of Petitioner's parental rights."

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[1] On appeal to this Court, Petitioner first argues that the trial court erred in concluding that Petitioner had no standing or right under the law to legitimate A.B.D. because his parental rights as to the child had been terminated.

"Preliminarily, we note the issue of whether [a party] has standing is a question of law. Accordingly, we conduct our review *de novo*." *Lee Ray Bergman Real Estate Rentals v. N.C. Fair Hous. Ctr.*, 153 N.C. App. 176, 179, 568 S.E.2d 883, 885 (2002) (citations omitted).

Section 7B-1112 of our General Statutes, delineating the purpose of a termination of parental rights, states:

> ***An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile*** and of the juvenile to the parent arising from the parental relationship, except that the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued.

N.C. Gen. Stat. § 7B-1112 (emphasis added); *see also Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 267 (2003) ("With the exception of a child's right to inherit from a parent, a termination of parental rights order completely and permanently severs all rights and obligations of the parent to the child and the child to the parent." (citation omitted)); *In re Montgomery*, 77 N.C. App. 709, 712, 336 S.E.2d 136, 138 (1985) (Where parents' parental rights were terminated, "they no longer have any constitutionally protected interest in the [] minor children.").

In stark contrast, section 49-11 of our General Statutes, delineating the effects of legitimation, makes plain that the purpose of legitimation is to establish a parent's rights and responsibilities:

> ***The effect of legitimation under G.S. 49-10 shall be to impose upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue***, and to the same extent as if said child had been born in wedlock, and to entitle such child by succession, inheritance or distribution, to take real and personal property by, through, and from his or her father and mother as if such child had been born in lawful wedlock.

N.C. Gen. Stat. § 49-11 (2004) (emphasis added).

While we have found no North Carolina precedent addressing the issue in this case, we find *Krauss v. Wayne County Dep't of Soc. Servs.*, 347 N.C. 371, 493 S.E.2d 428 (1997), to be instructive. In *Krauss*, a father whose parental rights had been terminated filed an action seeking custody as an "other person" under N.C. Gen. Stat. § 50-13.1(a) (1995). The trial court dismissed the complaint, this Court affirmed, and our Supreme Court also affirmed, holding that the plaintiff lacked standing, even as an "other person," to seek custody. *Id.* at 375, 493 S.E.2d at 431. The termination order divested the father of any right to seek/re-obtain custody. *Id.*

Here, Petitioner sought to legitimate a child as to whom his parental rights had been terminated several years prior to his legitimation action. While Petitioner may be correct that he "is the one and only person in the world who could possibly be the 'putative father' of A.B.D.," his rights and responsibilities as a biological, putative, or any other category of father ceased upon the termination of his parental rights, which "completely and permanently terminate[d] all rights and obligations of the parent to the juvenile . . . ." N.C. Gen. Stat. § 7B-1112.

We find unconvincing Petitioner's argument that "permanent" as used in North Carolina General Statutes section 7B-1112 should be construed as temporary and modifiable to be without merit. "Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (quotation omitted). Dictionaries may be used to determine the plain meaning of language. *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). Permanent means "continuing or enduring (as in the same state, status, place) without fundamental or marked change; not subject to fluctuation or alteration[.]" *Webster's Third New International Dictionary* 1683 (1971). We find Petitioner's argument that the "permanent" termination of his parental rights could allow for modification and restoration to be without merit.

In sum, we find Petitioner's argument that the trial court erred in concluding that Petitioner had no standing or right under the law to legitimate A.B.D. because his parental rights had been terminated to be without merit.

[2] Petitioner next argues that the Assistant Clerk of Court erred and abused her discretion in setting aside her prior legitimation order. In violation of Appellate Rule of Procedure 28(b)(6), Petitioner fails to cite any authority for this argument and merely "reasserts Argument I." N.C. R. App. P. 28(b)(6). Further, since we found Petitioner's first argument to be without merit, this argument is likewise without merit.

Affirmed.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. CLARENCE OCTETREE

No. COA04-1313

(Filed 6 September 2005)

False Pretense— misdemeanor failure to work after being paid—motion to dismiss—sufficiency of evidence

The trial court did not err by failing to dismiss the charge of misdemeanor failure to work after being paid at the close of the State's evidence, because: (1) the evidence presented a question for the jury to resolve when the alleged victim testified that he gave defendant $100 to buy supplies for a task defendant had agreed to perform and defendant testified that he never received the $100 but refused to do the work because he had not been fully paid by the alleged victim for a previous job; and (2) even though the $100 was intended for the purchase of materials, the State produced substantial evidence under N.C.G.S. § 14-104 that defendant obtained an advance of money, provisions, goods, wares or merchandise from the alleged victim on the false promise of completing the work.

Appeal by defendant from judgment entered 12 May 2004 by Judge C. Philip Ginn in Henderson County Superior Court. Heard in the Court of Appeals 17 August 2005.

Attorney General Roy Cooper, by Assistant Attorney General Spurgeon Fields, III, for the State.

William D. Auman, for defendant-appellant.

TYSON, Judge.

Clarence Octetree ("defendant") appeals from judgment entered after a jury found him to be guilty of misdemeanor failure to work after being paid. We find no error.

I. Background

The State's evidence tended to show during late July 2003 William Noonan ("Noonan") hired defendant to remove brush and trees from his property over a two day period. Noonan paid defendant for his work at the end of both days. Noonan was initially satisfied with defendant's work and asked him to replace the wooden floor of Noonan's backyard shed the following day. Defendant agreed to per-

form the work and told Noonan that he would procure the plywood required for the repairs. Noonan gave defendant $100.00 to purchase the plywood. Defendant never returned to replace the wooden floor in Noonan's shed and failed to refund Noonan's money.

At trial, defendant testified that he did not receive $100.00 from Noonan. Defendant claimed Noonan still owed him $1,200.00 for previous work he had done. At the close of the State's evidence, defendant moved to dismiss the charge due to insufficient evidence concerning defendant's intent to defraud. The trial court denied defendant's motion.

On 12 May 2004, a jury found defendant to be guilty of misdemeanor failure to work after being paid. Defendant was sentenced to sixty days of imprisonment. The sentence was partially suspended for thirty-six months and defendant was placed on supervisory probation and required to serve five days in jail. Defendant appeals.

II. Issue

Defendant contends the trial court erred by failing to dismiss the charge at the close of the State's evidence due to insufficiency of the evidence.

III. Standard of Review

"To survive a motion to dismiss, the State must offer substantial evidence of each essential element of the offense and substantial evidence that defendant is the perpetrator." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citation omitted). Substantial evidence is evidence that is "existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citation omitted). "Ultimately, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *Lee*, 348 N.C. at 488, 501 S.E.2d at 343 (citation omitted).

IV. Misdemeanor Failure to Work After Being Paid

Defendant was charged with misdemeanor failure to work after being paid under N.C. Gen. Stat. § 14-104.

> If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation upon

> and by color of any promise or agreement that the person making the same will begin any work or labor of any description for such person or corporation from whom the advances are obtained, and the person making the promise or agreement shall willfully fail, without a lawful excuse, to commence or complete such work according to contract, he shall be guilty of a Class 2 misdemeanor.

N.C. Gen. Stat. § 14-104 (2003).

The State must prove defendant did not intend to begin work at the time he received the advances (of money or provisions, etc.) "but used the promise [to work] as an artifice or fraud for the sole purpose of obtaining the advancements . . . ." *State v. Griffin*, 154 N.C. 611, 613, 70 S.E. 292, 292-93 (1911). Intent is a state of mind and usually must be inferred from circumstantial evidence. *See State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120 (2003).

Noonan testified that he gave defendant $100.00 to buy supplies for a task defendant had agreed to perform. Defendant testified that he never received $100.00 and he refused to do the work because Noonan had not fully paid him for a previous job. Defendant moved to dismiss asserting the State had not presented substantial evidence of defendant's intent to defraud. We hold this evidence presented a question for the jury to resolve and does not mandate dismissal. *See State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975).

V. "Money, Provisions, Goods, Wares"

On appeal, defendant seeks to distinguish between being paid in advance for work and receiving money to purchase materials. Noonan's testimony, defendant argues, shows defendant was paid in advance for materials only and was not paid in advance for work to be performed.

The statute, however, makes it a misdemeanor to "obtain *any* advances in money, *provisions*, *goods*, *wares or merchandise of any description* from any other person" on the false promise of completing work. N.C. Gen. Stat. § 14-104 (emphasis supplied). Noonan testified that he gave defendant $100.00 to purchase plywood after defendant promised to complete the repairs. Even though the $100.00 was intended for the purchase of materials, the State produced substantial evidence defendant obtained an advance of "money, provisions, goods, wares or merchandise" from Noonan on the false promise of completing the work. *Id.*

VI. Conclusion

The trial court did not err by denying defendant's motion to dismiss on these grounds. Defendant received a fair trial free from prejudicial errors he assigned and argued.

No error.

Judges McCULLOUGH and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 SEPTEMBER 2005

BAKER v. WAL-MART STORES, INC. No. 04-1055	Ind. Comm. (I.C. #846590) (I.C. #940150)	Affirmed
FOY v. INTERSTATE BRANDS/MERITA No. 04-1451	Ind. Comm. (I.C. 173499)	Affirmed
HARRIS v. HARRIS No. 04-1409	Nash (00CVD369)	Affirmed in part; reversed in part
HUNT v. N.C. DEP'T OF CORR. No. 04-1445	Ind. Comm. (I.C. #959439)	Affirmed
IN RE D.R.M., S.S.M., T.D.M. No. 04-1526	Wake (03J177) (03J178) (03J179)	Affirmed
IN RE E.F.C.K. & C.F.W. No. 05-157	Forsyth (03J271) (03J272)	Affirmed
IN RE H.M.L. No. 04-1478	Durham (04J102)	Affirmed
IN RE I.N.P. No. 04-1486	Catawba (99J109)	Dismissed
IN RE J.A.D. & A.L.D. No. 05-208	Buncombe (96J412)	Affirmed
IN RE T.G. & R.J. No. 04-922	Mecklenburg (02J1172) (02J1173)	Affirmed
INVESTORS TITLE INS. CO. v. STURDIVANT No. 04-1427	Durham (03CVS402)	Affirmed
LEARY v. N.C. FOREST PRODS., INC. No. 04-1470	Pitt (89CVD1966)	Affirmed
STATE v. ABONZA No. 04-1542	Guilford (01CRS77202) (01CRS77203)	Dismissed
STATE v. AVERY No. 05-232	Person (02CRS3058) (02CRS52792)	Affirmed

	(02CRS52965) (02CRS53528) (02CRS53576) (04CRS1994) (04CRS1995)	
STATE v. BARKSDALE No. 04-1493	Forsyth (03CRS57277) (03CRS58398) (03CRS58399) (03CRS58401) (03CRS58402) (03CRS58405) (03CRS58406)	No error
STATE v. BATTS No. 04-1083	Pitt (01CRS59405) (02CRS1596)	No error
STATE v. BLOOMFIELD No. 04-1424	Mecklenburg (03CR235909)	New trial
STATE v. BRELAND No. 04-1665	Caldwell (01CRS9603)	No error
STATE v. BRODIE No. 05-9	New Hanover (04CRS4171) (04CRS4172) (04CRS4173) (04CRS4174) (04CRS4175) (04CRS4176) (04CRS4177) (04CRS4178) (04CRS4179) (04CRS4180) (04CRS4181)	Affirmed
STATE v. BRYANT No. 05-237	Robeson (02CRS53726)	No error
STATE v. CAESER No. 04-1733	Forsyth (02CRS23425)	No error
STATE v. CALLAHAN No. 05-5	Cleveland (03CRS1029)	No error
STATE v. CAPLES No. 04-887	Alamance (03CRS56601) (03CRS56607) (03CRS56792) (03CRS56793)	No error at trial; remanded for resentencting
STATE v. CARTER No. 04-1712	Cabarrus (04CRS10863) (04CRS51458)	No error

STATE v. CARY No. 04-1502	Forsyth (02CRS63910) (03CRS16574)	No error
STATE v. COWEE MOUNTAN IMPROVEMENT ASS'N No. 04-996	Utilities Comm. W-1202, SUB 0	Dismissed
STATE v. COX No. 04-1378	Forsyth (02CRS53243)	No error
STATE v. CURRIE No. 05-46	Granville (03CRS51956)	No error
STATE v. DAVIS No. 04-1602	Wake (03CRS52844) (03CRS52845)	Remanded
STATE v. FLOYD No. 04-1192	Davidson (03CRS8820) (03CRS56598)	Dismissed
STATE v. FRANKLIN No. 05-126	Rutherford (03CRS54338)	No error
STATE v. HAMPTON No. 04-586	Mecklenburg (02CRS248812)	No error
STATE v. HARGETT No. 04-1693	Gaston (00CRS66238) (00CRS66242)	Affirmed
STATE v. HERNANDEZ-MADRID No. 04-294	Wake (02CRS209) (02CRS1220) (02CRS1222) (02CRS1225)	Affirmed in part; Remanded for resentencing in part
STATE v. HINSON No. 04-1549	Robeson (99CRS16034)	New trial
STATE v. INGRAM No. 04-610	Anson (01CRS50984) (02CRS1072)	No error in trial; remanded for resentencing
STATE v. JACOBS No. 04-767	Alamance (03CRS56303)	Dismissed in part, no error in part
STATE v. LEARY No. 04-1560	Pasquotank (03CRS51684)	No error
STATE v. MACKEY No. 05-96	New Hanover (02CRS19667) (02CRS19668) (02CRS19669) (02CRS23727)	Affirmed

	(02CRS23728) (02CRS23729) (03CRS21320) (03CRS21321)	
STATE v. MARTIN No. 04-1553	Henderson (03CRS2280) (03CRS2281)	No error
STATE v. MASSENBURG No. 05-10	Lenoir (04CRS50260)	No error
STATE v. MATHIS No. 05-11	Mecklenburg (03CRS210579) (03CRS210580) (03CRS210581)	No error
STATE v. McKINNON No. 04-1308	Mecklenburg (02CRS247956)	No error
STATE v. McLEAN No. 05-61	Cumberland (02CRS66870)	Affirmed
STATE v. MULLINS No. 04-1584	Pitt (04CRS7568)	Affirmed
STATE v. NELSON No. 05-97	Davidson (02CRS55314) (02CRS55315) (02CRS55316) (02CRS55317) (02CRS55318) (02CRS55319)	Affirmed
STATE v. POWELL No. 04-1340	Wake (02CRS42138) (02CRS28979) (02CRS69526)	Affirmed
STATE v. ROBERTS No. 04-1351	Lenoir (00CRS4217) (00CRS8354)	No error
STATE v. SCOTT No. 04-396	Richmond (00CRS50649) (00CRS50654) (00CRS50658)	Remanded for resentencing
STATE v. SELLARS No. 04-289	Alamance (99CRS56319) (00CRS1256)	Remanded for resentencing
STATE v. SMITH No. 04-374	Buncombe (02CRS15846)	No error
STATE v. SMITH No. 05-233	Cumberland (02CRS60679)	Dismissed

STATE v. SUELL No. 04-1183	New Hanover (03CRS828) (03CRS831) (03CRS832) (03CRS2123) (03CRS2416) (03CRS2425) (03CRS2426) (03CRS2427) (03CRS2428) (03CRS2429) (03CRS2430) (03CRS2431) (03CRS2432)	No error
STATE v. TINDALL No. 04-1284	New Hanover (03CRS56722) (03CRS56723)	No error in part, reversed in part
STATE v. WITSHER No. 04-488	Wilkes (02CRS51236) (02CRS51754) (02CRS51755) (02CRS51756) (02CRS51757) (02CRS51758) (02CRS51759) (02CRS51760) (02CRS51761) (02CRS51762) (02CRS51763) (02CRS51764) (02CRS51765)	Remanded for resentencing
STENGER v. SPAGNOLI No. 04-1402	Mecklenburg (00CVS14707)	Reversed
TORRES v. SMITH No. 04-693	Ind. Comm. (I.C. #164967)	Affirmed
WALKER v. N.C. DEP'T OF TRANSP. No. 04-1258	Ind. Comm. (I.C. #TA-16103)	Affirmed
ZBYTNIUK v. ABF FREIGHT SYS., INC. No. 04-118-2	Ind. Comm. (I.C. 844352)	Affirmed

IN RE PEDESTRIAN WALKWAY FAILURE

SANDRA D. MELTON, AND HUSBAND, ROBERT MORRIS MELTON, JR., AND ROBERT CHRISTOPHER MELTON, PLAINTIFFS V. TINDALL CORPORATION, FORMERLY, TINDALL CONCRETE PRODUCTS, INC., DEFENDANT

No. COA04-1244

(Filed 20 September 2005)

1. Discovery— violations and other misconduct—findings and conclusions of law

The trial court did not abuse its discretion in a negligence case by dismissing plaintiff's lawsuit pursuant to N.C.G.S. § 1A-1, Rules 37 and 41 for discovery violations and other misconduct even though plaintiff contends the trial court's findings and conclusions that catalogue his misconduct are unsupported by the evidence, because: (1) by failing to timely produce a copy of his 2001 income tax return that stated profits from the sale of a house, plaintiff did in fact deny defendant at least some discovery with respect to his profits from the sale when defendant was trying to determine plaintiff's lost wages; (2) in his 20 October 2003 court-ordered deposition, plaintiff was evasive when discussing specific figures concerning the costs of building the house and stated that his father handled the books; (3) the judge was not precluded from finding that there were false representations to the court and opposing counsel concerning when plaintiff had filed his 2001 federal income tax return; (4) there was evidence to support the judge's ruling that the 8 October 2003 version of plaintiff's 2001 federal income tax return contradicted his deposition testimony that he sold his house for a profit; (5) there was sufficient evidence for the judge's determination that plaintiff acted to frustrate a court order and defendant's efforts to obtain discovery by having his father prepare the 2001 tax return dated 16 October 2003; and (6) there was sufficient evidence to support the judge's determination that plaintiff engaged in a pattern of intentional misconduct to prevent defendant from pursuing discovery on the issue of profits from the home.

2. Discovery— violations and other misconduct—failure to produce state income tax return

The trial court did not abuse its discretion in a negligence case by dismissing plaintiff's lawsuit pursuant to N.C.G.S. § 1A-1, Rules 37 and 41 for discovery violations and other misconduct even though plaintiff contends the trial court erroneously con-

cluded that plaintiff committed discovery violations by failing to produce his 2001 North Carolina income tax return, because: (1) in a request for production of documents, plaintiff was asked to turn over all documents related in any way to his claim of lost wages caused by a pedestrian walkway failure; (2) as plaintiff's deposition testimony was equivocal as to whether such a return had been prepared and filed, the trial court was permitted to conclude that the document existed and had not been produced; and (3) failure to produce the state return violated plaintiff's duty to produce discoverable documents and supplement discovery responses as mandated by N.C.G.S. § 1A-1, Rules 26 and 37 as well as the trial court's Case Management Orders 1 and 5.

3. Constitutional Law— invocation of Fifth Amendment right—subjecting claim to dismissal by blocking discovery in civil case

The trial court did not err in a negligence case by conducting a Fifth Amendment analysis concluding that plaintiff waived his Fifth Amendment right to refuse to provide self-incriminating testimony in light of evidence that was already disclosed, and even if there was no waiver, plaintiff had subjected his claim to dismissal by invoking the right to block discovery by defendant seeking to determine whether plaintiff profited from the sale of a house as he had claimed when defendant was attempting to discover plaintiff's lost wages.

4. Discovery— discovery violations—dismissal of case—consideration of lesser sanctions

The trial court did not err in a negligence case by dismissing plaintiff's claims based on discovery violations and other misconduct without first considering less severe sanctions, because: (1) the trial court is not required to impose lesser sanctions, but only to consider lesser sanctions; and (2) defendant filed a motion which requested that plaintiff be sanctioned with dismissal of his claims or in the alternative lesser sanctions, and the trial court's order demonstrates it considered the lesser sanctions before ordering dismissal.

5. Judges— motion for recusal—failure to show bias or prejudice

The trial court did not err in a negligence case by denying plaintiff's motion to recuse the judge who entered the dismissal order even though plaintiff contends the judge's partiality was

suspect since his daughter was hired to work as a summer associate for defendant while she was in law school, he strongly encouraged the parties to settle, and he refused to allow videotaped testimony of plaintiff's expert witnesses, because: (1) the judge informed the parties about his daughter's employment and nobody objected to his continuing to act as the presiding judge; (2) the judge consulted with the Judicial Standards Commission which confirmed that his disqualification was not required; (3) the judge's daughter had no knowledge of, and no involvement with, the pedestrian walkway litigation; (4) there was no indication that the circumstances attending his daughter's summer employment in any way biased the judge from being evenhanded and unbiased; (5) the judge's suggestion that the parties settle was not improper; (6) the trial court established very specific guidelines for the taking of videotaped depositions to be used at trial and plaintiff failed to comply with those guidelines; and (7) the fact that a judge has repeatedly ruled against a party is not grounds for disqualification of that judge absent substantial evidence to support allegations of interest or prejudice.

Appeal by plaintiff Robert Christopher Melton from an order entered 11 December 2003 by Judge Thomas W. Seay, Jr., and an order entered 13 April 2004 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 May 2005.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Kathleen A. Naggs; Mauriello Law Offices, by Christopher D. Mauriello; and Wallace and Graham, P.A., by Mona Lisa Wallace and Marc P. Madonia, for plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr., Reid L. Phillips, and Robert J. King, III, for defendant appellee.

Parker Poe Adams & Bernstein, by David N. Allen, John E. Grupp, and Lori R. Keeton, for Charlotte Motor Speedway L.L.C., amicus curiae.

McCULLOUGH, Judge.

Plaintiff Robert Christopher Melton (Melton) appeals from the dismissal of his lawsuit for discovery violations and other misconduct, and from the denial of his motion to have the trial judge who entered the dismissal order recused. We affirm.

FACTS

On 20 May 2000, a pedestrian walkway collapsed at the Lowe's Motor Speedway (the Speedway) in Concord, North Carolina, causing injuries to several people who were using the walkway to leave a NASCAR event. Defendant Tindall Corporation (Tindall) had been involved in constructing the collapsed walkway.

As a result of the walkway collapse, approximately 100 people, including Melton, filed actions against, *inter alia*, Tindall and the Speedway. Melton's lawsuit alleged that negligence by Tindall and the Speedway was the proximate cause of his bodily injury, lost wages, and/or diminution in his future earning capacity.

The Honorable Chief Justice of the North Carolina Supreme Court designated each case related to the walkway collapse an "exceptional" case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and each case was assigned to be heard by Superior Court Judge W. Erwin Spainhour. As such, Melton's case was designated "exceptional" and assigned to Judge Spainhour.

In early 2003, the first pedestrian walkway case was tried. In that case, the jury found that the Speedway and Tindall were liable. Accordingly, Judge Spainhour ruled that the issue of liability had been established by collateral estoppel with respect to the remaining plaintiffs. Thus, Melton's suit required only a trial to determine his damages. The Speedway eventually settled with Melton, leaving Tindall as the only defendant with respect to Melton's lawsuit.

At some point in the litigation, it became clear that Melton's lost profits and diminution in future earnings capacity claims hinged upon his assertion that he was self-employed as a general contractor. Discovery indicated that Melton had built one house, and the profits that he supposedly received from the sale of this house were central to his claim for damages.

Discovery with respect to the profits from the sale of the house, like all of the discovery in the pedestrian walkway cases, was governed by a series of orders entered by Judge Spainhour, as well as by the North Carolina Rules of Civil Procedure. Given the voluminous discovery he was designated to oversee, Judge Spainhour conducted a series of status conferences and entered a number of Case Management Orders (CMOs) to govern the conduct of parties. In

CMO No. 1, entered 20 September 2001, the judge set forth, *inter alia*, the following discovery guidelines:

> It is the expectation of the Court that all discovery in these cases will be conducted in a manner that is in keeping with both the letter and spirit of the Rules of Civil Procedure relating to discovery and the provisions of this Order. It is the Court's expectation that **all discovery responses will contain full and complete answers and responses, and will be provided in a timely fashion**. It is also the Court's expectation that counsel for all parties will cooperate with one another regarding the scheduling of depositions and other matters relating to discovery in a manner so that the necessary discovery in this matter can be conducted in a productive manner with minimal involvement by the Court. Counsel for the parties shall first engage in good faith attempts to resolve any and all disputes and objections regarding discovery before seeking the . . . judge's assistance. Motions to compel shall specifically describe the discovery requests at issue.

(Emphasis added.) In CMO No. 5, entered 30 October 2002, the judge made the following directive:

> 9. By the earlier of November 1, 2002, or two (2) weeks before the date(s) scheduled for mediation, every Plaintiff shall serve on Defendants' counsel (i) **supplemental responses** to the Defendants' First Set of Interrogatories and Request for Production of Documents, and (ii) a certification that a complete and updated set of medical records and bills, life care plans and economic appraisals/reports have been provided to Defendants' counsel.

(Emphasis added.)

Early in the litigation, the following requests for production of documents were addressed to Melton:

> REQUEST NO. 5: All statements, bills, invoices, receipts, checks and other documents that relate in any way to the items of expense or loss for which you seek compensation in this action.
>
> * * * *
>
> REQUEST NO. 6: Any and all documents that you contend support your claim, if any, of lost wages caused by the [i]ncident.

Plaintiff was also asked to produce all of his federal and state income tax returns filed for the years of 1995-2000.

In a deposition taken on 5 December 2001, Melton testified that, in 2001, he made a profit of "approximately $18,000" on the sale of the house he had built. Defense counsel later discovered that Melton had not produced certain income tax documents for 2001 and 2002. Melton's attorney was notified of these omissions in a 9 May 2003 letter stating the following:

> [I]t appears that . . . Melton has never produced copies of his 2001 or 2002 income tax returns, or any 1099 or W-2 forms for 2002. These documents are obviously relevant to Mr. Melton's claim of lost earnings, since they relate to his earning capacity and act to mitigate his claimed damages. As such, these documents should have been produced in response to various document requests, including Requests no[s]. 5 and 6 in the Speedway's First Request for Production of Documents and Tindall's Comprehensive Request for Supplementation. Please have these documents delivered to me by Tuesday, May 13.

In a 12 May 2003 letter, Melton's lawyer responded by noting that "Mr. Melton is unable to locate his actual [2001] income tax records." Along with the letter, Melton included his 2002 tax returns.

Tindall subsequently filed a motion to compel production of Melton's 2001 tax documents. At the hearing on this motion, the following colloquy ensued:

> [PLAINTIFF'S ATTORNEY]: . . . I contacted Mr. Melton [with respect to the 2001 tax documents] about three, four times to try and get them from him. He contacted the IRS and he tried to get them, and he couldn't get them. And that was the response I got from Mr. Melton.
>
> THE COURT: Well, he certainly can get them. I've done it myself. He is incorrect about that. . . .
>
> [DEFENSE COUNSEL]: You can get the form off the web site, Judge.
>
> THE COURT: Right.
>
> [PLAINTIFF'S ATTORNEY]: Again, I'm just—we tried to get it, and I have the letter saying the response from him and my paralegal trying to get them. And I certainly have no problem trying to get them. We've tried a number of times to do that.

On 30 September 2003, Judge Spainhour entered an order requiring Melton to obtain his 2001 federal income tax return and Form 1099

from the Internal Revenue Service and compelling production of these documents. A Form 4506 "Request for Copy or Transcript of Tax Form" was attached to the order.

Melton subsequently provided defense counsel with a 2001 federal individual income tax return dated **8 October 2003**, after entry of the order compelling production of this document. The only income reported for 2001 on this return was $15,979.00, the amount paid to Melton by an employer, Jensen Construction, in 2001. Thus, this return did not reflect that Melton had profited from the sale of a house in 2001. Melton did not produce the Form 1099 relating to the sale of his house as required by Judge Spainhour's order. Furthermore, though the order compelling production of documents did not specifically require Melton to produce his 2001 North Carolina income tax return, the letter from his attorney accompanying the federal tax return indicated that "Melton's income tax records for 2001" were enclosed with the letter. No 2001 state tax return was included in the mailing.

On 10 October 2003, Tindall filed a motion to strike Melton's lost profits evidence on the ground that he had produced no documents to substantiate his claim. Further, Tindall alleged that Melton either failed to report profits from the sale of his house to the IRS, or falsely represented to the court that he earned profits from the sale of a house he had built. As an alternative to striking evidence, Tindall's motion requested that it be allowed to re-depose Melton regarding the 2001 tax return, the missing Form 1099, and all related issues. Judge Spainhour entered an order permitting Tindall to re-depose Melton and again ordered Melton to "deliver to counsel for Tindall all documents relating in any way to the construction and sale of the house owned by [him] that was sold in 2001, including but not limited to the 1099 Form for such sale, regardless of whether such documents have previously been produced to Tindall."

Just prior to being re-deposed on 20 October 2003, Melton produced another 2001 federal income tax return dated **16 October 2003**, which did include income from the sale of a house. During the deposition, Melton stated that he had only filed one federal income tax return for 2001: the one dated 8 October 2003. He claimed to be waiting to file the return dated 16 October 2003 until his deposition had been completed. Melton admitted that he did not include the income from the sale of the house he built in the 8 October return because he "didn't have the money at the time to pay . . . the taxes." Later in the deposition, Melton's lawyer asserted that the Fifth

Amendment right against self-incrimination allowed Melton to decline to respond to a question about whether he "deliberately didn't tell the IRS about [the] profits [from the house]." Further, Melton generally declined to answer specific questions about the items on the 16 October return based upon his assertion that his father had prepared it. With respect to his 2001 state income tax return, Melton equivocated: at first, he claimed that he had filed a 2001 North Carolina income tax return without making payment and that a copy of the return was at his residence, but he later indicated that the return had not even been prepared. Melton further admitted that he did not actually have any income tax returns for 2001 when his attorney indicated that Melton was "unable to locate" such records and that he never mistakenly thought that he had already filed his tax returns.

Following this deposition, Tindall filed a supplement to its motion to strike the lost profits evidence in which it requested, *inter alia*, that all of Melton's claims be dismissed. Just prior to the hearing on this motion, Melton filed a motion to recuse Judge Spainhour. Judge Spainhour entered an order referring the recusal motion to another judge to be appointed by the North Carolina Administrative Office of the Courts (AOC). AOC appointed Superior Court Judge Thomas W. Seay, Jr., to rule on the motion. After conducting a hearing, Judge Seay determined that "there [was] no believable evidence of any bias, prejudice, or favoritism for or against any party" and that "neither the records in th[e] case [nor] any evidence or exhibits offered . . . create[d] a reasonable perception that Judge Spainhour would be unable to rule impartially or would, for any reason, fail to provide the plaintiffs and defendants with a fair and impartial trial." Accordingly, Judge Seay denied the motion for recusal.

After the denial of the recusal motion, Judge Spainhour conducted a hearing on Tindall's pending motion to strike Melton's lost profits evidence and/or dismiss his claims. In an order entered 13 April 2004, Judge Spainhour determined the following:

> 27. By failing to produce his 2002 income tax returns in a timely fashion, Melton violated both [North Carolina Rules of Civil Procedure] 26 and 34 and Case Management Order[s] . . . 1 and 5.
>
> 28. By failing to produce his 2001 North Carolina income tax return[], Melton violated both [North Carolina Rules of Civil Procedure] 26 and 34 and Case Management Order[s] . . . 1 and 5.

29. The representation to [defense] counsel in the letter from Melton's counsel dated May 12, 2003 that Melton had been unable to locate his 2001 income tax documents was false.

30. The representations to the Court in the September 19, 2003 hearing that Melton had made repeated efforts to obtain his 2001 federal income tax returns from the Internal Revenue Service were false.

31. Melton knew at the time of the foregoing letter to Tindall's counsel and at the time of the September 19, 2003 hearing that he had not filed his 2001 federal income tax return[].

32. The October 8, 2003 version of Melton's 2001 federal income tax return[] contradict[s] Melton's deposition testimony that he had sold a house for a profit.

33. Melton's refusal to answer questions regarding the filing of his 2001 federal income tax return[], citing his Fifth Amendment right against self-incrimination, was inappropriate since Melton had already admitted that he had intentionally filed [an] incorrect return[] and thereby had waived his Fifth Amendment privilege. . . .

34. Even if Melton had not waived his Fifth Amendment rights as to the filing of the 2001 federal return[], a plaintiff who invokes the Fifth Amendment to block discovery by the defendant in a civil action subjects his claim to dismissal. . . .

35. By having a third party prepare the October 16, 2003 version of his 2001 federal income tax return[], Melton acted to frustrate the Court's verbal [o]rder . . . as well as Tindall's efforts to obtain discovery on a material issue in this case.

36. Melton has engaged in a pattern of intentional misconduct that was apparently designed to prevent Tindall from pursuing discovery on the issue of the profits of the house supposedly sold for a profit in 2001. In doing so, Melton violated [North Carolina Rules of Civil Procedure] 26 and 34 and the [o]rders of th[e] Court, made misrepresentations to th[e] Court and opposing counsel, wrongly refused to answer questions in a court-ordered deposition, and offered contradictory testimony as to the existence of important documents.

37. . . . Melton had several opportunities to mitigate the harm caused by such conduct. For example, after Melton's failure to

> produce 2001 tax records was pointed out by Tindall, Melton could have admitted that no such records had been generated, instead of making misrepresentations to the Court and counsel for Tindall on the issue. Similarly, after the Court issued its October 13, 2003 [o]rder that Melton be re-deposed, Melton could have testified fully and truthfully regarding the existence and content of the 2001 tax returns. Instead, Melton refused to answer questions regarding the federal return[] and gave contradictory testimony regarding the state return[].

(Citations omitted.) After considering other sanctions, Judge Spainhour concluded that "sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct." Accordingly, Melton's claims were dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rules 37 and 41.

From the dismissal of his claims and the denial of his recusal motion, Melton now appeals.

I.

We first address Melton's arguments concerning the dismissal of his claims due to discovery violations and other misconduct. These arguments lack merit.

At the outset, we note that Judge Spainhour dismissed Melton's claims pursuant to both N.C. Gen. Stat. § 1A-1, Rules 37 and 41. Rule 37 provides that "[i]f a party . . . fails to obey an order to provide . . . discovery . . . [,] a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others . . . [a]n order . . . dismissing the action or proceeding or any part thereof . . . ." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(c) (2003). The imposition of sanctions under Rule 37 "is in the sound discretion of the trial judge and cannot be overturned absent a showing of abuse of that discretion." *Bumgarner v. Reneau*, 332 N.C. 624, 631, 422 S.E.2d 686, 690 (1992).

An abuse of discretion may arise if there is no record evidence which indicates that defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred. *See Cloer v. Smith*, 132 N.C. App. 569, 573, 512 S.E.2d 779, 782 (1999) (discussing a trial court's findings with respect to discovery violations and holding that "the deposition transcript supports the trial court's findings that counsel for [one of the parties] refused to allow [the party] to answer some questions, and, in other instances, 'told [the

party] what to say' "); *King v. Koucouliotes*, 108 N.C. App. 751, 754, 425 S.E.2d 462, 464 (conducting a legal analysis to determine "whether . . . trial witnesses and trial exhibits are discoverable"), *disc. review improvidently allowed*, 335 N.C. 164, 436 S.E.2d 132 (1993). Further, "[t]he choice of sanctions under Rule 37 is within the trial court's discretion" and is reviewable only for an abuse of discretion. *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992), *aff'd*, 334 N.C. 303, 432 S.E.2d 339 (1993).

Rule 41 permits a trial court to dismiss an action or claim "[f]or failure of the plaintiff . . . to comply with the[] rules [of Civil Procedure] or any order of [the] court." N.C. Gen. Stat. § 1A-1, Rule 41(b). "[T]he power to sanction disobedient parties, even to the point of dismissing their actions or striking their defenses, did not originate with Rule 41(b). It is longstanding and inherent. For courts to function properly, it could not be otherwise." *Minor v. Minor*, 62 N.C. App. 750, 752, 303 S.E.2d 397, 399 (1983) (citation omitted). Dismissal under Rule 41(b) is left to the sound discretion of the trial court and will not be disturbed on appeal in the absence of a showing of abuse of discretion. *Kerik v. Davidson Cty.*, 145 N.C. App. 222, 227, 551 S.E.2d 186, 190 (2001).

A.

[1] Melton first contends that the findings and conclusions by Judge Spainhour that catalogue his misconduct are unsupported by evidence in the record. Melton specifically cites five allegedly vacuous determinations.

First, he alleges there is no evidence in support of Judge Spainhour's finding that Tindall was denied discovery relating to the costs of, and profits from, the sale of Melton's house in 2001. However, by failing to timely produce a copy of his 2001 income tax return that stated profits from the sale of the house, Melton did, in fact, deny Tindall at least some discovery with respect to his profits from the sale. Moreover, in his 20 October 2003 court-ordered deposition, Melton was evasive when discussing specific figures concerning the costs of building the house and stated that his father handled the books. Thus, there is ample evidentiary support for Judge Spainhour's finding.

Second, Melton asserts that the record does not support the determinations that he falsely represented to the court and opposing counsel that he had filed his 2001 federal income tax return before

8 October 2003. The basis of this argument is Melton's contention that his lawyer's statements, which indicated that the 2001 federal income tax return was filed as of a hearing in September of 2003, are not attributable to Melton. However, it is the established law of this State that, especially with respect to discovery, "admissions of attorneys are binding upon their clients, and are generally conclusive." *Karp v. University of North Carolina*, 78 N.C. App. 214, 216, 336 S.E.2d 640, 641 (1985); *see also Henderson v. Wachovia Bank of N.C.*, 145 N.C. App. 621, 624, 551 S.E.2d 464, 467 (noting that there is "a preference in the law to impute lawyer conduct to clients"), *disc. review denied*, 354 N.C. 572, 558 S.E.2d 869 (2001). The facts and circumstances of the instant case do not justify deviation from this principle. Thus, Judge Spainhour was not precluded from finding that there were false representations to the court and opposing counsel concerning when Melton had filed his 2001 federal income tax return.

Third, Melton avers that there was no evidence in support of Judge Spainhour's ruling that the 8 October 2003 version of Melton's 2001 federal income tax return contradicted his deposition testimony that he sold his house for a profit. However, it is undisputed that the 8 October 2003 version of Melton's 2001 federal tax return did not report a profit from the sale of a house and that Melton's deposition testimony indicated that he did profit from the sale of a house.

Fourth, Melton alleges that there was no evidentiary support for Judge Spainhour's determination that he acted to frustrate a court order and Tindall's efforts to obtain discovery by having his father prepare the 2001 tax return dated 16 October 2003. Our review indicates that Judge Spainhour ordered Melton to be deposed on, *inter alia*, "the issuance and filing of tax documents relating to his income in 2001." However, Melton testified during his court-ordered deposition that he was not familiar with the figures on the revised return because his father had prepared it. This evidence was sufficient to permit Judge Spainhour's determination that Melton acted to frustrate the order and that he had hindered Tindall's efforts to obtain discovery.

Fifth, Melton argues there was no evidence to support Judge Spainhour's determination that he had engaged in a pattern of intention misconduct to prevent Tindall from pursuing discovery on the issue of profits from the home. In essence, this argument is a catch-all argument in which Melton insists that, because there was no evidence of any misconduct at all, Judge Spainhour could not find the misconduct to be intentional. However, as already indicated, the evi-

dence of misconduct was substantial. Moreover, the evidence before Judge Spainhour easily permitted him to conclude that Melton had engaged in a pattern of misconduct to thwart discovery.

B.

[2] Melton next argues that Judge Spainhour erroneously concluded that he had committed discovery violations by failing to produce his 2001 North Carolina income tax return. We do not agree.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . , including the existence, description, nature, custody, condition and location of any . . . documents, or other tangible things . . . ." N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2003). Discovery may be made by an appropriate request for the production of documents. N.C. Gen. Stat. § 1A-1, Rule 26(a). A party generally has no duty to supplement discovery "that was complete when made"; however "[a] duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses." N.C. Gen. Stat. § 1A-1, Rule 26(e)(3).

"Any party may serve on any other party a request . . . to produce . . . any designated documents . . . ." N.C. Gen. Stat. § 1A-1, Rule 34(a) (2003). "[I]nspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated." N.C. Gen. Stat. § 1A-1, Rule 34(b).

In addition, Judge Spainhour's CMO No. 1 required the parties to conduct discovery in accordance with "both the letter and spirit of the Rules of Civil Procedure relating to discovery" and ordered all discovery responses to "contain full and complete answers and responses, and [to] be provided in a timely fashion." Judge Spainhour's CMO No. 5 required discovery responses to be supplemented.

In a request for production of documents, Melton was asked to turn over all documents related "in any way" to his claim of lost wages caused by the walkway failure. On 9 May 2003, a defense attorney wrote a letter to Melton's lawyer stating that he did not yet have Melton's 2001 tax records and that these records should have been produced pursuant to the request for production of documents. Melton's attorney replied that the 2001 records had been lost but did not assert that they were not discoverable. Thereafter, Judge Spainhour ordered Melton to be re-deposed regarding "the issuance

and filing of tax documents relating to his income in 2001" and required him to produce "all documents relating in any way to the construction and sale of the house . . . that was sold in 2001." Melton has never argued that his 2001 state tax return was not covered by defense requests and orders of the court, and he does not dispute that, as of the date of his dismissal hearing, he had not produced his 2001 state tax return. As Melton's deposition testimony was equivocal as to whether such a return had been prepared and filed, Judge Spainhour was permitted to conclude that the document existed and had not been produced. Further, we conclude that there was no error in Judge Spainhour's conclusion that Melton's failure to produce the 2001 state return violated his duties to produce discoverable documents and supplement discovery responses as mandated by N.C. Gen. Stat. § 1A-1, Rules 26 and 37, as well as CMOs Nos. 1 and 5.

C.

[3] In his next argument on appeal, Melton contends that Judge Spainhour's Fifth Amendment analysis was inappropriate. Judge Spainhour concluded that Melton had waived his Fifth Amendment right to refuse to provide self-incriminating testimony, but that, even if there was no waiver, Melton had subjected his claim to dismissal by invoking the right to block discovery by defendant.

This Court has held that a civil plaintiff who invokes the Fifth Amendment to thwart discovery subjects his claim to dismissal. *Sugg v. Field*, 139 N.C. App. 160, 164, 532 S.E.2d 843, 846 (2000). However, "before dismissing a claim based upon plaintiff's refusal to testify in reliance upon the privilege against self-incrimination, [a] court must employ [a] balancing test . . . weighing [plaintiff]'s privilege against self-incrimination against the other party's rights to due process and a fair trial." *Id.* (citations omitted).

In the instant case, one of the purposes of the court-ordered deposition of Melton was to determine whether he profited from the sale of a house. Defense counsel was asking questions designed to show whether there were such profits, in which case Melton had been dishonest on the only 2001 federal tax return that he had actually filed, or no such profits existed, in which case Melton was being dishonest with defense counsel and the court. Therefore, Melton's decision to assert the Fifth Amendment, rather than answer a question concerning why he did not tell the IRS about the profits, served to impede Tindall's ability to obtain accurate discovery about the nature of the profits from the sale of the house. Judge Spainhour's order is

replete with references to the importance of this information, and it properly indicates that the value of asserting the Fifth Amendment was minimal in light of the conduct Melton had already disclosed. Accordingly, even assuming *arguendo* that Melton did not waive his right to assert the Fifth Amendment, Judge Spainhour properly ruled that, by so doing, Melton subjected his claims to dismissal.

D.

[4] In his next argument on appeal, Melton contends that Judge Spainhour erred by dismissing his claims without first considering less severe sanctions. A dismissal pursuant to Rule 41 "should be applied 'only when the trial court determines that less drastic sanctions will not suffice.' " *Miller v. Ferree*, 84 N.C. App. 135, 136, 351 S.E.2d 845, 847 (1987). Likewise, " '[b]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions.' " *Global Furn., Inc. v. Proctor*, 165 N.C. App. 229, 233, 598 S.E.2d 232, 235 (2004) (citation omitted). "The trial court is not required to *impose* lesser sanctions, but only to *consider* lesser sanctions." *Id.* Moreover, this Court will affirm an order for sanctions where "it may be inferred from the record that the trial court considered all available sanctions" and "the sanctions imposed were appropriate in light of [the party's] actions in th[e] case." *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995).

In the instant case, Tindall filed a motion which requested that Melton be sanctioned with the dismissal of his claims but also requested, in the alterative, lesser sanctions. Judge Spainhour's order states that

> [t]he Court has carefully considered each of [Melton's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct . . . .

We conclude that this sufficiently demonstrates that Judge Spainhour considered lesser sanctions before ordering a dismissal.

E.

Thus, we conclude that Judge Spainhour did not abuse his discretion by dismissing Melton's claims. The corresponding assignments of error are overruled, and the dismissal order is affirmed.

II.

[5] We next address Melton's argument that Judge Seay erred by denying the motion to recuse Judge Spainhour.[1] This contention lacks merit.

"[A] party has a right to be tried before a judge whose impartiality cannot reasonably be questioned." *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987). Therefore, "[o]n motion of any party, a judge should [be] disqualif[ied] . . . in a proceeding in which his impartiality may reasonably be questioned, including but not limited to instances where . . . he has a personal bias or prejudice concerning a party . . . ." Code of Judicial Conduct, Canon 3(C)(1)(a) (2005).

Melton insists that Judge Spainhour's impartiality was suspect because his daughter, while in law school, was hired to work as a summer associate in the media and communications law department of the firm representing Tindall. The record tends to show that, upon being informed of the offer of employment to his daughter, Judge Spainhour informed counsel for all of the parties involved in the pedestrian walkway litigation, and none objected to his continuing to act as the presiding judge. At a 29 April 2003 hearing, Judge Spainhour again informed counsel for the plaintiffs and defendants in the pedestrian walkway matter of his daughter's employment. Judge Spainhour also indicated that he had consulted with the North Carolina Judicial Standards Commission, which had confirmed that his disqualification was not required. Again, no party objected to Judge Spainhour continuing to preside over any of the pedestrian walkway cases. On 31 October 2003, Judge Spainhour sent an e-mail to counsel for Melton, Tindall, and the Speedway stating that his daughter would be working a second summer with Tindall's law firm. The record indicates that Judge Spainhour's daughter had no knowledge of, and no involvement with, the pedestrian walkway litigation.

In addition to the general rules requiring impartiality, a judge must be disqualified from hearing a case in which his son or daughter is "acting as a lawyer in the proceeding." Code of Judicial Conduct, Canon 3(C)(1)(d)(ii) (2005). However, in the instant case, Judge Spainhour's daughter was not acting as a lawyer in the pedestrian walkway cases, and there is no indication that the circum-

1. Melton has also filed a petition for writ of *certiorari* requesting review of Judge Seay's recusal order "[i]n the event this Court determine[d] the [r]ecusal [o]rder . . . [was] not appealable." As we have determined that the recusal order is appealable, the petition for a writ of *certiorari* is denied.

stances attending her summer employment in any way prevented Judge Spainhour from being evenhanded and unbiased. Therefore, his daughter's employment situation did not require Judge Spainhour's recusal.

Melton next argues that Judge Spainhour had to be recused because he strongly encouraged the parties to reach a settlement. Specifically, Melton takes issue with an e-mail to his attorney and Tindall's attorneys in which Judge Spainhour noted that he was "concerned" about Tindall's motion to strike filed after Melton's court-ordered deposition and suggested that the parties "seriously re-visit the idea of a settlement before . . . the hearing [on the motion]." We note that a trial judge's decision to "explor[e] settlement possibilities [is] a function to be commended to all trial judges in civil cases" and is not generally a ground for disqualifying a judge. *Roper v. Thomas*, 60 N.C. App. 64, 76, 298 S.E.2d 424, 431 (1982), *disc. review denied*, 308 N.C. 191, 302 S.E.2d 244 (1983). Moreover, even where a trial judge becomes ostensibly angry at the failure of settlement negotiations, his disqualification is not necessarily required under the law. *State v. Kamtsiklis*, 94 N.C. App. 250, 258-59, 380 S.E.2d 400, 404, *appeal dismissed*, *disc. review denied*, 325 N.C. 711, 388 S.E.2d 466 (1989). In the instant case, we are unpersuaded that Judge Spainhour's suggestion that the parties settle was improper. Therefore, Judge Seay did not err by declining to order recusal on this ground.

Finally, Melton alleges impropriety in Judge Spainhour's refusal to allow videotaped testimony of Melton's expert witnesses. The record indicates that Judge Spainhour established very specific guidelines for the taking of videotaped, "for-trial" depositions and that Melton had not complied with these guidelines. Accordingly, Judge Spainhour denied his request to allow videotaped testimony of Melton's expert witnesses. This ruling did not constitute a ground for recusal in light of the facts and circumstances of the instant case. *See Love v. Pressley*, 34 N.C. App. 503, 506, 239 S.E.2d 574, 577 (1977) ("[T]he fact that a trial judge has repeatedly ruled against a party is not grounds for disqualification of that judge absent substantial evidence to support allegations of interest or prejudice."), *disc. review denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

Thus, we conclude that Judge Seay did not err by denying Melton's motion to recuse Judge Spainhour. The corresponding assignments of error are overruled, and the recusal order is affirmed.

For the foregoing reasons, the orders appealed from are

Affirmed.

Judges TIMMONS-GOODSON and TYSON concur.

BRYAN HEATH BAKER, AND WIFE, SUSAN D. BAKER; TAMMY L. HEPLER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN A. HEPLER III; STEVEN P. VANDERHOOF; MARGARET F. LINDSEY; AND WALTER SUDDERTH, PLAINTIFFS V. SPEEDWAY MOTORSPORTS, INC. AND CHARLOTTE MOTOR SPEEDWAY, INC. *DOING BUSINESS AS* LOWE'S MOTOR SPEEDWAY, AND TINDALL CORPORATION, *FORMERLY* TINDALL CONCRETE PRODUCTS, INC., DEFENDANTS

No. COA04-1379

(Filed 20 September 2005)

1. Appeal and Error— appealability—interlocutory orders—discovery sanctions—order to compel

Plaintiff's appeals from an interlocutory order imposing sanctions for discovery violations and compelling discovery were heard pursuant to Appellate Rule 2 given the need for finality and certainty in this complex litigation.

2. Discovery— sanctions—failure to meet deadline

There was no abuse of discretion in the exclusion of an expert witness's testimony for failure to meet a discovery deadline where the record was replete with admonitions from the judge that discovery rules and orders should be complied with strictly and completely.

3. Discovery— failure to meet deadline—not raised immediately—not waived

Defendants did not waive objection to plaintiff's failure to meet a discovery deadline where they did not schedule a deposition for the excluded expert or otherwise proceed with discovery concerning his testimony, even though they waited two years to bring a motion to exclude.

4. Appeal and Error— preservation of issues—equitable estoppel—not raised at trial—waiver

An equitable estoppel argument not raised at trial was not considered on appeal.

5. Discovery— request for admission—failure to admit or deny—failure to supplement—deemed admitted

There was no abuse of discretion in deeming requests for admissions admitted where plaintiff declined to admit or deny based on lack of expertise, and continued to assert that she could not admit or deny even though supplementation was required. The judge could permissibly find that plaintiff either did not make reasonable inquiry of her experts or, having made such inquiry, was not in a position to contradict the information and should have made the admission.

6. Discovery— sanctions—delay in seeking records—subsequent destruction of records

The trial court did not abuse its discretion by not allowing plaintiff to present evidence of her back injury where she did not produce medical records of an earlier back injury. Although since destroyed, the records were available when originally requested, and their absence potentially prejudiced defendants' ability to dispute plaintiff's claim.

7. Discovery— entry of written order—reflection of earlier oral order

A discovery order which on its face seemed to require action prior to the date it was entered was upheld because it concerned discovery instructions given by the judge clearly and unambiguously at an earlier hearing, and because it required production of documents and information which plaintiff should have produced under previous orders.

Appeal by plaintiff Tammy L. Hepler, individually and as the administratrix of the estate of John A. Hepler, III, from an order entered 23 April 2004 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 May 2005.

The Blount Law Firm, P.A., by Marvin K. Blount, Jr., Darren M. Dawson, Rebecca Cameron Blount, and Harry H. Albritton, Jr.; and Wyrick Robbins Yates & Ponton L.L.P., by K. Edward Greene and Kathleen A. Naggs, for Tammy L. Hepler plaintiff appellant.

Parker Poe Adams & Bernstein, by David N. Allen, John E. Grupp, and Lori R. Keeton, for Speedway Motorsports, Inc., and Charlotte Motor Speedway, Inc., defendant appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr., Reid L. Phillips, and John W. Ormand, III, for Tindall Corporation defendant appellant.

McCULLOUGH, Judge.

Plaintiff Tammy L. Hepler, individually and as the administratix of the estate of her husband, John A. Hepler, III, appeals from an order sanctioning her for discovery violations and requiring her to provide information and produce documents. We affirm.

FACTS

On 20 May 2000, a pedestrian walkway collapsed at the Lowe's Motor Speedway (hereinafter "the Speedway")[1] in Concord, North Carolina, causing injuries to several people who were using the walkway to leave a NASCAR event. Defendant Tindall Corporation (hereinafter "Tindall") had been involved in constructing the collapsed walkway.

As a result of the walkway collapse, approximately 100 people filed actions against, *inter alia*, the Speedway and Tindall (hereinafter "defendants"). The present plaintiff, Tammy L. Hepler (hereinafter "Tammy Hepler" or "Mrs. Hepler") filed an action for her own injuries and also filed an action as the administratrix of the estate of her late husband, John A. Hepler, III, (hereinafter "Drew Hepler" or "Mr. Hepler"). The complaint alleged that Mr. Hepler's fall from the walkway caused injury to his right ankle and foot, which required surgery, and that he died as a result of multiple drug toxicity from the medications prescribed and taken for the injuries sustained in the walkway collapse. The complaint further alleged that Mrs. Hepler suffered injuries to her neck, shoulders, and lower back as a result of the injury. It was also alleged that both of the Heplers experienced lost wages and economic loss.

The Honorable Chief Justice of the North Carolina Supreme Court designated each case related to the walkway collapse an "exceptional" case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and each case was assigned to be heard by Superior Court Judge W. Erwin Spainhour. As such, the Hepler suits were designated "exceptional" and assigned to Judge Spainhour.

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1. As used in this opinion, the phrase "the Speedway" refers to defendants Speedway Motorsports, Inc., and Charlotte Motor Speedway, Inc., doing business as Lowe's Motor Speedway.

In early 2003, the first pedestrian walkway case was tried. In that case, the jury found that the Speedway and Tindall were liable. Judge Spainhour ruled that the issue of liability had been established by collateral estoppel with respect to the remaining plaintiffs. Thus, the Hepler lawsuits required only a trial to determine damages.

On 23 March 2004, defendant Tindall filed a motion for sanctions and to compel the production of certain items (hereinafter "Tindall's motion"). A hearing on this motion was held on 1 April 2004. During this hearing, Judge Spainhour orally announced his rulings. These rulings were reduced to writing, and a written order was signed by Judge Spainhour on 19 April 2004 and filed on 22 April 2004 (hereinafter "the 22 April 2004 order").

Tindall's motion addressed alleged violations of the North Carolina Rules of Civil Procedure and Case Management Orders (CMOs), which Judge Spainhour had entered to govern the voluminous discovery involved in all of the pedestrian walkway litigation. CMO No. 1, entered 20 September 2001, provided, *inter alia*, that

> [t]he identification of all expert witnesses shall include the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each such opinion as provided in Rule 26 of the North Carolina Rules of Civil Procedure.
>
> On or before March 15, 2002, all parties shall identify all expert witnesses who shall be called to testify at the trial of the particular Plaintiff(s)' case. . . .
>
> Any expert witness not identified in accordance with the terms and conditions [of] this [CMO] shall not be permitted to testify at trial absent a showing of good cause.

CMO No. 2, entered 13 March 2002, slightly revised the identification requirements and provided that "[t]he identification of all expert witnesses on or before March 15, 2002 shall be limited to the name, business affiliation and address of each expert. On or before March 29, 2002, all parties shall provide the remaining identification of all expert witnesses as defined in . . . [CMO] No. 1." CMO No. 5, entered 30 October 2002, required all plaintiffs in the pedestrian walkway litigation to provide supplemental responses to interrogatories and requests for production of documents and to certify that a complete

and updated set of, *inter alia*, medical records had been provided to defendants. CMO No. 6, entered 16 May 2003, again required all plaintiffs to "provide defense counsel with updated medical reports, medical bills, [and] expert witness reports" and mandated that plaintiffs notify defense counsel if such information had already been provided.

Specifically, Tindall's motion and Judge Spainhour's 22 April 2004 order addressed the following topics:

i. Requests for Admissions Concerning an Autopsy Performed on Mr. Hepler

An autopsy performed on Mr. Hepler revealed the presence of certain drugs in his system. Defense attorneys sought to determine whether these findings would be contested and whether the drugs found in his system had been prescribed for Mr. Hepler in the recent past. Therefore, the following requests for admissions were served upon Mrs. Hepler:

> 2. The results shown in the toxicology section of the Autopsy Report . . . accurately report the levels of acetaminophen, alprazolam, hydrocodone, norpropoxyphene, and propoxyphene which existed in Drew Hepler's blood and liver at the time of [his] death.
>
> * * * *
>
> 3. The propoxyphene and norpropoxyphene shown by the Autopsy Report as found in Drew Hepler's blood and liver did not result from any medication prescribed for [him] during the six-month period prior to his death.
>
> * * * *
>
> 4. No physician or other medical care provider prescribed any medicines for Drew Hepler containing propoxyphene . . . during the six month period prior to his death.
>
> * * * *
>
> 5. No physician or other medical care provider prescribed Darvocet or Darvon for Drew Hepler during the six-month period prior to his death.

(hereinafter "the RFAs" or "RFAs Nos. 2-5"). On 13 March 2002, Mrs. Hepler responded that she could not admit or deny any of the fore-

going items because she was "not educated nor qualified to interpret the findings of [the medical examiner]" and "lack[ed] knowledge concerning medicine and the effect of medications prescribed to and taken by Drew Hepler during the six-month period prior to his death." Further, she stated that she had "made reasonable inquiry and the information known or readily obtainable to her [was] insufficient to enable her to admit or deny th[e] [RFAs] for the reason that she lack[ed] knowledge concerning medicine and the formulation, preparation, and interpretation of autopsy reports. . . ." On 11 December 2003, well after the parties were required to be aware of the substance of their experts' opinions pursuant to CMOs Nos. 1 and 2, Mrs. Hepler's attorney indicated that these responses remained full and complete responses.

In its motion, Tindall sought sanctions for the failure of Mrs. Hepler to consult with her experts before responding to RFAs Nos. 2-5. Specifically, Tindall requested that the Court "strike [the] non-responses . . . and . . . deem [RFAs Nos. 2-5] to be admitted." In his 22 April 2004 order, Judge Spainhour determined that

> Tammy Hepler, by her response to Requests for Admissions Nos. 2, 3, 4, and 5, either has no expert witness qualified to testify about such matters or else, if she does have such experts, she failed to make reasonable inquiry of them. In either event, Plaintiff through her responses to those requests has prejudiced Defendants in their defense of Plaintiff's claims . . . .

As a sanction, Mrs. Hepler was prohibited from contradicting the subject matter in RFAs Nos. 2-5 at trial.

ii. Mrs. Hepler's Late Identification of Dr. Joseph Bederka as an Expert Witness

On 29 March 2002, Mrs. Hepler disclosed for the first time that she might call Dr. Joseph Bederka as an expert in the field of toxicology to provide testimony as to the cause of Mr. Hepler's death. Pursuant to CMOs Nos. 1 and 2, all parties were required to disclose the name, business affiliation, and address of all of their expert witnesses by 15 March 2002 and were required to disclose the substance of the facts and opinions to which the experts were expected to testify and a summary of the grounds for the experts' opinions by 29 March 2002. Judge Spainhour had consistently enforced the deadlines in CMOs Nos. 1 and 2, and had previously excluded a defense witness for the failure to meet the 15 March 2002 deadline.

Tindall sought to have Dr. Bederka's testimony excluded based upon his late identification. At the 1 April 2004 hearing on this issue, Mrs. Hepler's attorney asserted that the failure to disclose Dr. Bederka's name, business affiliation, and address on 15 March 2002 was the result of a "clerical error" and was inadvertent. Judge Spainhour indicated that he did not attribute any ill will to the nondisclosure, but noted that he felt obligated "to be as fair as [he could]" and to treat everybody the same. In his 22 April 2004 order, Judge Spainhour ruled that

> Tammy Hepler failed to timely identify Dr. Joseph Bederka in accordance with the deadline established by the Case Management Orders for the identification of all expert witnesses and, as with other expert witnesses identified late by other parties, Dr. Bederka therefore should not, and he will not, be permitted to testify.

Further, Judge Spainhour ruled that no other witnesses would be permitted to refer to any opinions held by Dr. Bederka.

iii. Incomplete Discovery Concerning Mrs. Hepler's Previous Back Injuries

Defense interrogatories served in August of 2001 requested that Mrs. Hepler identify the names and addresses of all health care providers who examined or treated her, as well as any accidents, injuries, medical conditions, or illnesses she experienced, during the ten years preceding the pedestrian walkway collapse. A corresponding request for production of documents sought "[a]ll medical records . . . relating to every illness or injury identified . . . in [the] answers to [i]nterrogatories . . . ."

Mrs. Hepler's answers indicated that she suffered a herniated disc in 1994, for which she received treatment from Dr. F. Gary Gieseke in Florida, and that she underwent back surgery in 1995. In a 21 November 2003 letter, defense counsel requested additional information about Dr. Gieseke's examination and treatment of Mrs. Hepler. Specifically, the letter noted that the defense had received hospital records pertaining to the back surgery, but lacked records of other treatment provided by Dr. Gieseke. Prompt production of such additional records was requested. Mrs. Hepler's attorney responded on 11 December 2003 by indicating that Mrs. Hepler had requested the information and documents pertaining to her treatment by Dr. Gieseke and that she would supplement the discovery requests when

the information was provided. Dr. Gieseke's office had a policy of keeping records for only seven years; therefore, records relating to Dr. Gieseke's treatment of Mrs. Hepler in 1995 were no longer available when Mrs. Hepler requested them. An MRI taken of Mrs. Hepler's back was among the documents that could no longer be produced.

Mrs. Hepler also failed to produce chiropractic records relating to treatment of a pinched nerve in her lower spine during the 1990's, and failed to produce records relating to treatment for back pain in 1994, including records arising from her admission to a hospital on 5 July 1994.

Tindall sought to have Mrs. Hepler precluded from introducing any evidence tending to show that the back injuries referenced in her complaint were the result of the pedestrian walkway failure. Judge Spainhour found that

> [t]he medical records that are missing, destroyed, or have not been produced from Dr. Gieseke and other providers who treated [Mrs. Hepler] for her history of back problems, particularly the MRI, were relevant to the defense of [her] claims relating to her back[,] and such records should have been produced when first requested by Defendants in 2001. [Her] failure to obtain and produce such records requires that an appropriate remedy or sanction be entered.

After considering other available remedies and sanctions, Judge Spainhour ruled that Mrs. Hepler would be precluded from presenting any testimony or offering any exhibits or documents "that state, imply or infer that any back injury or problem . . . [was] caused or developed as a result of the pedestrian walkway failure."

iv. The Motion to Compel

Tindall also sought a court order compelling production of additional medical records concerning the Heplers. In particular, Tindall sought previous mental health records, which were alleged to be important in defending Mrs. Hepler's claim that she suffered emotional distress as a result of the pedestrian walkway collapse. At the 1 April 2004 hearing, Judge Spainhour orally instructed Mrs. Hepler's attorney to produce these records "[w]ithin 20 days" from the date of the hearing. In the order entered 22 April 2004, Judge Spainhour ruled that

> Tammy Hepler has failed to identify all of her medical care providers and has failed to produce all of the medical records for

> herself . . . which she was required to produce by the Rules of Civil Procedure and the Case Management Orders. [Her] failures to do so have prejudiced Defendants in their ability to prepare the defense of her claims . . . , which are scheduled for trial beginning June 21, 2004.

The written order repeated Judge Spainhour's previous verbal order that "all such records should be produced and all identification should be made by [Mrs. Hepler] within 20 days of the date of the hearing on this matter."

From the order imposing sanctions and compelling production of medical records, Mrs. Hepler now appeals.

THE INTERLOCUTORY NATURE OF MRS. HEPLER'S APPEAL

[1] The order from which Mrs. Hepler appeals is interlocutory. *See Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (noting that 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"), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429-30 (1950). As a general rule, appeals from interlocutory orders will be dismissed by this Court unless the trial court has entered a certification pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), or the appeal affects a substantial right. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2003) (making an interlocutory order 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); N.C. Gen. Stat. § 1-277(a) (2003) (permitting an appeal from an interlocutory order "which affects a substantial right claimed in any action or proceeding").

Judge Spainhour's 22 April 2004 order performs two functions: it imposes sanctions for discovery violations, and it also requires Mrs. Hepler to comply with previous oral rulings and written orders governing discovery. Generally, discovery orders, including orders compelling production, are not immediately appealable. *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). However, "when [a discovery] order is enforced by sanctions pursuant to . . . Rule 37(b), the order is appealable," *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554, 353 S.E.2d 425, 426 (1987), and the appeal tests the validity of both the discovery order and the sanctions imposed, *Benfield v. Benfield*, 89 N.C. App. 415, 420, 366 S.E.2d 500, 503 (1988).

In the instant case, Mrs. Hepler appeals from the sanctions imposed pursuant to discovery orders without contesting the validity of the underlying discovery orders themselves. Therefore, it is questionable whether she has any right to immediately appeal from the portion of the interlocutory order imposing sanctions. Further, she undoubtedly has no immediate right of appeal from the portion of the interlocutory order compelling production.

Rule 2 of the North Carolina Rules of Appellate Procedure permits this Court to suspend or vary the requirements of the Rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure provides that "[t]he writ of certiorari may be issued in appropriate circumstances by [an] appellate court to permit review . . . when no right of appeal from an interlocutory order exists . . . ." This Court has discretion under Rule 2 to "treat [a] purported appeal as a petition for writ of certiorari and address the merits [of the arguments presented to this Court]." *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).

Given the number of parties, and trials, involved in the pedestrian walkway cases, the need for finality and certainty in this complex and "exceptional" litigation, and the likelihood that dismissing the present appeal would only delay this Court's ultimate review of the subject matter now at issue, we are persuaded that a disposition on the merits in the instant case would "expedite decision in the public interest." *See* N.C. R. App. P. 2 (2005). Accordingly, we exercise our authority under Rule 2 to consider Mrs. Hepler's appeal as a petition for *certiorari*, and we grant *certiorari* to review Judge Spainhour's 22 April 2004 order.

I.

In her first set of arguments, Mrs. Hepler contends that Judge Spainhour erred by excluding the testimony of her expert toxicologist, Dr. Bederka, and by precluding her from contradicting the subject matter contained in the requests for admissions concerning the drugs found in Mr. Hepler's body during an autopsy.

A.

[2] We first address Mrs. Hepler's arguments concerning the exclusion of Dr. Bederka's testimony. These arguments lack merit.

"If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others . . . [a]n order . . . prohibiting [the disobedient party] from introducing designated matters in evidence . . . ." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(b) (2003). The imposition of sanctions under Rule 37 "is in the sound discretion of the trial judge and cannot be overturned absent a showing of abuse of that discretion." *Bumgarner v. Reneau*, 332 N.C. 624, 631, 422 S.E.2d 686, 690 (1992). An abuse of discretion may arise if there is no record evidence which indicates that defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred. *See Cloer v. Smith*, 132 N.C. App. 569, 573, 512 S.E.2d 779, 782 (1999) (discussing a trial court's findings with respect to discovery violations and holding that "the deposition transcript supports the trial court's findings that counsel for [one of the parties] refused to allow [the party] to answer some questions, and, in other instances, 'told [the party] what to say' "); *King v. Koucouliotes*, 108 N.C. App. 751, 754, 425 S.E.2d 462, 464 (conducting a legal analysis to determine "whether . . . trial witnesses and trial exhibits are discoverable"), *disc. review improvidently allowed*, 335 N.C. 164, 436 S.E.2d 132 (1993). Further, "[t]he choice of sanctions under Rule 37 is within the trial court's discretion" and is reviewable only for an abuse of discretion. *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992), *aff'd*, 334 N.C. 303, 432 S.E.2d 339 (1993).

1.

Mrs. Hepler contends that Judge Spainhour was compelled to find that she had shown good cause for allowing Dr. Bederka to testify despite his late identification as an expert witness. As already indicated, CMOs Nos. 1 and 2 required a brief identification of all experts to occur on 15 March 2002 and more detailed information on each identified expert to be provided on 29 March 2002. CMO No. 1 further provided that "[a]ny expert witness not identified in accordance with the[se] terms and conditions . . . shall not be permitted to testify at trial absent a showing of good cause." Mrs. Hepler admits that she did not provide any information concerning Dr. Bederka on the 15 March deadline. However, she insists that the failure was due to inadvertence on her attorney's part, that she ultimately identified Dr. Bederka on the 29 March deadline, and that his eventual disclosure, although untimely, still occurred more than two years prior to the trial of the case in which Dr. Bederka was supposed to testify. It

follows, Mrs. Hepler insists, that there was necessarily good cause to allow Dr. Bederka to testify notwithstanding her technical failure to abide by the CMOs.

However, the record is replete with information which reveals the importance of the deadlines in each of the pedestrian walkway cases and with admonitions by Judge Spainhour that the parties should strictly and completely comply with rules and orders governing discovery. On the facts of this case, we are unpersuaded that Judge Spainhour was compelled to find that there was good cause to permit Dr. Bederka to testify, and we discern no abuse of discretion in the decision to exclude Dr. Bederka's testimony.

2.

[3] Mrs. Hepler further argues that, even if she did not make a showing of good cause, defendants waived their right to object to the late designation of Dr. Bederka. "Waiver 'is always based upon an express or implied agreement. There must always be an *intention* to relinquish a right, advantage, or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been *intentionally* given up.' " *Patterson v. Patterson*, 137 N.C. App. 653, 667, 529 S.E.2d 484, 492 (citation omitted), *disc. review denied*, 352 N.C. 591, 544 S.E.2d 783-84 (2000).

Mrs. Hepler notes that Tindall waited approximately two years after the late identification before bringing its motion to exclude Dr. Bederka's testimony. However, it also appears from the record that defendants did not schedule a deposition for Dr. Bederka and did not otherwise proceed with discovery concerning the testimony he would offer if called as a witness. Thus, assuming *arguendo* that a waiver analysis is appropriate, we are unpersuaded that the facts of the instant case compelled a finding of waiver.

3.

[4] Mrs. Hepler also contends that Judge Spainhour was compelled to find that defendants were equitably estopped from seeking sanctions for the late identification of Dr. Bederka. Our review of the record reveals that Mrs. Hepler did not make an equitable estoppel argument before Judge Spainhour. Therefore, she has waived appellate review of this issue. *See* N.C. R. App. P. 10(b)(1) (2005) ("In order to preserve a question for appellate review, a party must have

presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . ."); *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) ("[I]ssues and theories of a case not raised below will not be considered on appeal[.]").

B.

[5] We next address Mrs. Hepler's argument that Judge Spainhour erred by deeming defense RFAs Nos. 2-5 admitted and precluding her from presenting contradictory evidence. This argument lacks merit.

N.C. Gen. Stat. § 1A-1, Rule 36 (2003) provides as follows:

> (a) *Request for admission.*—A party may serve upon any other party a written request for the admission . . . of the truth of any matters within the scope of [N.C. Gen. Stat. § 1A-1] Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact . . . .
>
> The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . . The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.
>
> . . . The party who has requested the admissions may move to determine the sufficiency of the answers or objections. . . . **If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served**.

(b) *Effect of admission.*—Any matter admitted under this rule is **conclusively established** unless the court on motion permits withdrawal or amendment of the admission.

(Emphasis added.)

In the instant case, Mrs. Hepler declined to admit or deny the subject matter of RFAs Nos. 2-5 on the ground that she lacked the necessary expertise. Furthermore, although supplementation of these responses was required, she continued to assert that she could not admit or deny the subject matter of the RFAs long after she was required to report the subject matter of all of her experts' opinions. Therefore, Judge Spainhour could permissibly find that Mrs. Hepler either did not make reasonable inquiry of her experts or that, if she had made such inquiry, she was not in a position to contradict the information contained in the RFAs and should have admitted them. Thus, Judge Spainhour did not err by concluding that Mrs. Hepler had not complied with the dictates of Rule 36(a).

Further, Rule 36 provides that a trial court "may" order that a matter be deemed admitted upon determining that a response to a request for admission is noncompliant; therefore, trial courts are vested with the discretion to impose this sanction. *See Whitley v. Coltrane*, 65 N.C. App. 679, 681, 309 S.E.2d 712, 715 (1983) (holding that use of the word "may" in subsection (b) of Rule 36 indicates that "the ruling . . . [is] discretionary with the trial court"). Therefore, this Court's review of a trial court's decision to deem a matter admitted under Rule 36(a) is limited to determining whether the trial court abused its discretion. *See id.* Given the facts of the instant case, we discern no abuse of discretion in Judge Spainhour's decision to deem RFAs Nos. 2-5 admitted.

The corresponding assignments of error are overruled.

II.

[6] Mrs. Hepler next argues that Judge Spainhour erred by precluding her from presenting evidence of her back injury at trial. This contention lacks merit.

As a sanction for failing to comply with a discovery order, a trial court may "refus[e] to allow the disobedient party to support or oppose designated claims or defenses, or prohibit[] him from introducing designated matters in evidence." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(b). As already indicated, the decision to impose sanctions

pursuant to Rule 37, and the choice of sanction, are consigned to the discretion of trial court. *Ante*, slip op. at 13, 173 N.C. App. 254, 264, 618 S.E.2d 796, 805 (2005).

In the instant case, Mrs. Hepler failed to produce records of her office visits with Dr. Gieseke, an MRI taken of her back, chiropractic records relating to treatment of a pinched nerve in her lower spine during the 1990's, and documents, including hospital records, relating to treatment for back pain in 1994. Mrs. Hepler asserts that she committed no discovery violations because some of these records had been destroyed by the time she acted upon the realization that she had not produced them. In support of this position, Mrs. Hepler correctly notes that "if a party is unable to answer discovery requests because of circumstances beyond its control, an answer cannot be compelled." *Atlantic Veneer Corp. v. Robbins*, 133 N.C. App. 594, 598, 516 S.E.2d 169, 172 (1999). However, the record reveals, and Judge Spainhour found, that the now unavailable records would have been available if Mrs. Hepler had produced them when they were originally requested. Accordingly, Judge Spainhour did not err by concluding that Mrs. Hepler had committed a discovery violation. Furthermore, given that the absence of these documents potentially prejudiced the defendants' ability to dispute Mrs. Hepler's claim that the pedestrian walkway collapse caused her back injury, we are unpersuaded that Judge Spainhour abused his discretion by precluding Mrs. Hepler from presenting evidence of this claim at trial.

The corresponding assignments of error are overruled.

III.

[7] In her final argument, Mrs. Hepler challenges portions of Judge Spainhour's 22 April 2002 order which require the production of documents and compliance with the Rules of Civil Procedure and the CMOs entered in the pedestrian walkway litigation. She contends that the order should be reversed because it requires the impossible. This contention lacks merit.

In Conclusion of Law No. 4, Judge Spainhour's written order states that production of certain records must occur "within 20 days of the date of the hearing on [Tindall's motion to compel]." Paragraph four of the decretal portion of the written order also provides that

> [b]y April 21, 2004, Plaintiff shall identify all medical care providers and produce all the documents which Plaintiff was obligated to identify and produce in response to the Discovery

> Requests, the Rules of Civil Procedure and the Case Management Orders of th[e] Court . . . , and also by April 21, 2004, Plaintiff's counsel shall certify to Defendant's counsel in writing that such has been done and that all health care providers have been identified and all medical records previously requested have been produced[.]

Mrs. Hepler insists that she could not comply with these directives because they require action to be taken prior to the day on which the order was entered (22 April 2004).

However, Conclusion of Law No. 4 in the written order corresponds to a verbal instruction given by Judge Spainhour at the 1 April 2004 hearing on Tindall's motion to compel. Specifically, at the hearing, Judge Spainhour clearly and unambiguously instructed Mrs. Hepler's attorney to produce the documents subsequently referenced in Conclusion of Law No. 4 "[w]ithin 20 days." Furthermore, paragraph four of the decretal portion of the written order merely requires production of documents and information that Mrs. Hepler already should have produced pursuant to previous orders entered by Judge Spainhour.

We are unpersuaded that the circumstances surrounding the filing of Judge Spainhour's 22 April 2004 order in any way excused Mrs. Hepler from complying with Judge Spainhour's prior rulings in open court and previously entered CMOs. *See State v. Smith*, 320 N.C. 404, 415-16, 358 S.E.2d 329, 335 (1987) (affirming order where the trial court "passed on each part of [a corresponding] motion . . . in open court as it was argued and later reduced its ruling to writing, signed the order, and filed it with the clerk"); *Danielson v. Cummings*, 43 N.C. App. 546, 547-48, 259 S.E.2d 332, 333 (1979) ("The law is not so impractical as to require written notice of legal action to effectuate such action when the parties already have actual notice of the action taken from the proceedings in open court."), *aff'd*, 300 N.C. 175, 265 S.E.2d 161 (1980).

The corresponding assignments of error are overruled.

For the foregoing reasons, the order appealed from is

Affirmed.

Judges TIMMONS-GOODSON and TYSON concur.

STATE OF NORTH CAROLINA v. GEORGE WESLEY LAWSON

No. COA04-564

(Filed 20 September 2005)

1. Evidence— hearsay—identification of defendant based on statement of another witness—harmless error beyond a reasonable doubt

The trial court committed harmless error beyond a reasonable doubt in an assault with a deadly weapon inflicting serious injury case by admitting the victim's inadmissible hearsay statement identifying defendant as the perpetrator based on the statement of another witness, because: (1) a witness who was present during the incident identified defendant as the person who injured the victim and described the events that took place during the incident; (2) defendant contacted an officer and admitted to injuring the victim; and (3) another officer who responded to the emergency 911 call made that night explained the declarant witness's unavailable status.

2. Constitutional Law— right to confrontation—nontestimonial evidence—adequate indicia of reliability

Defendant's Sixth Amendment right to confrontation was not violated in an assault with a deadly weapon inflicting serious injury case even though defendant contends the statements made by his former girlfriend to the victim were testimonial in nature according to *Crawford v. Washington*, 541 U.S. 36 (2004), because: (1) the statements were nontestimonial and made while the victim was being transported to a hospital for injuries caused by defendant; (2) the statements were not made during any police investigation, rather they were made during a private conversation between the girlfriend and the victim and outside the presence of any police officer; (3) these statements were made merely to inform the victim of the attacker's identity since the girlfriend knew and the victim did not; and (4) it was unlikely that when the girlfriend made these statements she was thinking in terms of anything outside the scope of her private conversation, and she was not thinking about testifying as to this matter before the court.

3. Constitutional Law— right to confrontation—harmless error—sufficient indicia of reliability

Although defendant's constitutional right to confrontation was violated in an assault with a deadly weapon inflicting serious injury case through the admission of his girlfriend's prior statement to the victim when the State did not provide sufficient written notice in advance stating its intent to offer the girlfriend's statement as to defendant's identity through the victim's testimony, there was sufficient undisputable evidence of defendant's guilt without the victim's statement identifying defendant as the perpetrator to render the constitutional error harmless beyond a reasonable doubt.

4. Assault— deadly weapon inflicting serious injury—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury based on insufficient evidence to support the deadly weapon element, and the case is remanded for entry of judgment on the lesser-included offense of assault inflicting serious injury, because: (1) there was insufficient evidence to determine defendant's size and strength compared to that of the victim; (2) when instruments fall within the purview of those "other weapons that may become deadly" such as defendant's hands, there must be sufficient evidence at trial regarding the size and condition of defendant versus the victim as well as sufficient evidence pertaining to the manner of the weapon's use; and (3) although the jury had an opportunity to observe both defendant and the victim at trial, mere observation by the jury of the victim and defendant's strength and size alone is insufficient to support the deadly weapon element.

5. Sentencing— aggravating factors—*Blakely* error

The trial court erred in an assault with a deadly weapon inflicting serious injury case by sentencing defendant in the aggravated range based upon findings of aggravating factors that were not submitted to and found by the jury beyond a reasonable doubt, and defendant's case is remanded for resentencing.

Judge CALABRIA concurring in part and dissenting in part.

Appeal by defendant from judgment entered 6 November 2003 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 16 February 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kimberly D. Potter, for the State.

Lynne Rupp, for defendant-appellant.

JACKSON, Judge.

On 5 November 2003, George Wesley Lawson ("defendant") was tried on an indictment charging him with first degree burglary and the assault of Kevin Taborn ("Taborn") with a deadly weapon inflicting serious bodily injury. At the close of the State's evidence, the court granted defendant's motion to dismiss the first degree burglary charge. On 7 November 2003, a jury convicted defendant of assault with a deadly weapon inflicting serious injury. The court sentenced defendant as a level three offender to forty two (42) to sixty (60) months in the North Carolina Department of Correction. The court found as aggravating factors that defendant committed the crime while the victim was asleep, and by breaking and entering into the residence of Sherell Stanley, his former girlfriend, at 3:00 a.m. with the intent to assault both her and the victim. The court found no mitigating factors.

On 18 May 2001, Taborn visited Sherell Stanley and her children at her residence. They watched movies and then went to bed. At approximately 3:38 a.m., Officer Patricia Smith ("Officer Smith") responded to a domestic disturbance call made by Sherell Stanley. After Officer Smith arrived at the Stanley residence, she noticed that Sherell Stanley's forehead was swollen and that she (Stanley) was upset. After Officer Smith questioned Sherell Stanley about the incident to learn who had assaulted her (Stanley) and the victim, Sherell Stanley directed Officer Smith to defendant's residence.

Emergency services personnel responded shortly after police officers arrived at Sherell Stanley's home. The emergency services personnel subsequently transported Taborn to the hospital where he sought medical treatment for a broken jaw. He was directed by the hospital staff to seek additional treatment at the University of North Carolina's hospital. Taborn's injuries required reconstructive surgery of his bone structure, which necessitated placing a titanium plate with screws and a mesh screen on the top of it in order to simulate his bone structure. Taborn's injuries also caused him to miss approximately two months of work.

On 19 May 2001, defendant, an informant who gathered drug information for the city of Kinston, North Carolina, contacted Of-

ficer Cary Barnes ("Officer Barnes") and the two of them met in person. Defendant informed Officer Barnes that "he had got in some trouble" and that he had gone to his girlfriend's house and found a man there. Defendant then told Officer Barnes "he beat the gentleman down," he was "furious," and he "lost it." Subsequently, the police arrested defendant.

At trial, Taborn testified that his face hurt when he woke up. Taborn further stated that he knew who hit him in the face prior to arriving at the hospital. After the State asked Taborn how he knew who hit him, Taborn responded that Sherell Stanley and Tyechia Stanley, her daughter, told him. The court overruled defendant's objection and the motion to strike Taborn's response as inadmissible hearsay.

Taborn then testified that Sherell Stanley and Tyechia Stanley told him that George Lawson hit him and that he had never seen Lawson before. Defendant's attorney failed to renew his objection or make a motion to strike this testimony as inadmissible hearsay, as he had done after Taborn's previous testimony. Taborn further testified that he continues to have pain from the injuries he sustained, including tingling and numbness in his face and black dots in his left eye. Tyechia Stanley, who was present during the incident, testified at trial that she knew defendant, that she observed defendant fighting with Taborn, and that she and her mother tried to stop defendant from hitting Taborn.

Sherell Stanley did not appear in court for defendant's trial. During Officer Smith's testimony, the Court held a *voir dire* of Officer Smith on the issue of her failure to appear in court to testify. Prior to trial, the victim-witness coordinator contacted Sherell Stanley by phone and Ms. Stanley responded that she did not want law enforcement to come to her work or home. She further stated that she would come to the District Attorney's office to accept service of the subpoena but ultimately failed to do so. The Kinston Police Department attempted to serve the subpoena on Sherell Stanley but were unable to find her. Officer Smith visited Sherell Stanley's home and informed her of the court date; however, Sherell Stanley could not be located on the morning of the trial. After the *voir dire* proceedings, the trial court issued an Order for Sherell Stanley's arrest.

[1] Defendant first contends the trial court erred when it allowed inadmissible hearsay by Taborn, thus, violating defendant's state and federal rights under the Confrontation Clause, his right to a

fair trial, and right to due process of the law. Specifically, Taborn testified as follows:

State: [D]id you have an idea after talking with Ms. Sherell who might possibly have done this to you?

Counsel: I'm going to object, your honor. He's already said he didn't see it and doesn't know. He's just trying to get her testimony in.

Court: Overruled. Go ahead on.

State: Did you after speaking with Ms. Sherell Stanley have an idea who did this to you?

Witness: I knew that about 3:30 or 4:00 before I got to the hospital.

State: And how did you know that?

Witness: Sherell told me and her daughter.

Counsel: Objection. Motion to Strike.

Court: Overruled.

State: And what - who did you believe did this to you at that point?

Witness: She said *a guy named George Lawson*. I had never seen him before in my life.

(Emphasis added).

The North Carolina Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801(c) (2003). In the instant case, Taborn testified as to Sherell Stanley's statement and the statement was offered to prove the truth of the matter asserted—that defendant injured Taborn.

The North Carolina Rules of Appellate Procedure state, however, that "to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1) (2004).

In the instant case, defendant effectively objected to the State's line of questioning. We believe that defendant's pattern of objections to the hearsay testimony constituted a continuing objection to the line of questioning and therefore all of the hearsay testimony may be considered on appeal, although only part of the testimony was objected to at trial. *State v. Brooks*, 72 N.C. App. 254, 324 S.E.2d 854 (1985). However, having found that defendant properly preserved this issue, we also hold that the State has proven the admission of Taborn's testimony is harmless beyond a reasonable doubt. *State v. Morgan*, 359 N.C. 131, 157, 604 S.E.2d 886, 902 (2004); N.C. Gen. Stat. § 15A-1443(b) (2003). Absent the inadmissible hearsay, the record tends to show: (1) Tyechia Stanley, who was present during the incident, identified defendant as the person who injured Taborn and described the events that took place during the incident; (2) defendant contacted Officer Barnes, for whom he served as an informant, regarding this incident and admitted to injuring Taborn on 19 May 2001; and (3) Officer Smith responded to the emergency 911 phone call made on 19 May 2001, and during *voir dire* proceedings, explained Sherell Stanley's unavailable status. Absent the inadmissible hearsay, we still find ample evidence in the record to support the jury's guilty verdict against defendant. Therefore, this assignment of error is overruled.

[2] Defendant next contends his Sixth Amendment right to confrontation was violated relying upon *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). His reliance is misplaced as he misinterprets the United States Supreme Court's ruling in *Crawford*. Defendant asserts the statements made by Sherell Stanley to Taborn were testimonial in nature and, thus, fall within *Crawford's* definition of "testimonial." *Id.* at 68, 158 L. Ed. 2d at 203. In *Crawford*, the Court stated:

> where nontestimonial [sic] hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . .[,] [and] [w]e leave for another day any effort to spell out a comprehensive definition of "testimonial." . . .[;] [w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.

Id. In the instant case, Taborn testified about statements made by Stanley; these statements were non-testimonial and made while Taborn was being transported to a hospital for injuries caused by

defendant. The statements were not made during any police investigation, rather they were made during a private conversation between Stanley and Taborn and outside the presence of any police officer. Further, these statements were made merely to inform Taborn of the attacker's identity since Stanley already knew the attacker's identity and he did not. In *Crawford*, the Court recognized that testimonial statements include those "pretrial statements that declarants would reasonably expect to be used prosecutorially" at a later trial. *Id.* at 51, 158 L. Ed. 2d at 193. Here, however, it was unlikely that when Stanley made these statements, she was thinking in terms of anything outside the scope of their private conversation—certainly not about testifying as to this matter before the court. These statements therefore do not fall within that category "which the confrontation clause was directed" to protect. *Id.*

[3] While *Crawford* does not require that Stanley's statement be excluded, we still must determine whether the non-testimonial statement had "adequate indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980), *overruled on other grounds by Crawford*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

> In the instant case, defendant argues:
>
> While Rule of Evidence 804(b)(5) provides for the admission of hearsay statements when the declarant is unavailable and the statement is not covered by any specific exception, but is determined to have "equivalent circumstantial guarantees of trustworthiness." N.C.G.S. section 8C-1, Rule 804(b)(5), initially the trial court must find that the declarant is unavailable . . . . In the instant case, the trial court did not make a finding that Ms. Sherell was unavailable, though the court did, at a later stage in the proceedings, hear evidence that Ms. Sherell knew she was required in court, but she failed to appear. Additionally, the trial court failed to make findings of fact to support the admission of Ms. Stanley's statement based on its "trustworthiness."

Our Supreme Court, in discussing Rule 803(24), which is substantially similar to Rule 804(b)(5), previously has stated:

> First, we consider the rule's requirements for the element of trustworthiness. Rule 803(24) permits the admission of a statement "not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness." N.C.G.S. 8C-1, Rule 803(24) (1988). The con-

> frontation clause also imposes a requirement of trustworthiness. The statement of a hearsay declarant is admissible only if it bears adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980).

State v. Deanes, 323 N.C. 508, 516, 374 S.E.2d 249, 255 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989). The test of "adequate indicia of reliability" is virtually the same as the standard under Rule 804(b)(5). The dissent states that defendant failed to properly preserve the issue of whether Stanley's statement violates the standard set forth in *Roberts*. We conclude, however, that defendant properly preserved this issue for appellate review in this case and reserve for another day the issue of whether we automatically proceed to an *Ohio v. Roberts* analysis every time a *Crawford* issue is raised.

The test in *Roberts* requires the court to determine whether Stanley's out-of-court statement was properly admitted under any hearsay exception to the general rule or whether the out-of-court statement had "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66, 65 L. Ed. 2d at 608. Here, the out-of-court statement did not sufficiently fall within any recognizable exception to the general rule of hearsay. We further find that the statement did not present any particularized guarantee of trustworthiness. Under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2003), the following is not barred by the hearsay rule when the declarant is unavailable:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

The record before the court tends to show that the State did not provide written notice in advance to defendant of its intent to offer

Stanley's statement as to defendant's identity through Taborn's testimony. The State did not provide sufficient written notice in advance stating its intent to offer Stanley's statement into evidence, therefore, the statement cannot be admitted under this hearsay exception.

Applying the analysis set forth in *Roberts*, we hold that defendant's constitutional right was violated through the admission of Stanley's prior statement to Taborn. The burden, therefore, must shift to the State to show that the inadmissible statement was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2003). "In order for this Court to find that the error affecting defendant's constitutional rights was harmless beyond a reasonable doubt, we must determine that the error had no bearing on the jury deliberations." *State v. Sisk*, 123 N.C. App. 361, 370, 473 S.E.2d 348, 354 (1996) (citing *State v. Reid*, 334 N.C. 551, 558, 434 S.E.2d 193, 198 (1993)), *disc. rev. denied*, 345 N.C. 182, 478 S.E.2d 15 (1996), *aff'd in part*, 345 N.C. 749, 483 S.E.2d 440 (1997)). "Overwhelming evidence of a defendant's guilt may render a constitutional error harmless beyond a reasonable doubt." *State v. Roope*, 130 N.C. App. 356, 367, 503 S.E.2d 118, 126, *disc. rev. denied*, 349 N.C. 374, 525 S.E.2d 189 (1998) (citing *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284 (1969); *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988)).

In the instant case, Tyechia Stanley, who was present during the incident, testified at trial that she knew defendant, that she observed defendant fighting with Taborn, and that she and her mother tried to stop defendant from hitting Taborn. It is further apparent from the record that Tyechia Stanley's testimony identifying defendant as the perpetrator was not refuted. In addition, Officer Smith testified that she arrived at the scene within minutes after the 911 call, that Sherell Stanley directed her to defendant's address, and that she issued a warrant for defendant's arrest using the address given to her by Stanley. Officer Barnes further testified that defendant discussed with him the assault against the victim, admitted to being involved in a fight at Stanley's home in which "he beat the gentleman down," he was "furious," and "he lost it." Accordingly, there was sufficient undisputable evidence, without Taborn's statement identifying defendant as the perpetrator, "of . . . defendant's guilt to render the constitutional error harmless beyond a reasonable doubt." *Roope*, 130 N.C. App. at 367, 503 S.E.2d at 126. Therefore, this assignment of error is overruled.

[4] Defendant asserts the trial court erred when it denied defendant's motion to dismiss the charge of assault with a deadly weapon inflict-

ing serious injury when there was insufficient evidence to support the "deadly weapon" element of such charge. We agree.

When ruling on a motion to dismiss, the trial court must " 'consider whether the State has presented substantial evidence of each essential element of the crime charged.' " *State v. Morgan*, 164 N.C. App. 298, 302-03, 595 S.E.2d 804, 808 (2004) (quoting *State v. Alexander*, 152 N.C. App. 701, 705, 568 S.E.2d 317, 319 (2002)). The trial court further must interpret the evidence in the light most favorable to the State, "drawing all reasonable inferences in the State's favor." *State v. Grumbles*, 104 N.C. App. 766, 770, 411 S.E.2d 407, 410 (1991) (citing *State v. King*, 299 N.C. 707, 264 S.E.2d 40 (1980)).

By statute, the essential elements of assault with a deadly weapon with intent to inflict serious injury are (1) an assault; (2) with a deadly weapon; (3) inflicting serious injury; (4) not resulting in death. N.C. Gen. Stat. § 14-32(b) (2003). *See State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990). A deadly weapon is "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). This Court has held previously that a defendant's fists can be considered a deadly weapon depending on the manner in which they were used ***and*** the relative size and condition of the parties. *See State v. Rogers*, 153 N.C. App. 203, 211, 569 S.E.2d 657, 663 (2002), *disc. rev. denied*, 357 N.C. 168, 581 S.E.2d 442 (2003); *State v. Krider*, 138 N.C. App. 37, 530 S.E.2d 569 (2000); *Grumbles*, 104 N.C. App. at 771, 411 S.E.2d at 410; *State v. Jacobs*, 61 N.C. App. 610, 301 S.E.2d 429, *disc. rev. denied*, 309 N.C. 463, 307 S.E.2d 368 (1983); *State v. Archbell*, 139 N.C. 537, 51 S.E. 801 (1905).

Here, the trial court's jury charge states, in relevant part:

> 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. First, that the defendant assaulted victim intentionally beating him with an unknown object, a deadly weapon, by beating him in the face. Secondly the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. Hands and feet can be a deadly weapon. In determining whether hands and feet or another unknown object was a deadly weapon you should consider the nature of whatever object was used, *the manner in which it was used and the size and strength of the defendant as*

> *compared to the victim*. And third, that the defendant inflicted serious injury upon the victim . . . .

(emphasis added). Based on the record before this Court, there is insufficient evidence to determine defendant's size and strength compared to that of the victim. The State contends this Court has never stated that the size and condition of defendant compared to the victim is a requirement. In *Archbell*, however, our Supreme Court stated:

> [s]ome weapons are *per se* deadly, and others, owing to the violence and manner of use, become deadly. In the latter class of cases, where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and necessary to submit the matter to the jury with proper instructions.

Id. at 538, 51 S.E. at 801 (*citing State v. Hunley*, 91 N.C. 621 (1884)).

When, therefore, instruments fall within the purview of those "other weapons that may become deadly," there must be sufficient evidence at trial regarding the size and condition of defendant versus the victim as well as sufficient evidence pertaining to the manner of the weapon's use. *See Rogers*, 153 N.C. App. at 211, 569 S.E.2d at 663; *State v. Hunt*, 153 N.C. App. 316, 318-19, 569 S.E.2d 709, 711 (2002); *Grumbles*, 104 N.C. App. at 769, 411 S.E.2d at 409 (citing *Jacobs*, 61 N.C. App. at 611, 301 S.E.2d at 430); *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985).

After reviewing the record, we find the State presented sufficient evidence to be submitted to the jury as to the manner of the weapon's use, however, we do not find that the State presented sufficient evidence as to defendant's size or condition compared to that of the victim. The State asserts that the jury had an opportunity to observe both defendant and victim at the trial; however, mere observation by the jury of the victim and defendant's strength and size, alone, is not sufficient evidence to support the deadly weapon element for the charge of assault with a deadly weapon with intent to inflict serious injury. *See Archbell*, 139 N.C. at 537, 51 S.E. at 801.

Accordingly, we arrest judgment on assault with a deadly weapon inflicting serious injury and we remand for entry of judgment on the lesser included offense of assault inflicting serious injury.

[5] The final issue before us pertains to a Motion for Appropriate Relief filed by defendant with this court on 17 November 2004. In his

motion, defendant asserts that the trial court erred by sentencing him in the aggravated range based upon findings of aggravating factors that were not submitted to and found by the jury beyond a reasonable doubt. Defendant seeks to have his sentence vacated and the cause remanded to the trial court for resentencing. In support of his motion, defendant relies upon the United States Supreme Court's ruling in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), which was decided subsequent to the adjudication, but prior to the disposition on appeal, the instant case.

In *Blakely*, the Supreme Court held that, other than the fact of a prior conviction, any fact which increases the punishment for an offense beyond that which could be imposed upon a jury verdict for the offense charged must be submitted to and found by a jury beyond a reasonable doubt. 542 U.S. 296, 303-04, 159 L. Ed. 2d 403, 413-14. Our Supreme Court recently applied this holding in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). In the case *sub judice*, the trial court found, and imposed sentence in the aggravated range upon, the aggravating factors that the offense occurred while the victim was asleep and that defendant committed the offense by breaking and entering his former girlfriend's home with the intent to assault both the victim and his former girlfriend.

It is clear that the aggravating factors, upon which the trial court based its decision to impose a sentence in the aggravated range, were not submitted to, nor found beyond a reasonable doubt by, the jury. Defendant's first degree burglary charge was dismissed by the trial court at the close of the State's evidence upon defendant's motion and the issue of breaking and entering was, therefore, never presented to the jury for determination. Further, no charge or instruction was given to the jury regarding a determination as to whether defendant committed the offense alleged while the victim was asleep. Accordingly, we hold that defendant's sentencing in the aggravated range was in violation of *Blakely*.

The State argues that any *Blakely* error in this case is harmless. However, our Supreme Court, in *Allen*, has held unequivocally that *Blakely* errors under our Structured Sentencing Act are structural and, therefore, reversible *per se*. *Allen*, 359 N.C. at 444, 615 S.E.2d at 269. Consequently, as we hold that defendant's sentencing violated the requirements of *Blakely*, defendant's sentence is ordered vacated and the cause is remanded for resentencing.

Affirm, in part. Reverse and remand, in part.

Judge HUNTER concurs.

Judge CALABRIA concurs in part and dissents in part.

CALABRIA, Judge, concurring in part and dissenting in part.

I fully concur with the majority's holding that defendant properly objected to Taborn's testimony and that Stanley's statements were non-testimonial under *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). I further concur with the majority's holding with respect to defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. However, I respectfully dissent from the assertion by the majority, relying on *State v. Blackstock*, 165 N.C. App. 50, 63, 598 S.E.2d 412, 420 (2004), that "we must still determine whether the non-testimonial statement had 'adequate indicia of reliability' " under *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980), *overruled on other grounds by Crawford*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

In *Blackstock*, the victim of a robbery and shooting made several statements to law enforcement officers and his wife and daughter following the crimes. *Id.*, 165 N.C. App. at 52, 598 S.E.2d at 414. The trial court allowed the victim's wife and daughter to testify to these statements at trial pursuant to N.C. Gen. Stat. § 8C-1, Rules 803(3) and 804(b)(5) over the defendant's objections, despite the fact that the victim had died prior to trial. On appeal, the defendant argued that the victim's statements to his wife and daughter "were not properly admissible under any hearsay exception and that their admission violated his right to confrontation." *Id.*, 165 N.C. App. at 59, 598 S.E.2d at 418. In analyzing the defendant's right to confrontation, we first determined the victim's statements were non-testimonial in nature under *Crawford*. *Id.*, 165 N.C. App. at 62-63, 598 S.E.2d at 420. This Court subsequently responded to defendant's specific assertion that the testimony was inadmissible under *Roberts* by analyzing whether the testimony lacked adequate indicia of reliability. It was because the constitutional question of admissibility under *Roberts* was squarely presented by the defendant to this Court that we undertook that analysis. *Blackstock* does not and should not be read to establish a *per se* rule that this Court is somehow compelled to determine the alternative, constitutional argument that evidence is inadmissible under *Roberts* merely because a defendant has argued solely

that the evidence is inadmissible as testimonial under *Crawford*. After *Crawford*, it stands to reason that a defendant on appeal is fully entitled to argue that certain evidence is inadmissible under *Crawford* because it is testimonial and alternatively argue that the same evidence, if deemed non-testimonial, is barred under *Roberts* as failing to have adequate indicia of reliability.

In the instant case, defendant has not presented an alternative argument on appeal that the statements made by Stanley and testified to by Taborn were non-testimonial but barred under *Roberts*. Indeed, other than the separate constitutional attack under *Crawford* that Stanley's statements were testimonial, defendant does not cite *Roberts* (or any authority) in his brief for the proposition that the subject testimony was constitutionally infirm. Accordingly, defendant has failed to raise the constitutionality of Taborn's testimony under *Roberts*, and this argument has been abandoned under our Rules of Appellate Procedure. *See* N.C. R. App. P. 28(b)(6) (2005) (stating that "[a]ssignments of error . . . in support of which no reason or argument is stated . . . will be taken as abandoned"). Moreover, defendant has failed to observe N.C. R. App. P. 28 (b)(6) by failing to cite authority for the proposition that Taborn's testimony was constitutionally barred by *Roberts* or any of its progeny. This failing is significant as it appears the State was not put on notice that admissibility under *Roberts* was at issue in the instant case, *accord Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); that is, the State limits its argument to respond to defendant's contention that Stanley's statements were testimonial under *Crawford* and does not alternatively present an argument that such statements were inadmissible under *Roberts*. This limitation on the State's argument is reasonable in light of our long adherence to the appellate rules. For these reasons, I respectfully dissent as to the portion of the opinion requiring an analysis under *Roberts* merely because a defendant challenges the evidence on the grounds that it was testimonial under *Crawford*.

KEYZER v. AMERLINK, LTD.

[173 N.C. App. 284 (2005)]

LUDOVICUS N. KEYZER, A/K/A LUDO KEYZER, JOSEPH KINTZ, ROBIN KINTZ, CARL W. PARKER III, AND BARRY NAKELL, PLAINTIFFS V. AMERLINK, LTD., RICHARD SPOOR, DEBORAH N. MEYER, JOHN MEUSER, MEYER & MEUSER, P.A., AMERICAN DETECTIVE SERVICES, INC., AND KENNETH J. JOHNSON, DEFENDANTS

No. COA04-1096

(Filed 20 September 2005)

1. Privacy— invasion of—asking about prior settlement—testing confidentiality agreement

Plaintiffs did not articulate how their personal affairs or private concerns were intruded upon by defendants posing as potential clients or interviewing a former client to test compliance with a confidentiality clause in a settlement agreement. The trial court correctly dismissed or granted summary judgment on invasion of privacy claims.

2. Trespass— private detectives posing as potential legal clients—consent to enter

The trial court did not err by granting summary judgment for defendants on a civil trespass claim where defendants sent private investigators posing as potential clients to plaintiff attorney's law office, which was also his home, to ask about a prior suit which had been settled with a confidentiality agreement. Although plaintiff contended that defendants' misrepresentation of their identities rendered any consent void, the entry complained of was not of the kind that interfered with plaintiff's ownership or possession of the land.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiffs from orders entered 22 September 2003, 30 January 2004, 22 March 2004, and 12 April 2004 by Judge John R. Jolly, Jr., in Orange County Superior Court. Heard in the Court of Appeals 9 May 2005.

Barry Nakell for plaintiffs-appellants.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for defendants-appellees Amerlink, Ltd. and Richard Spoor.

Cranfill, Sumner & Hartzog, L.L.P., by Richard T. Boyette, Alicia S. Levy, and Meredith T. Black, for defendants-appellees Deborah N. Meyer, John Meuser, and Meyer & Meuser, P.A.

Nexsen Pruet Adams Kleemeier, PLLC, by Patrick D. Sarsfield, II, for defendants-appellees American Detective Services, Inc., and Kenneth J. Johnson.

LEVINSON, Judge.

Plaintiffs appeal from orders dismissing their claims against defendants for invasion of privacy, trespass, unfair or deceptive trade practices, and punitive damages. We affirm.

Preliminarily, we note that this is a companion case to *Keyzer v. Amerlink*, 172 N.C. App. 592, ––– S.E.2d ––– (filed 16 August 2005). The facts of the instant case are summarized, in pertinent part, as follows: Ludovicus Keyzer (Keyzer), a Dutch citizen residing in the Netherlands, purchased a log home kit from Amerlink, Ltd. (Amerlink), a corporation that does business in North Carolina selling log home kits. In February 1999 Keyzer filed suit against Amerlink, asserting claims arising from the log home package sale. Amerlink was represented in this lawsuit by defendants Meyer, Meuser, and Meyer & Meuser, P.A. On 12 September 2001 the parties reached a settlement agreement, which provided in relevant part that: (1) defendants would make two payments to plaintiff totaling $200,000; (2) plaintiff would release defendants from liability on all claims arising from the log home sale; and (3) neither party would reveal the terms of the settlement contract. Defendants Amerlink and Spoor subsequently employed defendants American Detective Services, Inc. (American Detective) and Kenneth Johnson (Johnson) to conduct certain investigations of plaintiffs Barry Nakell (Nakell) and Keyzer, in order to ascertain their compliance with the settlement contract's confidentiality clause.

The present appeal arises from a lawsuit initiated 11 April 2003 by plaintiffs (Keyzer, Joseph and Robin Kintz, Carl Parker, III, and Barry Nakell). Plaintiffs filed suit against defendants (Amerlink, Richard Spoor, Deborah Meyer, John Meuser, Meyer & Meuser, P.A., American Detective Services, Inc., and Kenneth Johnson), seeking compensatory and punitive damages for invasion of privacy, civil trespass, and unfair or deceptive trade practices. Plaintiffs alleged that defendants' conduct during their investigation of Nakell and Keyzer, and specifically their interviews of Nakell and Keyzer, had given rise to these claims. By their answers, defendants denied the material allegations of the complaint. Defendants also moved for dismissal of plaintiffs' claims under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003), and for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56

(2003). In response to the parties' motions, the trial court entered several orders, including the following:

> Order of 22 September 2003: Dismissal, per Rule 12(b)(6), of all claims by all plaintiffs, brought against Meyer, Meuser, and Meyer & Meuser, P.A. for trespass and punitive damages, and dismissal of claims for invasion of privacy brought by all plaintiffs, with the exception of Keyzer's privacy claim.
>
> Order of 30 January 2004: Summary judgment entered in favor of defendants Meyer, Meuser, and Meyer & Meuser, P.A., on Keyzer's claim for invasion of privacy.
>
> Order of 22 March 2004: Summary judgment entered in favor of American Detective and Johnson, on all of plaintiffs' claims.
>
> Order of 12 April 2004: Summary judgment entered in favor of Amerlink and Spoor on all of plaintiffs' claims.

Plaintiffs timely appealed from the above orders.

Standard of Review

Plaintiffs appeal from the trial court's dismissal of certain claims under Rule 12(b)(6), and from the court's award of summary judgment in favor of defendants on other claims. Accordingly, we first review the pertinent standards of review.

The standard of review of a court's dismissal under Rule 12(b)(6) is well established: "The question before a court considering a motion to dismiss for failure to state a claim is whether, if all the plaintiff's allegations are taken as true, the plaintiff is entitled to recover under some legal theory." *Toomer v. Garrett*, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002). Dismissal under Rule 12(b)(6) is proper "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (2) when some fact disclosed in the claim necessarily defeats plaintiff's claim." *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1979). In addition, because "this appeal is based on [defendant's] motion to dismiss, we must treat plaintiff's factual allegations as true." *Lovelace v. City of Shelby*, 351 N.C. 458, 459, 526 S.E.2d 652, 654 (2000) (citation omitted).

Regarding summary judgment orders, Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." On a motion for summary judgment, "[t]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact[.]" *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). " 'The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.' " *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

However, "for defendants to prevail on their motion for summary judgment, they [do] not need to negate every element of [plaintiff's claim]. 'If defendant effectively refutes even one element, summary judgment is proper.' " *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 745, 600 S.E.2d 492, 498 (2004) (quoting *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 190, 374 S.E.2d 135, 137 (1988)). "Further, the nonmoving party may not rely on the mere allegations and denials in his pleadings but must by affidavit, or other means provided in the Rules, set forth specific facts showing a genuine issue of fact for the jury; otherwise, 'summary judgment, if appropriate, shall be entered against [the nonmoving party].' " *In re Will of McCauley*, 356 N.C. 91, 100-01, 565 S.E.2d 88, 95 (2002) (quoting Rule 56(e)).

Invasion of Privacy

[1] Plaintiffs brought claims of invasion of privacy against defendants, on the theory of intrusion into each plaintiff's seclusion, solitude, or private affairs. Plaintiffs appeal from orders by the trial court that (1) dismissed, under Rule 12(b)(6), all claims of invasion of privacy brought against Meyer, Meuser, and Meyer & Meuser, P.A., except for the claim brought by Keyzer; (2) granted summary judgment for Meyer, Meuser, and Meyer & Meuser, P.A. on Keyzer's invasion of privacy claim; and (3) granted summary judgment for Amerlink, Spoor, American Detective, and Johnson, on all claims against them for invasion of privacy. Plaintiffs argue that their complaint sufficiently states a claim for relief against Meyer, Meuser, and Meyer & Meuser, P.A., and that the evidence demonstrated a genuine issue of material fact regarding the invasion of privacy claims, both

against the other defendants and on Keyzer's claim against Meyer, Meuser, and Meyer & Meuser, P.A. We disagree.

> The tort of invasion of privacy by intrusion into seclusion has been recognized in North Carolina and is defined as the intentional intrusion 'physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [where] the intrusion would be highly offensive to a reasonable person.' The kinds of intrusions that have been recognized under this tort include 'physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another.'

Toomer, 155 N.C. App. at 479-80, 574 S.E.2d at 90 (quoting *Miller v. Brooks*, 123 N.C. App. 20, 26, 472 S.E.2d 350, 354 (1996), and *Hall v. Post*, 85 N.C. App. 610, 615, 355 S.E.2d 819, 823 (1987), *rev'd on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988)). Thus, "[g]enerally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 29, 588 S.E.2d 20, 27 (2003) (citing *Burgess v. Busby*, 142 N.C. App. 393, 544 S.E.2d 4 (2001)).

In the instant case, plaintiffs' claims of invasion of privacy are primarily based on their allegations that: (1) plaintiffs Keyzer, Mr. and Mrs. Kintz, and Parker were represented by plaintiff Nakell in their respective litigations with defendant Amerlink; (2) defendants acted in concert to conduct an interview with Nakell in his law office, located in the same building as his residence; (3) during the Nakel interview, defendant-investigator Johnson posed as a disgruntled Amerlink customer and as a potential legal client of Nakell's; (4) defendants tape-recorded the interview with Nakell without his knowledge; (5) defendants also hired investigators to interview Keyzer at his flower shop in The Netherlands; (6) during these interviews, the investigators asked questions relevant to the litigation between Keyzer and Amerlink, and to the settlement agreement executed by the parties, without revealing their connection to defendants; (7) defendants' investigation of plaintiffs' compliance with the confidentiality clause had no legitimate purpose and was based on improper motives; and (8) defendants Meyer, Meuser, and Meyer & Meuser, P.A. acted in violation of the North Carolina Rules of Professional Conduct.

However, plaintiffs fail to articulate how these allegations, if true, constitute evidence that any of their personal affairs or private concerns were intruded upon. Moreover, none of the plaintiffs produced any evidence, by affidavit or otherwise, that defendants had investigated their personal affairs; had spied on, observed, or otherwise obtained any information about their private concerns; had actually obtained any information protected by the attorney-client privilege; had entered personal, non-commercial, areas of any of their houses; or had in any other way involved themselves in any of the plaintiffs' private or personal lives.

As regards defendants Meyer, Meuser, and Meyer & Meuser, P.A., we conclude that plaintiffs' complaint fails to state a claim for relief for invasion of privacy committed against plaintiffs Nakell, Mr. and Mrs. Kintz, or Parker. Accordingly, the trial court did not err by dismissing plaintiffs' complaints under Rule 12(b)(6). We further conclude that the court did not err by granting summary judgment for Meyer, Meuser, and Meyer & Meuser, P.A. on plaintiff Keyzer's claim for invasion of privacy. We note that the parties have presented arguments on whether to apply the law of North Carolina or of the Netherlands to Keyzer's claim, and we conclude that the result is the same either way. We also conclude that the trial court did not err by granting summary judgment for the other defendants on plaintiffs' claims for invasion of privacy. This assignment of error is overruled.

Trespass

[2] Plaintiff Nakell argues that the trial court erred by granting summary judgment in favor of defendants on his claim of civil trespass. We disagree.

"The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass." *Broughton*, 161 N.C. App. at 32, 588 S.E.2d at 29 (citing *Kuykendall v. Turner*, 61 N.C. App. 638, 642, 301 S.E.2d 715, 718 (1983)).

In the instant case, plaintiff argues that defendants' entry onto his property was unauthorized, and thus was a trespass. The evidence shows that Johnson and another investigator met with plaintiff in his law office after making an appointment by posing as prospective clients. Plaintiff contends that defendants' misrepresentation of their identities and purpose for visiting rendered "any consent *void ab ini-*

tio." In support of this proposition, plaintiff cites *Blackwood v. Cates*, 297 N.C. 163, 254 S.E.2d 7 (1979); *Miller v. Brooks*, 123 N.C. App. 20, 472 S.E.2d 350 (1996); and *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517 (4th Cir. 1999). However, these cases do not support plaintiff's contention under the facts of the instant case. *Blackwood* and *Miller* merely stand for the proposition that a party's consent to another's entry onto his land does not insulate against liability for trespass when the other commits subsequent wrongful acts in excess or abuse of his authority to enter, not a *per se* rule that a misrepresentation of identify invalidates the consent of the party to whom the misrepresentation was made. Likewise, *Food Lion*, *supra*, noted that "consent gained by misrepresentation is sometimes sufficient" as a defense to a claim of trespass, did not hold in accord with plaintiff's position, and further bolsters the conclusion that the individual facts of a case determine whether consent given pursuant to a misrepresentation of identify is valid as a defense to a claim of trespass.

We observe further that *Food Lion* adopted in large measure the reasoning of another case, *J.H. Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995), stating that "[w]e like *Desnick's* thoughtful analysis about when a consent to enter that is based on misrepresentation may be given effect." *Food Lion*, *id.* We also find the analysis in *Desnick* useful. The case dealt with reporters who posed as patients of a medical practice in order to obtain information about its procedures, and analyzed the consent issue in light of the aim of the tort of the trespass to protect the inviolability of a person's property. The Court held:

> There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. . . . [T]he defendants' test patients gained entry into the plaintiffs' premises by misrepresenting their purposes[.] . . . But the entry [did] not . . . infring[e on] the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land.

Desnick, 44 F.3d at 1352, 1353. Although not binding on this Court, we find the reasoning of *Desnick* persuasive. Moreover, this Court took a similar approach in *Broughton.* In that case, the defendant, a newspaper reporter, obtained permission to enter onto plaintiff's property by misrepresenting the visit as a "social" call. The defendant later published a newspaper article that included information gathered

during this visit. This Court held that "[p]laintiff has not shown or alleged that [defendant's] entry onto her land was unauthorized. To the contrary, the evidence was that plaintiff engaged in 'social' conversation with [defendant] and did not ask her to leave the property. Thus, the trial court properly granted summary judgment for defendants . . . on the trespass claim." Applying the reasoning of *Broughton* to the instant case, we hold that the trial court properly granted summary judgment for defendants on plaintiff's claim of trespass. Under these facts, the entry complained of was not of the kind that interfered with plaintiff's ownership or possession of the land; therefore, plaintiff has failed to raise a genuine issue of material fact that defendants made an unauthorized entry of the kind to support the tort of trespass. This assignment of error is overruled.

We have examined plaintiffs' remaining arguments and find them to be without merit. We conclude the trial court did not err by dismissing plaintiffs' claims, and that the court's order should be

Affirmed.

Chief Judge MARTIN concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part, dissenting in part.

I concur to affirm the dismissal of plaintiffs' invasion of privacy claim. The dismissal of plaintiffs' civil trespass claim and consequently, their unfair or deceptive practices and punitive damages claims should be reversed. I respectfully dissent.

I. Civil Trespass

The majority's opinion holds defendants did not make an " 'unauthorized entry' of the kind to support the tort of trespass" because "the entry complained of was not of the kind that interfered with plaintiffs' ownership or possession of the land." I disagree.

In the bundle of rights that define private property, the greatest stick in the bundle is exclusivity of possession. Exclusivity of possession is the basis that permits the landowner to exclude anyone from his or her property. *Hildebrand v. Telegraph Co.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941) ("The word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon

which it is practicable to place a money value. The term comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use."). This exclusivity of possession is the basis for civil and criminal trespass. *Id.*

"The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 32, 588 S.E.2d 20, 29 (2003) (citing *Kuykendall v. Turner*, 61 N.C. App. 638, 642, 301 S.E.2d 715, 718 (1983)). Consent is defined as an "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person . . . ." Black's Law Dictionary (8th ed. 2004). "Consent to a trespass which is obtained as the result of duress, fraud, or mistake is ineffective to establish a defense to an action for trespass to land." William S. Haynes, *North Carolina Tort Law* § 28-5 (1989).

Prior precedents have addressed the issue of whether obtaining consent to enter property obtained by fraud revokes consent, and the entry on another's property becomes unauthorized in a civil trespass case. Our Supreme Court has held consent to enter the lands of another is conditional, not absolute, and can be revoked by subsequent acts or be void *ab initio*. "One who enters upon the land of another with the consent of the possessor may, by his subsequent wrongful act in excess or abuse of his authority to enter, become liable in damages as a trespasser." *Blackwood v. Cates*, 297 N.C. 163, 167, 254 S.E.2d 7, 9 (1979) (defendants did not engage in a voluntary act to invalidate their perceived consent to be on the plaintiffs' property) (quoting *Smith v. VonCannon*, 283 N.C. 656, 660, 197 S.E.2d 524, 528 (1973)). In *Smith*, our Supreme Court held, "[w]e perceive no basis for a distinction between an involuntary intrusion upon the land of another and an involuntary exceeding of the landowner's assent to the original entry . . . ." 283 N.C. at 661, 197 S.E.2d at 528.

The majority's opinion asserts *Broughton v. McClatchy Newspapers, Inc.*, controls its result here. 161 N.C. App. 20, 588 S.E.2d 20 (2003). In *Broughton*, the plaintiff alleged the reporter misrepresented the purpose of a visit, stating her visit to plaintiff's home was a "social call" when in fact, the visit was to gather intelligence for a subsequent negative article about the plaintiff and her divorce. *Id.* at 32, 588 S.E.2d at 29. This Court held the plaintiff failed to show or

allege the reporter was an unauthorized trespasser when the plaintiff engaged in "social" conversation on the front porch of her home, and plaintiff did not ask the reporter to leave her property. *Id.* at 33, 588 S.E.2d at 29. Here, plaintiffs alleged in their complaint defendant's entry was unauthorized. As N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003) provides, summary judgment shall be rendered if "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The issue of consent is a question for the jury.

The majority's opinion further cites *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, as persuasive authority to support its notion that consent procured by fraud is not void or voidable. 194 F.3d 505, 517 (4th Cir. 1999) (adopting the Seventh Circuit's reasoning in *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (1995)).

The Fourth Circuit recognized:

> the various jurisdictions and authorities in this country are not of one mind in dealing with the issue. *Compare Restatement (Second) of Torts*, § 892B(2) (1965) ("if the person consenting to the conduct of another . . . is induced [to consent] by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm") and *Shiffman v. Empire Blue Cross and Blue Shield*, 256 A.D.2d 131, 681 N.Y.S.2d 511, 512 (App. Div. 1998) (reporter who gained entry to medical office by posing as potential patient using false identification and insurance cards could not assert consent as defense to trespass claim "since consent obtained by misrepresentation or fraud is invalid"), *with Desnick*, 44 F.3d at 1351-53 (ABC agents with concealed cameras who obtained consent to enter an ophthalmic clinic by pretending to be patients were not trespassers because, among other things, they "entered offices open to anyone"); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) ("where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass"); and *Martin v. Fidelity & Cas. Co. of New York*, 421 So.2d 109, 111 (Ala. 1982) (consent to enter is valid "even though consent may have been given under a mistake of facts, or procured by fraud") (citation omitted).

Id.

In *Food Lion, Inc.*, ABC reporters falsified job applications with misrepresented identities and references to secure employment at

Food Lion. 194 F.3d at 510. These applications failed to mention their concurrent employment with ABC. *Id.* The reporters used their positions as purported Food Lion employees to gain access to areas and information not available to the public. *Id.* at 510-11. The court affirmed the lower court's decision, holding Food Lion showed a trespass, not by misrepresentation, but by the breach of their duty of loyalty "triggered by the filming in non-public areas, which was adverse to Food Lion—was a wrongful act in excess of [the reporters'] authority to enter Food Lion's premises as employees." *Id.* at 518 (citing *Blackwood*, 297 N.C. at 167, 254 S.E.2d at 9 (finding liability for trespass when activity on property exceeded scope of consent to enter)). Food Lion's consent for the reporters to enter or remain on the property was "nullified when they tortiously breached their duty of loyalty to Food Lion." *Id.* at 519. Here, defendant falsely told plaintiff he was a prospective client to gain entry to his private office, remained after being asked, and specifically denied he worked for defendant while he secretly taped the conversation without plaintiff's knowledge or consent. The holding in *Food Lion* supports plaintiffs' trespass claim here.

In *Desnick v. American Broadcasting Companies, Inc.*, an ABC producer obtained permission from Dr. Desnick to film his offices for a news report after he falsely promised Dr. Desnick the report would be "fair and balanced," contain no "undercover surveillance," or involve "ambush interviews." 44 F.3d 1345, 1348. Subsequently, ABC investigators posed as test patients requesting eye examinations. *Id.* When the news report aired, it alleged Dr. Desnick tampered with equipment to obtain skewed results and recommended unnecessary surgeries. *Id.* at 1348-49. The Seventh Circuit explained, "the test patients entered *offices that were open to anyone* expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves)." *Id.* at 1352 (emphasis supplied). The court also recognized and cited *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.*, 925 F.2d 174, 178 (7th Cir. 1991), which held, "if a competitor gained entry to a business firm's premises posing as a customer but in fact hoping to steal the firm's trade secrets" the business owner's consent would be void and the trespasser would be liable. *Id.* Plaintiff Nakell's private law office is not "offices that were open to anyone." *Id.*

In *Medical Laboratory Management v. American Broadcasting Companies, Inc.*, the United States District Court for Arizona held

Desnick was not controlling or persuasive authority in the State of Arizona. 30 F. Supp. 2d 1182, 1203 (D. Ariz., 1998) ("[T]he conclusions reached in *Desnick* are not supported by the law in Arizona or the Ninth Circuit . . . If the person consenting to the conduct of another is induced to consent by . . . the other's misrepresentation, the consent is not effective for the unexpected invasion or harm." (quotation omitted)), *aff'd*, 306 F.3d 806 (9th Cir. 2002).

In *Medical Laboratory Management*, an employee of ABC telephoned the plaintiff and misrepresented she was a medical laboratory technician interested in opening a pap smear laboratory in the State of Georgia. 30 F. Supp. 2d at 1185. On that pretext, a meeting was scheduled. *Id.* The employee of ABC and a cameraman met and also toured the laboratory with the plaintiff and discussed costs, turn around time, and laboratory procedures. *Id.* ABC used the information obtained during the tour and meeting for a news report on frequent errors in pap smear testing. *Id.* at 1186.

In *Shiffman v. Empire Blue Cross and Blue Shield*, as here, a learned professional was fraudulently solicited for services. 256 A.D.2d 131, 131, 681 N.Y.S.2d 511, 511 (N.Y.A.D., 1998). The reporter misrepresented her identity and the purpose of her visit. *Id.* The court held, the "implied consent to enter the premises were legally insufficient since consent obtained by misrepresentation or fraud is invalid . . . ." *Id.*

The holdings in *Blackwood*, *Smith*, *Medical Laboratory Management*, and *Shiffman* support the viability of plaintiffs' trespass claims. *Blackwood*, 297 N.C. at 167, 254 S.E.2d at 9; *Smith*, 283 N.C. at 660, 197 S.E.2d at 528; *Medical Laboratory Management*, 30 F. Supp. 2d at 1203; *Shiffman*, 256 A.D.2d at 131, 681 N.Y.S.2d at 511. The facts in *Broughton* are easily distinguishable and not controlling to those before us. 161 N.C. App. 20, 588 S.E.2d 20.

Here, defendant Johnson contacted plaintiff Nakell and posed as a potential client. Plaintiff scheduled an appointment for defendant to meet plaintiff at his law office located within his private residence. Defendant obtained consent to enter plaintiff's private office that is not open to the general public and met with him on the pretext and false assertion that defendant was a dissatisfied customer of Amerlink seeking representation. *See Shiffman*, 256 A.D.2d at 131, 681 N.Y.S.2d at 511; *Medical Laboratory Management*, 30 F. Supp. 2d at 1203; *c.f. Blackwood*, 297 N.C. at 167, 254 S.E.2d at 9.

Defendant lied about the identity of his employer and about the purpose of the visit. When plaintiff Nakell directly asked defendant Johnson if he worked for defendant Amerlink, he again lied and answered in the negative. Defendant recorded the entire meeting without plaintiff's knowledge. Defendant's sole purpose of seeking the office visit was an attempt to obtain plaintiff's breach of the non-disclosure agreement so defendant could fraudulently avoid agreed payment thereunder.

Defendant's conduct and assertions were fraudulent and deceitful. Plaintiff's initial and subsequent consent were procured through defendant's trickery and lies. Throughout defendant's entire investigation, he fraudulently gained consent to enter plaintiff's attorney's property, to meet with plaintiff's counsel, and with the intent to lure private information out of plaintiff and his attorney to avoid payment on his mediated settlement agreement. Plaintiff's consent to enter and remain on plaintiff's property was voided when plaintiff's consent was derived from defendant's repeated fraud and deceit. *Blackwood*, 297 N.C. at 167, 254 S.E.2d at 9 (quoting *Smith*, 283 N.C. at 660, 197 S.E.2d at 528). Without consent, plaintiff asserts a viable civil trespass claim. The majority's opinion appears to agree that defendant had no consent to enter or remain on the property, but the majority's opinion does not explain or cite any authority for its assertion that defendant's unlawful and unauthorized entry was not "the kind to support the tort of trespass."

IV. Conclusion

I concur with the majority's opinion to dismiss plaintiff's claim against defendants for invasion of privacy. Because plaintiff has asserted a viable civil trespass claim, plaintiff is also entitled to assert unfair and deceptive trade practices and punitive damages claims. *Taha v. Thompson*, 120 N.C. App. 697, 704, 463 S.E.2d 553, 558 (1995) ("Because we find sufficient evidence to submit the trespass . . . to the jury, we conclude it would be error not to submit the factual issues underlying plaintiff's unfair and deceptive trade practices claim as well."), *disc. rev. denied*, 344 N.C. 443, 476 S.E.2d 130 (1996).

Plaintiff's consent to enter and remain on his property was derived by defendant's fraud or deceit and is void. I vote to reverse the trial court's dismissal of plaintiff's civil trespass, unfair and deceptive trade practices, and punitive damages claims. I respectfully dissent.

BARBARA A. JARMAN, PLAINTIFF v. JIM DEASON, D/B/A DEASON LANDSCAPE & IRRIGATION, DEFENDANT

No. COA04-1005

(Filed 20 September 2005)

Employer and Employee— wrongful discharge—age discrimination—no public policy violation

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's claim for wrongful discharge on the basis of age discrimination, because: (1) where, as here, the General Assembly has set forth the public policy of this State and limited the application of the policy to employers of fifteen or more people, it is not the province of the Court of Appeals to superimpose its own determination of what North Carolina's public policy should be; and (2) defendant's actions are not prohibited by the public policy as established by our General Assembly when defendant does not employ fifteen or more full-time employees. N.C.G.S. § 143-422.2.

Judge GEER concurring.

Appeal by plaintiff from judgment entered 24 May 2004 by Judge Yvonne Mims Evans in Gaston County Superior Court. Heard in the Court of Appeals 10 March 2005.

Jim Funderburk, for plaintiff-appellant.

Van Hoy, Reutlinger, Adams & Dunn, by G. Bryan Adams, III, and Stephen J. Dunn, for defendant-appellee.

CALABRIA, Judge.

Barbara A. Jarman ("plaintiff") appeals from a trial court judgment dismissing her claim for wrongful discharge on the basis of age discrimination against Jim Deason, d/b/a Deason Landscape & Irrigation ("defendant"). We affirm.

Plaintiff's 9 June 2003 complaint, as later amended, alleged the following facts. On or about 24 March 2003, defendant "advised [plaintiff] that even though she was doing a good job, she was 'getting some age on her' and [discharged] her." At the time of her discharge, plaintiff was fifty-two years old and had been employed by defendant for approximately eight years and seven months as an employee-at-

will working in the area of lawn maintenance, landscaping, and irrigation. Plaintiff worked with defendant longer than any other employee, was considered a good employee, received wage increases during her employment from $5.00 per hour to $9.50 per hour, was physically capable of continuing her employment, and intended to continue working with defendant past her retirement age of sixty-five. Defendant did not contest plaintiff's application for unemployment benefits, which stated she was discharged due to her age. As the basis for her claim plaintiff alleged, "[A]lthough Defendant does not employ 15 full-time employees, it is, on information and belief, against the public policy of the State of North Carolina to allow discrimination on the basis of age." On 24 May 2004, the trial court granted defendant's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief may be granted under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003). Plaintiff appeals.

"On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). On appeal, plaintiff asserts the trial court erred by dismissing her complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the grounds that the legislature, via N.C. Gen. Stat. § 143-422.2 (2003), has declared it against the public policy of this State to discriminate based on age. Defendant rejoins that dismissal was proper under N.C. Gen. Stat. § 143-422.2, which provides as follows:

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.
>
> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.[1]

1. We note both Title VII and the Age and Employment Discrimination Act contain the similar numerical thresholds of employees below which they do not apply. Title VII prohibits discrimination on the basis of "race, color, religion, sex, or national origin" by an employer "who has fifteen or more employees for each working day in each of twenty or more calendar weeks." 42 U.S.C. § 2000e (2005). Under the Age and Employ-

For reasons that follow, we are of the opinion that defendant's interpretation regarding the legislature's expression of public policy in N.C. Gen. Stat. § 143-422.2 is correct and affirm. "The general rule in North Carolina is that absent 'constitutional restraint, questions as to public policy are for legislative determination.' " *In re Phillip Morris*, 335 N.C. 227, 230, 436 S.E.2d 828, 830 (1993) (quoting *State v. Whittle Communications*, 328 N.C. 456, 470, 402 S.E.2d 556, 564 (1991). In the instant case, the legislature has clearly and distinctly set forth this State's public policy with respect to employment discrimination. Our legislature has specifically prohibited employment discrimination on certain enumerated bases by employers of fifteen or more people and deemed such discrimination to be contrary to the interests of the public. Our Supreme Court has noted that, where the legislature is clearly aware of a practice challenged on public policy grounds and knows how to forbid it but chooses not to, the proper course of action is to recognize and honor the legislative determination. *Id.* Thus, where, as here, the General Assembly has set forth the public policy of this State and limited the application of the policy to employers of fifteen or more people, it is not the province of this Court to superimpose our own determination of what North Carolina's public policy should be over that deemed appropriate by our General Assembly. This holding is not an endorsement of such practices; rather, it is a recognition of the respective functions of the judiciary and legislature. Defendant's actions, regardless of how repugnant we may find those actions, are not prohibited by the public policy as established by our General Assembly, and relief must come from the appropriate governmental body.

Plaintiff nevertheless asserts that "th[is] Court is not limited by the legislature. The Court is free to determine, on its own, whether an act on the part of an employer in an at-will employment situation violates the public policy of this state." Plaintiff cites various cases concerning discrimination on bases other than those specifically enumerated in N.C. Gen. Stat. § 143-422.2. *See, e.g.*, *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 528 S.E.2d 368 (2000) (concerning employment discrimination on the basis of physical impairment); *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276 (1992) (concerning termi-

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ment Discrimination Act, an employer, "who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year[,]" 29 U.S.C. § 630 (2005), is prohibited from "fail[ing] or refus[ing] to hire or discharg[ing] any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a) (2005).

nation of employment due to an employee's exercise of his right to free speech); *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989) (concerning termination of employment due to employee's refusal to violate state and federal transportation regulations). However, those cases cannot avail plaintiff precisely because they involve bases not encompassed by the language of the statute. There is a marked difference between recognizing additional bases not enumerated in the statute and changing the criteria of the bases that are specifically enumerated. In the first instance, the General Assembly has declared the contours and existence of this State's public policy, and the Court is not faced with the task of overriding that which has been set forth. In the second instance, the Court is forced to countermand the determination of the General Assembly in favor of our own. We do not believe that to be the proper function of this Court.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge GEER concurs in a separate opinion.

GEER, Judge, concurring.

Although I concur with the majority's conclusion that the trial court properly granted defendant's motion to dismiss, I analyze the issue somewhat differently. In *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (quoting *Sides v. Duke Univ.*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985)), our Supreme Court first recognized a public policy exception to the employment at will doctrine: " '[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.' "

Although *Coman* establishes the availability of a tort action for wrongful discharge in violation of public policy, the Court did not define what constituted "public policy" for purposes of such a claim. *Id.* That issue was addressed by the Supreme Court in *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992), in which the Court held:

> Although the definition of "public policy" approved by this Court does not include a laundry list of what is or is not "injurious to the public or against the public good," at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.

Since *Amos*, our courts, in identifying "public policy," have looked not only to statutes, but also to the constitution and state regulations. *See*, *e.g.*, *Deerman v. Beverly Cal. Corp.*, 135 N.C. App. 1, 12, 518 S.E.2d 804, 810 (1999) (Board of Nursing regulations); *Lenzer v. Flaherty*, 106 N.C. App. 496, 515, 418 S.E.2d 276, 287 (the state constitution), *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992).

Plaintiff, in arguing that her termination based on age discrimination violated public policy, points only to North Carolina's Equal Employment Practices Act ("EEPA"):

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

N.C. Gen. Stat. § 143-422.2 (2003). This Court has repeatedly recognized that the EEPA may form the basis for a wrongful discharge claim. *See*, *e.g.*, *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 322, 528 S.E.2d 368, 370 (2000) (wrongful discharge claim for handicap discrimination based upon N.C. Gen. Stat. § 143-422.2); *McCullough v. Branch Banking & Trust Co.*, 136 N.C. App. 340, 346, 524 S.E.2d 569, 574 (2000) (holding that the plaintiff had asserted a claim by alleging that his termination was "in violation of this State's public policy prohibiting discrimination on account of a person's handicap or disability," citing N.C. Gen. Stat. § 143-422.2); *Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 504 S.E.2d 580 (1998) (remanding race discrimination and retaliation claims based on N.C. Gen. Stat. § 143-422.2 for trial), *disc. review denied*, 350 N.C. 91, 527 S.E.2d 662 (1999). As the majority opinion explains, since the complaint does not allege that defendant employed 15 or more employees, the question before this Court is whether the numerical limitation in N.C. Gen. Stat. § 143-422.2 also limits the scope of North Carolina's public policy against age discrimination.

Several other states have addressed this same question, reaching varying results. In *Jennings v. Marralle*, 8 Cal. 4th 121, 124-25, 32 Cal.

Rptr. 2d 275, 277, 876 P.2d 1074, 1076 (1994), the California Supreme Court held that an employee, alleging age discrimination, could not maintain a claim for wrongful discharge in violation of public policy when the state fair employment act applied only to employers who employed five or more persons, a criteria that the defendant did not meet. The Court stated:

> This exemption of small employers from the [Act's] ban on age discrimination was enacted simultaneously to, and is inseparable from, the legislative statement of policy. For that reason, and because no other statute or constitutional provision bars age discrimination, we conclude that there presently exists no "fundamental policy" which precludes age discrimination by a small employer.

Id. at 125, 32 Cal. Rptr. 2d at 277, 876 P.2d at 1076 (construing Cal. Code §§ 12920, 12926(d) (West 2005)).

The Supreme Courts in Connecticut, Nevada, Oklahoma, and Utah have all reached the same conclusion with respect to discrimination claims. *See Thibodeau v. Design Group One Architects, LLC*, 260 Conn. 691, 709, 802 A.2d 731, 742 (2002) ("[T]he act also embodies a second public policy, namely that employers with fewer than three employees shall not be required to defend against employment discrimination claims. Contrary to the urging of the plaintiff, we cannot give voice to the act's prohibitions and simultaneously ignore its exemption for small employers, for the latter operates as a limitation on the former." (construing Conn. Gen. Stat. §§ 460-51(10), -60 (2004))); *Chavez v. Sievers*, 118 Nev. 288, 294, 43 P.3d 1022, 1026 (2002) ("Since the legislature determined that small businesses should not be subject to racial discrimination suits, we decline to create an exception to the at-will doctrine for alleged racial discrimination at these businesses." (construing Nev. Rev. Stat. §§ 613.310(2), .330 (2003))); *Brown v. Ford*, 905 P.2d 223, 229 (Okla. 1995) ("[Plaintiff's] common-law claim would not be actionable as a discharge in breach of public policy because her employer, who engaged *fewer than fifteen employees*, is outside the Act's purview." (construing Okla. Stat. tit. 25, §§ 1301(1), 1302 (1987))); *Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc.*, 2000 UT 18, ¶¶ 13-14, 994 P.2d 1261, 1266 (2000) (holding that the plaintiff could not assert an age discrimination claim against a small employer when the fair employment statute applied only to employers of 15 or more employees and the plaintiff pointed to no other applicable constitu-

tional or statutory declaration of public policy (construing Utah Code Ann. §§ 34A-5-102(8), -106 (2001))).

In contrast, the highest courts in Ohio and West Virginia have both allowed wrongful discharge in violation of public policy claims based on discrimination by employers not employing the statutorily-required number of employees. *See Collins v. Rizkana*, 73 Ohio St. 3d 65, 652 N.E.2d 653 (1995); *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997). In *Collins*, the statute at issue prohibited "any employer" from discriminating based on race, color, religion, sex, national origin, handicap, age, or ancestry. *Collins*, 73 Ohio St. 3d at 74, 652 N.E.2d at 660-61 (construing Ohio Rev. Code Ann. § 4112.02 (LexisNexis 2001)). It also provided a statutory remedy with respect to employers of four or more persons. *Id.* (construing Ohio Rev. Code Ann. § 4112.01(A)(2) (LexisNexis 2001)). In holding that the small employer limitation did not preclude the wrongful discharge claim, the Court explained:

> Since [the statute] does not preempt common-law claims, we cannot interpret [the requirement of four employees] as an intent by the General Assembly to grant small businesses in Ohio a license to sexually harass/discriminate against their employees with impunity. Instead, we can only read [that requirement] as evidencing an intention to exempt small businesses from the burdens of [the statute], not from its antidiscrimination policy. . . .
>
> We do not mean to suggest that where a statute's coverage provisions form an essential part of its public policy, we may extract a policy from the statute and use it to nullify the statute's own coverage provisions. However, in the absence of legislative intent to preempt common-law remedies, we can perceive no basis upon which to find that [the four-employee requirement] forms part of the public policy reflected in [the anti-discrimination provision]. Therefore, we cannot find it to be Ohio's public policy that an employer with three employees may condition their employment upon the performance of sexual favors while an employer with four employees may not.

Id. (internal citations omitted).

Likewise, the West Virginia Human Rights Act expresses a public policy of providing " 'all of its citizens equal opportunity for employment' " and prohibited discrimination by " 'any employer.' " *Williamson*, 200 W. Va. at 429, 490 S.E.2d at 31 (emphasis omitted) (quoting W. Va. Code §§ 5-11-2, 5-11-9(1) (2002)). The *Williamson*

court first determined that the remedial portions of the West Virginia Human Rights Act applied only to employers of 12 or more employees because it defined "employer" as including only employers of 12 or more employees. *Id.* at 428, 490 S.E.2d at 30 (construing W. Va. Code § 5-11-3(d) (2002)). Nevertheless, the court held that "[a]lthough the Act does not provide this plaintiff with a statutory remedy, it nevertheless sets forth a clear statement of public policy sufficient to support a common law claim for retaliatory discharge against an employer . . . exempted by [the statutory definition of employer]." *Id.* at 431, 490 S.E.2d at 33. *See also Molesworth v. Brandon*, 341 Md. 621, 632, 672 A.2d 608, 613 (1996) ("The public policy in § 14, however, by its own language, proscribes discrimination in employment by 'any employer.' . . . If the term 'employer' in § 14 were meant to refer only to employers as defined in § 15(b), the term 'any' would be unnecessary." (quoting Md. Ann. Code art. 49B, § 14 (2003)); *Roberts v. Dudley*, 140 Wash. 2d 58, 70, 993 P.2d 901, 908 (2000) (en banc) ("[T]he statutory remedy is not in itself an expression of the public policy, and the definition of 'employer' for the purpose of applying the statutory remedy does not alter or otherwise undo to any degree this state's public policy against employment discrimination." (construing Wash. Rev. Code § 49.60.040(3) (West 2002)).

Unlike the statutes in Ohio, West Virginia, Washington, and Maryland, however, the North Carolina EEPA does not contain an expression of policy regarding discrimination separate from the small employer exemption. The 15-employee requirement is incorporated within the anti-discrimination policy. Further, the EEPA contains no statutory remedy to which the 15-employee requirement could apply apart from the anti-discrimination policy. The EEPA simply declares the public policy of the State and authorizes the North Carolina Human Relations Commission to receive, investigate, and conciliate charges of discrimination forbidden by federal law forwarded by the Equal Employment Opportunity Commission. N.C. Gen. Stat. §§ 143-422.2, -422.3 (2003). I cannot, therefore, discern an intent by the General Assembly to express in the EEPA a public policy regarding discrimination divorced from the 15-employee requirement.

Nevertheless, as the California Supreme Court recognized in *Jennings* and the Utah Supreme Court recognized in *Burton*, an exemption for small employers in one statute addressing discrimination would not preclude a wrongful discharge claim if another statute or constitutional provision expressed a policy against discrimination without such a limitation. *See Jennings*, 8 Cal. 4th at 135,

32 Cal. Rptr. 2d at 284, 876 P.2d at 1083 ("The Legislature's decision to exclude small employers from the [fair employment act] *and the omission of any other legislation barring discrimination on the basis of age* precludes finding a fundamental policy that extends to age discrimination by small employers." (emphasis added)); *Burton*, 2000 UT 18 at § 14, 994 P.2d at 1266 ("There is no such constitutional or statutory declaration of public policy in Utah against discrimination on account of age in the termination of employment of employees of small employers.").

Maryland's highest court has held that an employee may pursue a wrongful discharge claim based on sex discrimination despite an exclusion in its Fair Employment Practices Act for small employers because "Maryland's public policy against sex discrimination is ubiquitous." *Molesworth*, 341 Md. at 632, 672 A.2d at 613. The Court observed that Maryland's Fair Employment Practices Act was "one of at least thirty-four statutes, one executive order, and one constitutional amendment in Maryland that prohibits discrimination based on sex in certain circumstances. Together these provisions provide strong evidence of a legislative intent to end discrimination based on sex in Maryland." *Id.*, 672 A.2d at 613-14.

The Washington Supreme Court has allowed a wrongful discharge claim based on age discrimination when a statute, other than the one including an exemption for small employers, also prohibited age discrimination in employment. *Bennett v. Hardy*, 113 Wash. 2d 912, 926, 784 P.2d 1258, 1264 (1990). *See also Badih v. Myers*, 36 Cal. App. 4th 1289, 1293, 43 Cal. Rptr. 2d 229, 231 (1995) (distinguishing *Jennings* with respect to a wrongful discharge claim based on sex discrimination because "sex discrimination . . . is prohibited not only by the [Fair Employment and Housing Act] but also by article I, section 8 of the California Constitution"), *disc. review denied*, No. 5048587, 1995 Cal. LEXIS 6410 (Cal. Oct. 19, 1995).

My review of North Carolina's General Statutes and constitution does not reveal another basis for upholding a wrongful discharge claim based on age discrimination apart from the EEPA. The General Assembly has expressed the State's public policy against employment discrimination in another statute not including a limitation based on the number of employees, but has chosen not to include age discrimination as one of the prohibited grounds for discrimination:

> No employer, employee, or any other person related to the administration of [the Occupational Safety and Health] Article

> shall be discriminated against in any work, procedure, *or employment* by reason of sex, race, ethnic origin, or by reason of religious affiliation.

N.C. Gen. Stat. § 95-151 (2003) (emphasis added). The applicable definition of employee includes "an employee of an employer who is employed in a business or other capacity of his employer, including any and all business units and agencies owned and/or controlled by the employer." N.C. Gen. Stat. § 95-127(9) (2003). The definition of employer includes "a person engaged in a business who has employees, including any state or political subdivision of a state, but does not include the employment of domestic workers employed in the place of residence of his or her employer." N.C. Gen. Stat. § 95-127(10).

In short, N.C. Gen. Stat. § 95-151 establishes a comprehensive policy precluding employment discrimination "by reason of sex, race, ethnic origin, or by reason of religious affiliation." While this statute would support a wrongful discharge claim based on one of the specified grounds, the omission of age from the list further limits our ability to recognize a common law wrongful discharge claim based on age discrimination by small employers.

I also have reviewed the General Statutes to determine whether, as in *Molesworth*, I can discern a substantial legislative policy against age discrimination. Repeatedly, our General Assembly has passed legislation prohibiting discrimination in a variety of contexts, but it rarely has included age. *See*, *e.g.*, N.C. Gen. Stat. § 18B-1006(k) (2003) (prohibiting issuance of alcoholic beverage permit to any private club that practices discrimination on the basis of race, gender, or ethnicity); N.C. Gen. Stat. § 18B-1215 (2003) (prohibiting discrimination in wine distribution agreements based on race, color, creed, sex, religion, or national origin); N.C. Gen. Stat. § 41A-4 (2003) (defining as an unlawful housing practice discrimination based on race, color, religion, sex, national origin, handicapping condition, or familial status); N.C. Gen. Stat. § 53-180(d) (2003) (prohibiting discrimination with respect to the extension of credit on the basis of race, color, religion, national origin, sex, or marital status); N.C. Gen. Stat. § 65-72(a) (2003) (stating the policy of the State as prohibiting cemeteries from discriminating based on race or color); N.C. Gen. Stat. § 75B-2 (2003) (prohibiting any person doing business in the State of North Carolina from entering into any agreement with any foreign government or person that requires discriminating based upon race, color, creed, religion, sex, national origin, or foreign trade relationships); N.C.

Gen. Stat. § 90-285.1(17) (2003) (providing for revocation of nursing home administrator license for discrimination among patients, employees, or staff based on race, sex, religion, color, or national origin); N.C. Gen. Stat. § 131A-8 (2003) (prohibiting health care facilities from discriminating based on race, creed, color, or national origin); N.C. Gen. Stat. § 143B-391(5) (2003) (creating Human Rights Commission in part "[t]o encourage the employment of qualified people without regard to race"); N.C. Gen. Stat. § 160A-353(6) (2003) (providing that a city may not accept a devise, bequest, or gift that requires it to discriminate among its citizens based on race, sex, or religion). Thus, our General Assembly has prohibited discrimination based on factors such as race, sex, color, national origin, and creed in a wide spectrum of activities touching almost every aspect of daily life—suggesting a pervasive or "ubiquitous" policy similar to what the Maryland Court of Appeals described in *Molesworth*.

By contrast, those statutes including age as an unlawful form of discrimination have instead focused either on limiting the discriminatory actions of governmental bodies or on specifying that the State will not do business with entities who discriminate based on age. *See*, *e.g.*, N.C. Gen. Stat. § 115D-77 (2003) (stating that the policy of the community college system is not to discriminate in employment based on race, religion, color, creed, national origin, sex, *age*, or disability except where age, sex, or physical or mental impairment is a bona fide occupational qualification); N.C. Gen. Stat. § 126-16 (2003) (requiring all State departments and agencies and local political subdivisions to give equal opportunity for employment and compensation without regard to race, religion, color, creed, national origin, sex, *age*, or handicapping condition except where age, sex, or physical requirements "constitute bona fide occupational qualifications necessary to proper and efficient administration"); N.C. Gen. Stat. § 136-28.4(b) (2003) (Department of Transportation shall give equal opportunity for contracts without regard to race, religion, color, creed, national origin, sex, *age*, or handicapping condition); N.C. Gen. Stat. § 143-128.2(h) (2003) (governmental bodies shall award public building contracts without regard to race, religion, color, creed, national origin, sex, *age*, or handicapping condition); N.C. Gen. Stat. § 143-135.5(b) (2003) (stating that State will not engage in business with a company found, within the last two years, by a court or administrative body to have discriminated unlawfully based on race, gender, religion, national origin, *age*, physical disability, or any other unlawful basis in its solicitation, selection, hiring, or treatment of another business); N.C. Gen. Stat. § 166A-12 (2003) (stat-

ing that state and local governmental bodies and other personnel who carry out emergency management functions shall not discriminate on grounds of race, color, religion, nationality, sex, *age*, or economic status in distribution of supplies, processing of applications, and other relief and assistance activities).

I do not believe that we can declare without further expression of legislative intent that the employee of a small employer may bring a claim against that private employer for wrongful discharge in violation of public policy based on age discrimination. Unlike, for example, race or sex, with age discrimination, there are policy decisions that must be made by the legislature, such as the beginning age for discrimination claims and whether there should be an ending age.

As the United States Supreme Court has pointed out, age discrimination, although without question troubling, is not comparable to other forms of discrimination such as that based on race or gender:

> Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a history of purposeful unequal treatment. Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. Accordingly, as we recognized in [prior decisions], age is not a suspect classification under the Equal Protection Clause.

Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83, 145 L. Ed. 2d 522, 542, 120 S. Ct. 631, 646 (2000) (internal citations and quotation marks omitted). A State is, therefore, allowed to discriminate based on age so long as "the age classification in question is rationally related to a legitimate state interest." *Id.* In contrast, with race, any distinction must further compelling governmental interests and with gender, classifications must both serve important governmental objectives and the discriminatory means employed must be substantially related to achievement of those objectives. *Id.* at 84, 145 L. Ed. 2d at 542-43, 120 S. Ct. at 647.

Thus, while it is questionable that State public policy could or would, for example, condemn race discrimination by a large employer but permit it by a small employer, age discrimination gives rise

to different considerations. Because the only statute reflecting the General Assembly's intent to prohibit age discrimination in the private sector includes the 15-employee limitation, I agree that this Court cannot recognize a claim for wrongful discharge in violation of public policy when an employer of fewer than 15 employees commits age discrimination.

THOMAS W. HILL, PLAINTIFF v. GARFORD TONY HILL, JEWEL ANNE HILL, D. SAMUEL NEILL, BOYD B. MASSAGEE, JR., M.M. HUNT, J.P. HUNT, BARBARA HILL GARRISON, WILLIAM LLOYD GARRISON, ERVIN W. BAZZLE, CINCINNATI INSURANCE CO., AND ESTATE OF SADIE C. HILL, DEFENDANTS

No. COA03-969-2

(Filed 20 September 2005)

1. Pleadings— Rule 11 sanctions—factual investigation

There was sufficient evidence to support the trial court's finding that plaintiff violated the factual certification requirement of N.C.G.S. § 1A-1, Rule 11, justifying the imposition of sanctions in a case which rose from the division of family assets. An attorney representing the estate made an independent investigation and concluded that there was no factual basis for claims of fraud or undue influence; a similar inquiry by plaintiff would have found ample evidence that his mother was competent and fully involved in managing both her business and personal affairs until her death.

2. Pleadings— Rule 11 sanctions—entire record considered

The entire record was before the court at a Rule 11 sanctions hearing, not just plaintiff's testimony that he made a reasonable inquiry, because defendant's motions were explicitly based on the record of the case.

3. Pleadings— frivolous appeals—authority to sanction under Rule 11

The authority to sanction frivolous appeals by shifting expenses incurred on appeal is exclusively granted to the appellate courts under Appellate Rule 34. The trial court here abused its discretion by awarding under Rule 11 attorney fees and costs incurred by defendants in defending plaintiff's appeal to the Court of Appeals and his petition to the Supreme Court.

4. Pleadings— Rule 11 sanctions—discovery resulting from complaint

Although plaintiff argues that the proper basis for discovery sanctions is N.C.G.S. § 1A-1, Rule 26(g) rather than N.C.G.S. § 1A-1, Rule 11, the document in issue here is plaintiff's complaint and Rule 11 applies.

5. Pleadings— Rule 11 sanctions—frivolous nature of complaint—not immediately apparent—sanctions levied retroactively

The trial court did not err by retroactively levying sanctions for discovery because the frivolous nature of the complaint was not discernible until after the evidence was entered and summary judgment ordered.

6. Pleadings— Rule 11 sanctions—amount—evidence reviewed

The trial court did not abuse its discretion in determining the amount of Rule 11 sanctions where it reviewed extensive affidavits itemizing defense counsel's expenses.

7. Pleadings— Rule 11 sanctions—attorney fees—unsubstantiated allegations

Unsubstantiated allegations of ex parte communications with trial judges do not bear on the award of reasonable attorney fees as a sanction under Rule 11.

8. Pleadings— Rule 11 sanctions—discovery with previous case

The trial court did not abuse its discretion by awarding as a sanction attorney fees and costs for discovery items that carried the file numbers of this suit and a previous suit.

9. Pleadings— Rule 11 sanctions—costs of motion to dismiss

Plaintiff violated Rule 11 when he signed a frivolous complaint. Expenses incurred during a motion to dismiss, whether granted or denied, were incurred due to plaintiff's signing and filing that complaint, and the trial court did not abuse its discretion by including those expenses in an award of sanctions.

10. Appeal and Error— frivolous appeals—expense shifting—authority—appellate rules

The proper basis for awarding expenses incurred on appeal, including attorney fees, is Appellate Rule 34. The application of N.C.G.S. § 6-21.5 is confined to the trial division.

11. Appeal and Error— preservation of issues—determination of issue by jury—insufficient request at trial

Plaintiff did not preserve for appellate review the issue of whether he should have had a jury determine his good faith and motives under Rule 11. Although plaintiff and defendant requested a jury trial of all issues of fact in their complaint and answers, plaintiff did not point to anything in the record or the transcript of the Rule 11 hearing indicating that he made a timely request, objection, or motion for that hearing to be before a jury.

Appeal by plaintiff from judgment entered 15 January 2003 by Judge Richard L. Doughton in Henderson County Superior Court. Heard in the Court of Appeals 20 April 2004.

On 11 October 2004, plaintiff petitioned for a rehearing of this case, which had resulted in a published opinion filed 7 September 2004. On 1 November 2004, we allowed plaintiff's petition and reheard the case with the filing of additional briefs. The following opinion supersedes and replaces the published opinion filed 7 September 2004.

William E. Loose, for plaintiff-appellant.

Long, Parker, Warren & Jones, P.A., by W. Scott Jones, for D. Samuel Neill, Boyd B. Massagee, Jr., M.M. Hunt, J.P. Hunt, Ervin W. Bazzle, Garford Tony Hill, Jewel Anne Hill, Barbara H. Garrison and William L. Garrison, defendants-appellees.

CALABRIA, Judge.

This appeal arises from sanctions imposed upon plaintiff on 15 January 2003 for violating N.C. Gen. Stat. § 1A-1, Rule 11 (2003) and N.C. Gen. Stat. § 6-21.5 (2003) in the underlying action, a dispute among the heirs of Sadie Clark Hill ("Sadie Hill" or "Sadie"). *See Hill v. Hill*, 147 N.C. App. 313, 556 S.E.2d 355 (2001) ("*Hill I*")[1]. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Sadie Hill was the mother of five children, including plaintiff Thomas W. Hill ("plaintiff") and defendants Garford Tony Hill ("Tony Hill" or "Tony") and Barbara Hill Garrison ("Barbara Garrison" or "Barbara"). Sadie died in March 1997. Although Sadie's will divided

1. This case was an unpublished opinion reported pursuant to N.C. R. App. P. 30(e).

her assets equally among her children, plaintiff was dissatisfied when he reviewed a 1987 contract ("1987 contract") between Sadie and Tony Hill and defendant Jewel Anne Hill ("Jewel Hill" or "Jewel"), in which Sadie conveyed her stock in the family business, Appalachian Apple Packers, Inc. ("AAP"), to Tony and Jewel, making them the sole shareholders.

Plaintiff asked Barbara Garrison, the administratrix of the Estate of Sadie C. Hill ("estate"), to bring suit against Tony and Jewel for allegedly using undue influence and fraud in their business dealings with Sadie. Specifically, plaintiff argued certain real property that was conveyed by Sadie to AAP in 1969 should be returned to the estate. Barbara declined his request. Plaintiff then brought a suit against Tony and Jewel Hill, which alleged undue influence, fraud, and misrepresentation of material facts in their business dealings with Sadie. This first suit survived dismissal when this Court held that plaintiff could properly bring suit on behalf of the estate as a real party in interest, since the administratrix of the estate had declined to do so. *Hill v. Hill*, 130 N.C. App. 484, 506 S.E.2d 299 (1998).[2]

On 15 January 1999, while the above-mentioned suit proceeded, plaintiff filed the instant action in Henderson County Superior Court alleging fraud, undue influence, and misappropriation of AAP corporate funds by Tony and Jewel Hill. Plaintiff's complaint also sought recovery for breach of duty against attorneys Neill and Massagee. Plaintiff further sought recovery for breach of duty against Barbara Garrison as administratrix of the estate, alleging that both Barbara and her husband, William L. Garrison, conspired with Tony and Jewel Hill to defraud Sadie Hill of her property and interest in AAP. Finally, the complaint sought recovery from M.M. Hunt and J.P. Hunt for alleged involvement in the misappropriation of AAP corporate funds and from Ervin W. Bazzle ("Bazzle"), appointed after Barbara Garrison withdrew, for alleged breach of his duty as administrator of the estate.

In orders filed 21 July 2000 and 2 August 2000, the trial court found there were no genuine issues of material fact as to plaintiff's claims and granted all defendants' motions for summary judgment. In *Hill I*, this Court affirmed the trial court's grants of summary judgment.

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2. This case was an unpublished opinion reported pursuant to N.C. R. App. P. 30(e).

On 15 January 2003, the trial court awarded attorney's fees and costs to defendants as sanctions against plaintiff under N.C. Gen. Stat. § 1A-1, Rule 11 and N.C. Gen. Stat. § 6-21.5. Defendants Neill, Massagee, Bazzle, M.M. Hunt, and J.P. Hunt were awarded $45,822.16. Defendants Barbara and William Garrison were awarded $27,894.78. Defendants Tony and Jewel Hill were awarded $42,559.75. The sanctions imposed upon plaintiff totaled $116,276.69. This amount included fees incurred by defendants due to plaintiff's appeal to this Court in *Hill I* and his subsequent petition for discretionary review to our Supreme Court, which was denied. *Hill v. Hill*, 356 N.C. 612, 574 S.E.2d 680 (2002).

I. Rule 11 Sanctions

A. Imposition of Sanctions

[1] Plaintiff asserts the trial court improperly imposed sanctions under Rule 11 against him. In pertinent part, Rule 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record. . . . A party who is not represented by an attorney shall sign his pleading, motion, or other paper. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a). Thus, Rule 11 requires the signer to certify "that the pleadings are: (1) well grounded in fact, (2) warranted by existing law, 'or a good faith argument for the extension, modification, or reversal of existing law,' and (3) not interposed for any improper purpose." *Grover v. Norris*, 137 N.C. App. 487, 491, 529 S.E.2d 231, 233 (2000). "A breach of the certification as to any one of these three [requirements] is a violation of the Rule." *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). This Court reviews *de novo* a

> trial court's order imposing Rule 11 sanctions . . . [and] must determine (1) whether the trial court's conclusions of law support its judgment or determination; (2) whether the trial court's

conclusions of law are supported by its findings of fact; and (3) whether the findings of fact are supported by a sufficiency of the evidence.

Renner v. Hawk, 125 N.C. App. 483, 491, 481 S.E.2d 370, 375 (1997).

In the instant case, the trial court found the plaintiff violated all three requirements of Rule 11. After careful review of the record, we find plaintiff violated the factual certification requirement, justifying the imposition of sanctions. Therefore, we only address his argument regarding this requirement. Plaintiff argues that there was insufficient evidence to support finding of fact 30 of the trial court's judgment and order, which states, "Plaintiff did not make a reasonable inquiry into the true and existing facts . . . allege[d] in [his] Complaint. . . . A reasonable individual with knowledge of the facts available to [plaintiff] . . . would not have believed [his] position[,] [that the 1987 contract was unfair to Sadie, to be] well grounded in fact." An appellate court, "analyzing whether a complaint meets the factual certification requirement, . . . must [determine]: (1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995).

Upon review of the record, we find plaintiff failed to undertake a reasonable inquiry, which would have revealed "his position was [not] well grounded in fact." *Id.* An attorney representing the estate made an independent investigation of plaintiff's claims and "concluded that there was insufficient evidence to establish a factual basis to prove any claims of fraud or undue influence upon Sadie Hill." If plaintiff had similarly inquired into the facts, he would have found ample evidence showing Sadie Hill to have been competent and fully involved in managing both her business and personal affairs throughout the 1980's and until her death in 1997. Most significantly, the evidence shows that Sadie Hill retained both independent legal and tax counsel for the purpose of drafting and reviewing the 1987 contract. Accordingly, the trial court's finding was supported by a sufficiency of the evidence.

[2] Plaintiff also argues that the only evidence at the Rule 11 hearing concerning his inquiry into the factual basis of his claim was his own testimony, which supported the proposition that he made a reason-

able inquiry and reasonably believed his position to be well grounded in fact. Plaintiff fails to recognize that defendants' Rule 11 motions were explicitly based on the record of the case. Thus, the entire record was before the court at the Rule 11 hearing, not merely the testimony and evidence presented during the hearing.

B. Appropriateness of Amount

Plaintiff next asserts the trial court abused its discretion regarding the amount of sanctions awarded under Rule 11(a). We disagree, *except* to the extent the trial court awarded attorney's fees and costs incurred by defendants due to plaintiff's appeal to this Court in *Hill I* and subsequent petition to our Supreme Court.

> If the trial court concludes that Rule 11 has been violated,
>
> the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

N.C. Gen. Stat. § 1A-1, Rule 11(a). As with any statutorily authorized award of attorney's fees, we review the trial court's award of attorney's fees under Rule 11 using an abuse of discretion standard. *Martin Architectural Prods., Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). The abuse of discretion standard "is intended to give great leeway to the trial court and a clear abuse of discretion must be shown." *Central Carolina Nissan, Inc. v. Sturgis*, 98 N.C. App. 253, 264, 390 S.E.2d 730, 737 (1990). Nevertheless, "it is fundamental to the administration of justice that a trial court not rely on irrelevant or improper matters in deciding issues entrusted to its discretion." *Id.*

[3] Plaintiff first argues that the trial court abused its discretion under Rule 11 by awarding attorney's fees and costs incurred by defendants in defending plaintiff's *Hill I* appeal and petition. Plaintiff contends N.C. R. App. P. 34 is the only proper basis for sanctioning appellants by awarding attorney's fees and costs to appellees. In pertinent part, N.C. R. App. P. 34 states:

> (a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney

or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

. . .

(b) A court of the appellate division may impose one or more of the following sanctions:

. . .

(2) monetary damages including, but not limited to,

a. single or double costs,

. . .

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under (b)(2) or (b)(3) of this rule.

Our courts have not directly addressed whether trial courts have discretion under Rule 11 to award attorney's fees and costs incurred after filing of a notice of appeal and due directly to the appeal. *See Griffin v. Sweet*, 136 N.C. App. 762, 525 S.E.2d 504 (2000) (mentioning this issue but not addressing it due to reversal on other grounds). Accordingly, we look to decisions under the Federal Rules of Civil Procedure for guidance. *See Turner v. Duke University*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (stating that "[d]ecisions under the federal rules are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules").

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed. 2d 359 (1990)[3], the U.S. Supreme Court addressed the issue of whether a district court had discretion to award attorney's fees, which defendants incurred due to plaintiff's appeal of a Rule 11 sanction. The U.S. Supreme Court decided the district court did not have discretion. The Court interpreted Fed. R. Civ. P. 11 in relation to Fed. R. Civ. P. 1 and Fed. R. App. P. 38 and reasoned that "Rule 11 does not apply to appellate proceedings." *Id.* at 406, 110 L. Ed. 2d at 382. The counterpart North Carolina rules, N.C. Gen. Stat. § 1A-1, Rules 1 and 11 and N.C. R. App. P. 34, closely track the above-mentioned federal rules. Thus, we find the U.S. Supreme Court's analysis sound with regard to the relationship between our Rule 11 and N.C. R. App. P. 34.

In applying the U.S. Supreme Court's analysis to our rules, we note that Rule 11 must be interpreted with reference to N.C. Gen. Stat. § 1A-1, Rule 1, *see id.*, which states the North Carolina Rules of Civil Procedure only "govern the procedure in the superior and district courts of the State of North Carolina. . . ." Whereas, the North Carolina Rules of Appellate Procedure "govern procedure in all appeals from the trial courts of the trial division to the courts of the appellate division. . . ." N.C. R. App. P. 1.

In this light, "extending the scope of [Rule 11] to cover any expenses, including fees on appeal, incurred 'because of the filing[,]' " *Cooter & Gell*, 496 U.S. at 406, 110 L. Ed. 2d at 382, would grant to trial courts discretion under Rule 11 to award attorney's fees and costs incurred due to an appeal "when the appeal would not be sanctioned under the appellate rules." *Id.* at 407, 110 L. Ed. 2d at 383. "Rule 11 is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level." *Id.* at 406, 110 L. Ed. 2d at 382. The authority to sanction frivolous appeals by shifting "expenses incurred on appeal . . . onto appellants" is exclusively granted to the appellate courts under N.C. R. App. P. 34. *Id. Cf. Four Seasons Homeowners Assoc., Inc. v. Sellers*, 72 N.C. App. 189, 323 S.E.2d 735 (1984) (reversing a trial court

3. The rule set forth in *Cooter & Gell*, that a district court has the power to impose sanctions under Fed. R. Civ. P. 11 after the dismissal of a case, was partially superceded by the 1993 amendment to Fed. R. Civ. P. 11, which provided a "safe harbor" provision requiring "a party seeking Rule 11 sanctions [to] wait 21 days from the service of their motion before filing it with the court, in order to give the party the opportunity to withdraw or appropriately correct the challenged paper, claim, defense, contention, allegation, or denial." *De La Fuente v. DCI Telecomms., Inc.*, 259 F. Supp. 2d 250, 258 n.4 (S.D.N.Y. 2003) (citing Fed. R. Civ. P. 11 (c)(1)(A)). The 1993 amendment did not alter the portions of the *Cooter & Gell* holding relevant to the instant case.

award of $4,480 for attorney's fees incurred by plaintiff due to defendants' appeal to this Court); N.C. Gen. Stat. § 1-294 (2003) (staying "all further proceedings in the court below . . . [except those] upon any other matter included in the action and not affected by the judgment appealed from").

This limit on Rule 11's scope also "accords with the policy of not discouraging meritorious appeals." *Cooter & Gell*, 496 U.S. at 408, 110 L. Ed. 2d at 383. If trial courts had discretion to routinely compel appellants "to shoulder the appellees' attorney's fees, valid challenges to [trial] court decisions would be discouraged." *Id.* Accordingly, attorney's fees and costs incurred in defending an appeal may only be awarded under N.C. R. App. P. 34 by an appellate court. Thus, the trial court abused its discretion under Rule 11 by improperly awarding to defendants attorney's fees and costs incurred after plaintiff's filing of notice of appeal and due directly to his appeal to this Court and petition to our Supreme Court.

[4] Plaintiff also argues the trial court abused its discretion by awarding, under Rule 11, attorney's fees and costs incurred during discovery proceedings because N.C. Gen. Stat. § 1A-1, Rule 26(g) is the only proper basis upon which to award such expenses. "N.C.G.S. § 1A-1, Rule 26(g) requires an attorney or unrepresented party to sign each *discovery request*, *response*, *or objection*. Such signature constitutes a certification parallel to that required by Rule 11." *Brooks v. Giesey*, 334 N.C. 303, 317, 432 S.E.2d 339, 347 (1993) (emphasis added). In the instant case, the document at issue is plaintiff's complaint, a pleading, which is covered under Rule 11, not a "discovery request, response, or objection." *Id.*; N.C. Gen. Stat. § 1A-1, Rule 11(a). Attorney's fees and costs incurred during discovery as a result of plaintiff's complaint are a proper basis for an award of attorney's fees and costs under Rule 11.

[5] Plaintiff next argues the trial court abused its discretion by retroactively levying sanctions for discovery rather than sanctioning at the time of the behavior. In support, plaintiff directs us to *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 464 S.E.2d 47 (1995), and quotes portions of *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986). *Pleasant Valley Promenade*, however, stands for the proposition that "the denial of a motion for summary judgment is not an automatic bar to imposition of Rule 11 sanctions." *Pleasant Valley Promenade*, 120 N.C. App. at 659, 464 S.E.2d at 55. Further, the portion of *Matter of Yagman* quoted by plaintiff is not the portion quoted

in *Pleasant Valley Promenade*. Moreover, the *Matter of Yagman* quotation relied upon by this Court in *Pleasant Valley Promenade* is counter to plaintiff's argument:

> As noted by the United States Court of Appeals for the Ninth Circuit in *Matter of Yagman*:
>
> > In some situations, liability under proper sanctioning authority will not be immediately apparent or may not be precisely and accurately discernible until a later time. For example, findings under Rule 11 occasionally cannot be made until after the evidentiary portion of the trial. A claim may appear to raise legitimate and genuine issues before trial, even in the face of summary judgment challenges, but will be unmasked as not well-founded in fact after the claimant has presented his evidence.
>
> *Matter of Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), *cert. denied*, *Real v. Yagman*, 484 U.S. 963, 98 L. Ed. 2d 390 (1987) (emphasis added). We agree with the reasoning of the Court in *Matter of Yagman*.

Id. at 660, 464 S.E.2d at 55-56. In the instant case, the trial court likely could not have known to sanction plaintiff during discovery because the frivolous nature of his complaint was not discernible until after evidence had been entered and summary judgment for defendants ordered.

[6] Plaintiff further argues the trial court failed to scrutinize defense counsels' expense affidavits and abused its discretion by entering a "round-figure, lump-sum" award. Plaintiff again relies on *Matter of Yagman* for his contention. In that case, the district court imposed sanctions in the amount of $250,000.00. *Matter of Yagman*, 796 F.2d 1165, 1182 (9th Cir. 1986). The United States Court of Appeals for the Ninth Circuit reversed the order, finding, *inter alia*, that the district court made "no attempt to itemize or quantify the sanctions." *Id.* at 1185. In contrast, the trial court, in this case, reviewed the extensive affidavits itemizing defense counsel expenses and, on this basis, ordered plaintiff to pay defendants' attorney's fees and costs in the total amount of $116,276.69.

[7] Plaintiff also argues, based on unsubstantiated allegations of *ex parte* communications, that the trial court abused its discretion by awarding attorney's fees for defense counsels' time spent in those alleged *ex parte* discussions with the assigned trial judges. The only

authority plaintiff cites for this proposition is N.C. Code of Judicial Conduct, Canon 3.A(4) (2004), which prohibits *ex parte* discussions between judges and parties. An alleged violation of the Code of Judicial Conduct may be a proper basis for pursuing disciplinary proceedings against a judge pursuant to "Article 30 of Chapter 7A of the General Statutes of North Carolina." N.C. Code of Judicial Conduct, Preamble (2004). However, unsubstantiated allegations of *ex parte* communications do not bear on the award of reasonable attorney's fees as a sanction under Rule 11.

[8] Plaintiff next argues the trial court abused its discretion by awarding attorney's fees and costs for discovery items that carried both the file number of his first suit, 97 CVS 725, and that of the instant case, 99 CVS 67. In support of this contention, plaintiff directs us to depositions carrying both file numbers in their caption and a letter sent by defense counsel. A deposition taken for both cases clearly was needed for each case and would have been taken for either one. The letter referenced by plaintiff did not deal with depositions but merely asked for a response to discovery requests in both cases.

[9] Plaintiff's final argument is that the trial court abused its discretion by awarding fees and costs for defendants' 12(b)(6) motions, which were denied. Plaintiff, however, violated Rule 11 at the moment he signed the complaint. *See Bryson*, 330 N.C. at 657, 412 S.E.2d at 334 (stating that "[t]he text of [Rule 11] requires that whether the document complies with . . . the Rule is determined as of the time it was signed"). Accordingly, expenses incurred during a motion to dismiss, whether granted or denied, are reasonable expenses incurred due to plaintiff's signing and filing the frivolous complaint.

II. Sanctions under N.C. Gen. Stat. § 6-21.5

[10] Since the trial court properly awarded attorney's fees and costs under Rule 11, with the exception of those incurred due to plaintiff's prior appeal to this Court and petition to our Supreme Court, we need only address whether the trial court, under N.C. Gen. Stat. § 6-21.5, had discretion to award attorney's fees incurred by defendants due to plaintiff's appeal and petition. Under N.C. Gen. Stat. § 6-21.5,

> [i]n any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the

> losing party in any pleading. *The filing of a general denial or the granting of any preliminary motion, . . .* is not in itself a sufficient reason for the court to award attorney's fees, but *may be evidence to support the court's decision to make such an award.* A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. *The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.*

(Emphasis added).

The emphasized portions of N.C. Gen. Stat. § 6-21.5 above clearly indicate that its application is confined to the trial division. *See Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (stating that "[w]here the language of a statute is clear, the courts must give the statute its plain meaning"); *Winston-Salem Wrecker Ass'n v. Barker*, 148 N.C. App. 114, 121, 557 S.E.2d 614, 619 (2001) (observing that "[b]ecause statutes awarding an attorney's fee to the prevailing party are in derogation of the common law, N.C.G.S. § 6-21.5 must be strictly construed"). Thus, similar to Rule 11, N.C. Gen. Stat. § 6-21.5 is most "sensibly understood as permitting an award only of [attorney's fees] directly caused by the filing, logically, those at the trial level." *Cooter & Gell*, 496 U.S. at 406, 110 L. Ed. 2d at 382. This interpretation also "accords with the policy of not discouraging meritorious appeals." *Id.* at 408, 110 L. Ed. 2d at 383. Accordingly, N.C. R. App. P. 34 is the only proper basis for awarding expenses, including attorney's fees, incurred due to an appeal, and the trial court abused its discretion under N.C. Gen. Stat. § 6-21.5.

III. Rule 11 Hearing

[11] Plaintiff asserts the trial court violated his rights under the Seventh Amendment of the U.S. Constitution and Article I, Section 25 of the N.C. Constitution by holding a Rule 11 hearing without a jury to determine the issue of his good faith and motives. Under N.C. R. App. P. 10(b)(1), "[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." Moreover, this Court will not address constitutional arguments unless such arguments were raised before the trial court. *Daniels v. Hetrick*, 164 N.C. App. 197, 200, 595 S.E.2d 700, 702 (2004).

In support of his putative right to have the Rule 11 hearing before a jury, plaintiff argues he properly requested a jury trial in his complaint and "again when facing the prospects of sanctions under Rule 11." Plaintiff directs this Court's attention to his complaint and the various defendants' answers in the record, which each request a jury trial for all issues of fact. However, plaintiff fails to point to anything in the record or Rule 11 hearing transcript indicating he made a timely request, objection, or motion to the trial court, on constitutional grounds or otherwise, regarding a right to a Rule 11 hearing before a jury. In addition, we note that an appellant has the duty to ensure the record and complete transcript are properly prepared and transmitted to this Court. *Hill v. Hill*, 13 N.C. App. 641, 642, 186 S.E.2d 665, 666 (1972). Here, plaintiff presented only a twelve-page, partial transcript of the Rule 11 hearing. This partial transcript contains no indication he made a timely request, objection, or motion to the trial court concerning the absence of a jury. Therefore, plaintiff failed to properly preserve this issue for appellate review under our Rules of Appellate Procedure, and we do not address the substantive merits of his argument.

IV. Conclusion

For the foregoing reasons, we affirm, in part, the trial court's order of sanctions under N.C. Gen. Stat. § 1A-1, Rule 11. We reverse, in part, the trial court's order of sanctions, having determined the trial court abused its discretion under Rule 11 and N.C. Gen. Stat. § 6-21.5 in awarding attorney's fees and costs incurred by defendants due to plaintiff's appeal to this Court and petition to our Supreme Court. The trial court's decision is remanded for further findings of fact, separating the attorney's fees and costs incurred by defendants at the trial level from those incurred after plaintiff's filing of notice of appeal and directly stemming from defendants' defense of his appeal and petition. We instruct the trial court, after making these findings, to issue an order under Rule 11 awarding only those fees and costs incurred at the trial level.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and STEELMAN concur.

STATE OF NORTH CAROLINA v. AARON JONWAN BREWTON, DEFENDANT

No. COA04-1127

(Filed 20 September 2005)

1. Conspiracy— first-degree murder—sufficiency of evidence

There was sufficient circumstantial evidence to deny defendant's motion to dismiss conspiracy to commit first-degree murder even though defendant's alleged co-conspirator testified that they did not expressly agree or plan to kill the victim. A reasonable juror could infer from the evidence an implicit agreement to work together.

2. Conspiracy— first-degree murder—premeditation and deliberation inherent in agreement

When a jury finds an agreement to commit a murder, it necessarily also finds premeditation and deliberation.

3. Sentencing— *Blakely* error—harmless error not applicable

A *Blakely* error in sentencing defendant with judicially found aggravating factors was not subject to harmless error analysis. Sentencing errors under *Blakely v. Washington*, 542 U.S. 296, are structural and reversible per se.

Appeal by defendant from judgment entered 13 May 2004 by Judge E. Penn Dameron, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 14 April 2005.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

GEER, Judge.

Defendant Aaron Jonwan Brewton appeals from the judgment of the trial court finding him guilty of conspiracy to commit murder. Defendant argues on appeal that the trial court (1) erred when it denied his motion to dismiss the conspiracy charge because there was insufficient evidence to support such a charge, (2) committed plain error by not properly instructing the jury on the charge of conspiracy to commit murder, and (3) erred by imposing an aggravated sentence based upon judicially-found aggravating factors. We hold

that there was sufficient evidence to deny the motion to dismiss and that the court did not commit plain error in its instructions to the jury. With respect to defendant's sentence, however, we hold that under *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), this case must be remanded for a new sentencing hearing.

Facts

The State's evidence tended to show the following. In January 2003, Neko Hyatt was stabbed to death by George Boston after an altercation outside a nightclub in Asheville, North Carolina. Defendant was present at the nightclub on the night of the murder and witnessed the altercation between Hyatt and Boston. Boston was later arrested and charged with the murder of Neko Hyatt.

In early May 2003, Boston was released on bond while the murder charge was pending. Those close to Neko Hyatt were upset, including Charles Hyatt (Neko Hyatt's brother) and defendant (Charles Hyatt's cousin). Boston's sister, Kimberly Boston, stated that her brother primarily stayed inside because there had been talk on the streets that something might happen to him.

On 24 May 2003, George Boston was sitting outside of the Deaverview Apartments. Kimberly Boston, who was also outside, saw two men drive by two or three times in a PT Cruiser, but she could not identify the men. Later, Kimberly saw a tall man, wearing a white T-shirt and a baseball cap on his head, come from behind one of the buildings. A deliveryman testified that the man had a white shirt or towel draped over what looked like a gun. The man raised his arm and fired three or four shots at George Boston before running to the PT Cruiser, which was waiting with the passenger door open. Kimberly chased after the PT Cruiser and got a partial license tag number. George Boston died later that day.

Kimberly Boston testified at trial that she believed, based upon the person's build, that defendant was the man who shot George Boston. Kimberly knew defendant because he had dated her sister for a time, and she also knew that defendant had recently made threats against her brother. George's older brother, Marcellus Boston, also identified defendant as the shooter based upon his build and from seeing his face from the eyes down. Marcellus could not see the shooter's entire face because he had a white shirt draped on his head. Another witness, Nikki Griffin, testified that while she could not see

the shooter's face, she thought it was defendant based upon the way he carried himself.

After the shooting, the police radioed all officers to watch for a gold PT Cruiser with two black males in the area of Deaverview Apartments. Shortly thereafter, an officer spotted and subsequently stopped the PT Cruiser. The officer arrested the driver, Charles Hyatt. No one else was in the car at the time.

Hyatt, who was charged with first degree murder and conspiracy to commit first degree murder, was called to testify by the State at defendant's trial. He stated that, on 24 May 2003, defendant, who was driving a burgundy car, agreed to give Hyatt a ride to get something to eat. Later, defendant decided instead to go to Deaverview Apartments. Hyatt testified that he was "all right with that." The two of them then borrowed a PT Cruiser from Carmell Harding. Harding had rented the car from Enterprise Rent-A-Car. After defendant dropped off the burgundy car, defendant drove the two men to the Deaverview Apartments in the PT Cruiser. Hyatt testified that at that point he "had no clue" why they were going to the apartment complex. When they spotted George Boston, defendant said to Hyatt, "[t]here he goes" and exclaimed "[b]itch n––––r." Hyatt acknowledged that George Boston was the only person they were looking for and that when defendant said "there he goes," Hyatt knew whom he meant.

After saying "[t]here he goes," defendant stopped the car down the road from the apartments and Hyatt moved to the driver's seat. Defendant got out of the car with a t-shirt balled up in his hand and headed into some trees across the street. Hyatt claimed that he did not see defendant take a gun. Hyatt then got in the driver's seat and drove around the complex for a few minutes by himself. Defendant called Hyatt on his cell phone and said, "Let's roll." As Hyatt drove towards the apartment complex exit, he heard three or four gunshots, but did not see the shooting itself. Hyatt picked up defendant near the apartment complex exit and they drove away without saying a word.

At defendant's direction, Hyatt drove defendant to defendant's uncle's house near the French Broad River by a route through the countryside. Defendant never said anything about what had happened at the apartments. As Hyatt was driving the PT Cruiser back to Asheville to return it to Harding, he was stopped by the police.

When interviewed by the police that afternoon, Hyatt initially falsely told them that he alone had borrowed the PT Cruiser and was by himself at Deaverview Apartments when defendant called to ask him for a ride. Hyatt claimed that he had simply picked defendant up and driven defendant to defendant's uncle's house. When the police asked Hyatt to call defendant on his cell phone, he refused to do so. Later, Hyatt gave statements consistent with his trial testimony. Hyatt also testified at trial that defendant had not discussed going to Deaverview Apartments to kill Boston and that there was no plan or agreement. According to Hyatt, it "just happened."

Defendant was subsequently indicted with first degree murder and conspiracy to commit first degree murder. These charges were tried on 10 May 2004 before Judge E. Penn Dameron, Jr. in Buncombe County Superior Court. The jury found defendant guilty of conspiracy to commit first degree murder. It could not, however, reach a unanimous verdict on the first degree murder charge, and the judge declared a mistrial as to that charge.

In the sentencing phase, Judge Dameron found as aggravating factors that (1) the offense was committed to disrupt the lawful exercise of a governmental function or the enforcement of the laws, (2) defendant knowingly created a great risk of death to more than one person by means of a weapon or device, and (3) defendant committed the offense while on pre-trial release. The judge found as mitigating factors that (1) defendant had a support system in the community, and (2) defendant had a positive employment history. The judge concluded that the aggravating factors outweighed the mitigating factors and sentenced defendant in the aggravated range to a term of 276 to 341 months imprisonment.

Defendant gave oral notice of appeal from his conviction for conspiracy to commit murder following sentencing on 13 May 2004. Defendant later filed a motion for appropriate relief with this Court on 13 October 2004 based on *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).

I

[1] Defendant first assigns error to the trial court's denial of his motion to dismiss the charge of conspiracy to commit first degree murder. Defendant argues that there was insufficient evidence of an agreement between defendant and Charles Hyatt to support a

finding of a conspiracy. When considering a motion to dismiss by a criminal defendant, 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, 123 S. Ct. 488 (2002). "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). When considering a motion to dismiss, the court must 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, 115 S. Ct. 2565 (1995). " 'In "borderline" or close cases, our courts have consistently expressed a preference for submitting issues to the jury . . . .' " *State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (quoting *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *cert. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986)), *aff'd per curiam*, 331 N.C. 113, 413 S.E.2d 798 (1992).

A criminal conspiracy is "an agreement, express or implied, between two or more persons, to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Gell*, 351 N.C. 192, 209, 524 S.E.2d 332, 343, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110, 121 S. Ct. 163 (2000). While the existence of an agreement is an essential element of conspiracy, an express agreement is not required in order to show that a conspiracy existed. *State v. Lawrence*, 352 N.C. 1, 24, 530 S.E.2d 807, 822 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684, 121 S. Ct. 789 (2001). As the Supreme Court stated in *Lawrence*:

> A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense. The existence of a conspiracy may be shown with direct or circumstantial evidence. The proof of a conspiracy may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.

Id. at 24-25, 530 S.E.2d at 822 (internal citations and quotation marks omitted). On the other hand, "[w]hile conspiracy can be proved by

inferences and circumstantial evidence, it 'cannot be established by a mere suspicion, nor does a mere relationship between the parties or association show a conspiracy.' " *State v. Benardello*, 164 N.C. App. 708, 711, 596 S.E.2d 358, 360 (2004) (quoting *State v. Massey*, 76 N.C. App. 660, 662, 334 S.E.2d 71, 72 (1985)).

Since Hyatt testified that he and defendant did not expressly agree or plan to kill Boston, the State had no direct evidence of conspiracy and had to rely upon circumstantial evidence. After reviewing the evidence in the light most favorable to the State, we find there was sufficient circumstantial evidence to support a charge of conspiracy to commit murder.

The evidence at trial indicated that both Hyatt and defendant were upset that Boston had been released on bond after killing Hyatt's brother. On the day of the murder, although Hyatt had requested a ride to get something to eat, defendant suggested instead that they go to Deaverview Apartments where they ultimately found Boston—a change with which Hyatt was "all right." Rather than simply driving there in defendant's girlfriend's car, which defendant already was driving, the two men borrowed a rental car from another person—conduct that the jury could view as an attempt to avoid identification. After driving back and forth through the apartment complex, defendant announced "[t]here he is," and Hyatt acknowledged that he understood defendant to be referring to Boston because that was the only person for whom they would be looking. Defendant immediately stopped the car and got out, while Hyatt drove around until he received a cell phone call from defendant, saying "[l]et's roll." At that point, Hyatt drove to a particular spot, stopped the car, and opened the passenger door. Although Hyatt heard a series of gunshots, he did not say anything to defendant after defendant jumped in the car, but simply drove him through the countryside to defendant's uncle's house. When he was stopped by the police while heading back to return the car, he initially told a false story to cover up the fact that the two men had together borrowed the PT Cruiser and gone to the Deaverview Apartments.

A reasonable juror could infer from this evidence an implicit agreement to work together to accomplish the goal of revenge for the murder of Hyatt's brother. There was evidence of motive, of a joint understanding that the two men would go to Deaverview Apartments, of a joint borrowing of a car without concrete ties to either one of them, of behavior consistent with Hyatt's driving a "get away" car, of a lack of any surprise on Hyatt's part regarding gunshots, and of

an effort on Hyatt's part to cover up the two men's joint activities. *See State v. Gibbs*, 335 N.C. 1, 48, 436 S.E.2d 321, 348 (1993) (finding that the defendants' actions after the crime were evidence of the conspiracy), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881, 114 S. Ct. 2767 (1994).

Although defendant relies upon *State v. Merrill*, 138 N.C. App. 215, 221-22, 530 S.E.2d 608, 613 (2000), the evidence in that case showed only that the alleged co-conspirator had suggested killing the victim (but received no response from the defendant), and, after the murder, the defendant had assisted in concealing the crime. There was no evidence of any assistance by the defendant in furtherance of the murder; in fact, she was out of town at the time of the murder. This Court held that "[m]ere passive cognizance of the crime or acquiescence in the conduct of others will not suffice to establish a conspiracy. . . . It is not sufficient that the actor only believe that the result would be produced, but did not consciously plan or desire to produce it." *Id.* at 221, 530 S.E.2d at 612.

In this case, the State presented evidence suggesting not just an awareness by Hyatt that Boston might be killed, but also affirmative acts by Hyatt to assist defendant. A reasonable juror could view the evidence as establishing the "mutual, implied understanding" held in *Lawrence*, 352 N.C. at 25, 530 S.E.2d at 822, to be sufficient to support a conspiracy charge. Thus, based on the totality of the evidence and the inferences that reasonably can be drawn from it, the trial court did not err in denying defendant's motion to dismiss the conspiracy charge. *See Gell*, 351 N.C. at 209-10, 524 S.E.2d at 344 (holding that the record contained sufficient evidence of an agreement to rob or kill the victim when the co-defendants were aware of the defendant's intent to rob and harm the victim, the co-defendants assisted the defendant in entering the victim's house undetected and showed the defendant the location of the victim's money, and the co-defendants left the house with the defendant after the murder); *State v. Burmeister*, 131 N.C. App. 190, 199, 506 S.E.2d 278, 283 (1998) (holding that the State presented sufficient evidence of a conspiracy to commit murder when the defendant and a co-defendant left jackets, jewelry, and wallets in a car driven by a third person while they went to harass a couple with the defendant hinting that he might kill the couple; the defendant instructed the driver to leave if they were not back within 15 minutes; and the driver, after hearing six gunshots, told the police two false stories to explain his presence near the scene). Since the evidence in this case is more than a series of indef-

inite, unrelated acts and gives rise to more than a mere suspicion of conspiracy, this assignment of error is overruled.

II

[2] Defendant's next assignment of error contends that the trial court erred in its instructions to the jury regarding conspiracy to commit murder. Defendant acknowledges that he did not object to the judge's instructions, but argues that the improper instructions constitute plain error. Plain error is a " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused . . . .' " *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) (internal quotation marks omitted)). Defendant has also filed a motion for appropriate relief that asserts a claim for ineffective assistance of counsel based upon trial counsel's failure to object to the jury instruction.

As part of its instructions on the conspiracy charge, the trial court stated that "[f]or purposes of this conspiracy charge only, murder is the unlawful killing of another with malice." Defendant argues that this instruction fails to require the jury to find premeditation and deliberation, two of the underlying elements of first degree murder. In support of his argument, defendant relies upon *State v. Choppy*, 141 N.C. App. 32, 39, 539 S.E.2d 44, 49 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001), in which this Court held: "To prove that the defendant committed conspiracy to commit first-degree murder, the State must prove that the defendant agreed to perform every element of the crime—i.e., that he agreed to the intentional killing of a victim after premeditation and deliberation." *See also State v. Curry*, 171 N.C. App. 568, 578, 615 S.E.2d 327, 334 (2005) (holding that the jury must be instructed to find an agreement to commit first-degree murder). Defendant asserts that the conviction for conspiracy to commit first degree murder cannot stand because the jury was not required to find that defendant and Hyatt agreed to premeditate and deliberate. We disagree.

First-degree murder is " 'the intentional and unlawful killing of a human being with malice and with premeditation and deliberation.' " *State v. King*, 353 N.C. 457, 484, 546 S.E.2d 575, 595 (2001) (quoting *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998)), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002, 122 S. Ct. 1107 (2002). "Premeditation means

that the act was thought out beforehand for some length of time, however short . . . . Deliberation means that the fatal act was executed with a fixed design to kill notwithstanding defendant was angry or in an emotional state at the time." *State v. Hornsby*, 152 N.C. App. 358, 364-65, 567 S.E.2d 449, 454 (2002) (internal quotation marks and citations omitted), *appeal dismissed and disc. review denied*, 356 N.C. 685, 578 S.E.2d 316 (2003).

We believe that when a jury finds that a defendant has agreed with another person to commit a murder, it necessarily finds premeditation and deliberation as well. If a defendant plans and enters into an agreement to commit murder, he also must have thought about and considered his act before it was committed (premeditation) and he must have had a design or plan to kill (deliberation). There is no required time period to find premeditation and deliberation, and these states of mind can arise in the same amount of time it takes to devise and enter into an agreement to kill another. *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994) ("[T]here must be evidence that a defendant thought about the act for some length of time, however short, before the actual killing; no particular amount of time is necessary to illustrate that there was premeditation."). A defendant cannot plan and agree with another to commit a crime without also having premeditated and deliberated.

Our Supreme Court's decision in *Gibbs* supports this conclusion. In *Gibbs*, the Court, in recognizing the crime of conspiracy to commit felony murder, held:

> [T]he [trial] court did not instruct the jurors that an unintentional killing during a felony would support a finding of first-degree murder by reason of felony murder. Rather, they were instructed that to find a conspiracy to commit murder, they must first find an agreement to commit first-degree murder. *When they found an agreement to kill, the jurors eliminated the possibility that an unintentional felony murder formed the basis for the specific intent underlying the conspiracy of which they convicted defendant.*

335 N.C. at 52, 436 S.E.2d at 350 (emphasis added). This analysis acknowledges that the finding of "an agreement to kill" is equivalent to a finding of an agreement to commit an intentional murder even in the absence of an instruction requiring the latter finding. Similarly, we hold that the finding of an agreement to kill is equivalent to the finding of an agreement to premeditate and deliberate. *See also id.* at 48,

436 S.E.2d at 348 ("[W]e conclude the defendant committed the offense of conspiracy to commit murder when he, Doris, and Yvette agreed to kill Ann's family.").

We note that other jurisdictions that have considered the relationship of conspiracy to the elements of premeditation and deliberation have reached a similar conclusion. The California Supreme Court most recently addressed this issue in *People v. Cortez*, 18 Cal. 4th 1223, 77 Cal. Rptr. 2d 733, 960 P.2d 537 (1998), and concluded:

> [I]t logically follows that where two or more persons conspire to commit murder—i.e., intend to agree or conspire, [and] further intend to commit the target offense of murder, . . .—each has acted with a state of mind functionally indistinguishable from the mental state of premeditating the target offense of murder. The mental state required for conviction of *conspiracy* to commit murder necessarily establishes premeditation and deliberation of the target offense of murder . . . .

Id. at 1232, 77 Cal. Rptr. 2d at 738, 960 P.2d at 542 (internal citations and quotation marks omitted). The court ultimately held that "all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder . . . ." *Id.* at 1237, 77 Cal. Rptr. 2d at 742, 960 P.2d at 546. *See also People v. Hammond*, 187 Mich. App. 105, 108, 466 N.W.2d 335, 337 (1991) (" 'Foreknowledge and plan are compatible with the substantive crime of first-degree murder as both the crime of conspiracy and the crime of first-degree murder share elements of deliberation and premeditation. Prior planning denotes premeditation and deliberation.' " (quoting *People v. Hamp*, 110 Mich. App. 92, 103, 312 N.W.2d 175, 180 (1981), *leave to appeal denied*, 417 Mich. 1053 (1983))). *But see United States v. Chagra*, 807 F.2d 398 (5th Cir. 1986) (holding that a person could impulsively plan and conspire to commit a murder without premeditating), *cert. denied*, 484 U.S. 832, 98 L. Ed. 2d 66, 108 S. Ct. 106 (1987).

The Maryland Court of Appeals recently analyzed the decisions of California, Michigan, and the Fifth Circuit, and concluded that the jury's finding of a conspiracy necessarily results in a finding of premeditation and deliberation:

> We think that the California court in *Cortez* and the Michigan court in *Hammond* were entirely correct in their analysis—that where the charge is made and the evidence shows that the

> defendant conspired to kill another person unlawfully and with malice aforethought, the conspiracy is necessarily one to commit murder in the first degree (even if a murder pursuant to the conspiracy never occurs or, for whatever reason, amounts to a second degree murder), as the agreement itself, for purposes of the conspiracy, would supply the necessary deliberation and premeditation.

Mitchell v. State, 363 Md. 130, 149, 767 A.2d 844, 854 (2001). We find the Maryland, Michigan, and California decisions persuasive.

Accordingly, we hold that the trial court's instruction regarding conspiracy did not constitute error. The instructions required the jury to find all of the necessary elements of conspiracy to commit first degree murder. Additionally, because we find no error in the instructions, defendant's claim for ineffective assistance of counsel must also be rejected.

III

[3] Defendant's final assignment of error asserts that he improperly received an aggravated sentence based upon judicially-found aggravating factors in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004). The State argues that this claim is procedurally barred because defendant failed to object at trial and that any error in not submitting the aggravating factors to the jury is harmless beyond a reasonable doubt.

The Supreme Court of this State addressed the impact of *Blakely* in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). In *Allen*, the court held that "*Blakely* applies to North Carolina's Structured Sentencing Act" and that the portions of N.C. Gen. Stat. § 15A-1340.16 (2003) that permit the imposition of an aggravated sentence based upon judicial findings of aggravating factors "violate[] the Sixth Amendment as interpreted in *Blakely*." *Id.* at 426-27, 615 S.E.2d at 258. The Court further held that the harmless-error rule does not apply to sentencing errors under *Blakely* because such errors "are structural and, therefore, reversible *per se*." *Id.* at 444, 615 S.E.2d at 269.

The holdings set forth in *Allen* and *Blakely* apply to " 'cases that are now pending on direct review.' " *Id.* at 427, 615 S.E.2d at 258 (quoting *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001), *overruled in part by Allen*, 359 N.C. at 437, 615 S.E.2d at

265). Under *Blakely* and *Allen*, the trial court erred in this case by imposing an aggravated sentence based upon aggravating factors found by the trial judge and not by the jury. Because such errors are reversible *per se*, we remand this case to the trial court for a new sentencing hearing.

No error in conviction; remanded for resentencing.

Judges TIMMONS-GOODSON and CALABRIA concur.

STATE OF NORTH CAROLINA v. CYNTHIA JOHNSTON

No. COA04-1283

(Filed 20 September 2005)

1. Appeal and Error— preservation of issues—first appeal of statute—interests of justice

An issue of first impression was heard under Rule 2 of the Appellate Rules of Appellate Procedure in the interests of justice even though it was not preserved for appellate review by an objection at trial. Moreover, the trial court failed to instruct on an essential element and used an incorrect version of the statute.

2. Crimes, Other— computer damage—felonious—amount of damage

In order to convict defendant of felonious damage to a computer, the State is required to prove that the damages exceeded $1,000 (less is a misdemeanor). Here, the trial court erred by not instructing the jury on the amount of damage; moreover, the State presented no evidence at trial that the damage exceeded $1,000. The case was remanded for entry of judgment and sentence on the misdemeanor. N.C.G.S. § 14-455(a)

3. Crimes, Other— computer damage—exceeding permission of owner

A computer damage defendant clearly exceeded the consent or permission of the computer's owner where patient data belonging to the owner was lost when defendant removed software belonging to her after employment difficulties.

4. Crimes, Other— computer damage—viruses—separate crime

"Applies to" in N.C.G.S. § 14-455 does not mean "is defined as," and subsection (b) of the statute creates an offense involving computer viruses that is separate from the offense of damage to computers in subsection (a).

5. Crimes, Other— computer damage—indictment—not fatally flawed

An indictment for damage to computers was sufficiently plain and intelligible and was not fatally flawed where it alleged that defendant unlawfully, willfully, and feloniously without the consent of the owner entered a controlled computer system for the purpose of damaging the system by deleting operational and system files, thereby causing a loss.

Appeal by defendant from judgment entered 19 May 2004 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 20 April 2005.

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

Jeffrey Evan Noecker for defendant-appellant.

HUNTER, Judge.

Cynthia Johnston ("defendant") presents the following issues for our consideration: Did the trial court err by (I) failing to instruct the jury regarding an essential element of felonious damage to computers; (II) denying her motion to dismiss; and (III) entering judgment on a fatally flawed indictment. After careful review, we vacate the judgment of the trial court and remand this case for entry of judgment and sentence on the misdemeanor offense of damaging computers.

The State presented evidence at trial tending to show the following: Dr. Thomas Kirby ("Dr. Kirby") is an optometrist with a practice located in four cities in New Hanover, Pender, and Brunswick Counties. Dr. Kirby and two other optometrists rotated through these four locations.

Prior to 1998, Dr. Kirby's insurance billing procedure consisted of completing a standardized health claim insurance form by hand and

mailing the form to the insurance company via standard United States mail. In order to improve efficiency, he contracted with defendant, a representative with Island Automated Medical Systems, in February of 1998 to computerize his billing system. Defendant thereafter purchased billing software and uploaded the software onto Dr. Kirby's office computers at all four locations. As payment, defendant and Dr. Kirby agreed that defendant would receive five percent (5%) of all insurance claims received from the insurance companies. Dr. Kirby testified that the computer program software was owned by defendant. Dr. Kirby also hired defendant as his data entry processor, for which he paid defendant an hourly salary in addition to the five percent (5%) portion of the insurance claims. Defendant was responsible for filing the insurance claims.

Dr. Kirby's and defendant's business relationship worked well until the end of 2000, when defendant's work quality declined due to personal problems. Defendant was absent from work without explanation, and while at work she handled personal business. As a result, a backlog developed in the number of claims processed.

On 20 October 2000, Dr. Kirby had a "counseling" meeting with defendant, during which he discussed defendant's work quality and gave defendant several warning notices. After the meeting, defendant left Dr. Kirby's office and went to her vehicle parked outside. Before getting into her car, however, defendant "spun around and came back in the office." She sat down at her desk and "did something on the [computer] keyboard." Defendant then removed a box of computer diskettes from her desk and left the building. Defendant appeared to be angry and "was mumbling something about not having to put up with this."

Dr. Kirby and two other individuals immediately checked the computer and noticed the program icon for the billing program was no longer on the computer screen. Prior to the meeting, an employee had observed the billing program up and running on the computer. Dr. Kirby testified that all of the patient and appointment information was missing. The patient information consisted of demographic data, patient demographics, names, addresses, insurance type, insurance numbers, and past claims. He testified this information was not part of defendant's software, but was stored on the hard drive. Dr. Kirby testified that the software was owned by defendant; however, the data was his property. Defendant removed the software program from the Wilmington location only. The three other locations retained the software and data.

As a result of defendant's removal of the software, Dr. Kirby purchased a new software program that was ultimately incompatible with his computers. Dr. Kirby purchased a new computer system and hired Patricia Payne ("Payne") to attempt to rebuild the lost insurance claims. Payne reviewed the patient files, spoke with patients, and re-filed several claims. Dr. Kirby agreed to pay Payne twenty percent (20%) of anything he received from her insurance filings with insurance companies. No testimony was given regarding the amount of the lost claims.

Defendant presented no evidence. Upon review of the evidence, the jury found defendant guilty of damaging a computer. The trial court sentenced defendant to a suspended sentence of ten to twelve months imprisonment and placed her on supervised probation for thirty-six months. The trial court also ordered defendant to pay costs and restitution in the amount of $1,766.00. Defendant appeals.

Defendant argues the trial court erred by (I) failing to instruct the jury regarding an essential element of felonious damage to a computer; (II) failing to dismiss the charge of felonious damage to a computer as there was insufficient evidence that defendant acted without authorization or that her actions amounted to alteration, damage, or destruction; and (III) entering judgment on a fatally flawed indictment.

I. Jury Instructions

[1] Defendant argues the trial court erroneously failed to instruct the jury regarding an essential element of the crime of felonious damage to a computer. Specifically, defendant contends the trial court did not instruct the jury that the computer damage must exceed $1,000.00 in order to constitute a felony.

As an initial matter, we address the State's contention that this issue is not preserved for appellate review because defendant failed to object to the trial court's instruction during the charge conference or after the charge was given to the jury. Pursuant to Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hear-

> ing of the jury, and, on request of any party, out of the presence of the jury.

N.C.R. App. P. 10(b)(2). Defendant did not object to the jury instruction in this case. Therefore, we can only review this issue for plain error. *See* N.C.R. App. P. 10(c)(4); *State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378 (1983). Defendant, however, has not alleged plain error and, therefore, this issue is not properly preserved for appellate review. *See State v. Moore*, 132 N.C. App. 197, 201, 511 S.E.2d 22, 25, *disc. review denied*, 350 N.C. 103, 525 S.E.2d 469 (1999).

However, under Rule 2 of the Appellate Rules:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2.

In *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005), our Supreme Court stated "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Id.* at 402, 610 S.E.2d at 361. In *Viar*, the majority opinion addressed an issue not raised or argued by the plaintiff which was the basis of the Industrial Commission's decision, namely, the reasonableness of the defendant's decision to delay installation of median barriers at a dangerous location. *Id.* By addressing an issue not raised by either party, the appellee did not have notice of the issue and did not address the issue in its brief. Our Supreme Court stated "[a]s 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." *Id.*

In this case, we choose to invoke Rule 2 upon our own initiative to "expedite decision in the public interest"[1] for the following reasons. First, our review of the record indicates the trial court failed to

1. Because we conclude invocation of Rule 2 is in the public interest, the present case is unlike that of *State v. Buchanan*, 170 N.C. App. 692, 696, 613 S.E.2d 356, 358 (2005), where this Court determined that the defendant's failure to preserve any issue for appeal did not create a "manifest injustice" and therefore declined to invoke Rule 2.

instruct on an essential element of the crime of felonious damage to computers, to wit: the damage must exceed $1,000.00. A pattern jury instruction does not exist for this statutory crime, and the lack of a pattern jury instruction may have facilitated the error in this case. Additionally, there are no cases interpreting, analyzing, citing, or explaining Article 60 "Computer-Related Crime" of Chapter 14 of our General Statutes. Specifically, section 14-455 of our General Statutes has never been addressed by our appellate courts. Thus, even if a trial court was inclined to fashion a jury instruction from the applicable case law, no applicable case law exists. Finally, the trial court utilized the incorrect statutory version of section 14-455 to charge the jury in this case. Notably, unlike the situation in *Viar*, the parties have addressed these issues in their briefs and at oral argument.

We also find that an invocation of Rule 2 is consistent with the purpose of Rule 2. Rule 2 was enacted in 1975. In explaining the rationale of Rule 2, the drafting committee included the following commentary in our appellate rules:

> This Rule expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases where this is necessary to accomplish a fundamental purpose of the rules. The power does not of course depend upon its express reservation by the Court in the body of the Rules. It is included here as a reminder to counsel that the power does exist, and that it may be drawn upon by either appellate court where the justice of doing so or the injustice of failing to do so is made clear to the court. The phrase "except as otherwise expressly provided" refers to the provision in Rule 27(c) that the time limits for taking appeal laid down in these Rules . . . may not be extended by any court.

N.C.R. App. P. 2, Commentary (1977). We therefore address the merits of defendant's argument in order to clarify the law of computer related crime in North Carolina. *See*, *e.g.*, *State v. Hudson*, 345 N.C. 729, 732, 483 S.E.2d 436, 438 (1997) (stating that, "[n]evertheless, we deny the State's request that we refuse to review the issue now. The Court of Appeals exercised its discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to consider this issue; we likewise exercise our discretion pursuant to N.C.G.S. § 7A-31 to review the Court of Appeals' decision so that the law pertaining to this issue in this jurisdiction will be consistent and clear").

[2] Defendant argues the trial court erred by failing to instruct the jury regarding the amount of damages. Under N.C. Gen. Stat. § 14-455(a) (1999), the statute in effect on 20 October 2000:

> It is unlawful to willfully and without authorization alter, damage, or destroy a computer, computer system, computer network, or any part thereof. A violation of this subsection is a Class G felony if the damage caused by the alteration, damage, or destruction is more than one thousand dollars ($1000). Any other violation of this subsection is a Class 1 misdemeanor.

Id. Under this statute, if the computer damage does not exceed $1,000.00, the alleged perpetrator is guilty of a Class 1 misdemeanor, and not a Class G felony.

In order to convict defendant of felonious damage to a computer, the State was therefore required to prove beyond a reasonable doubt, and the jury was required to so find, that the damages in this case exceeded $1,000.00. *Compare* N.C. Gen. Stat. § 14-72(a) (2003) (providing that "[l]arceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony"); *State v. Jones*, 275 N.C. 432, 436, 168 S.E.2d 380, 383 (1969) (emphasis omitted) (stating that, in order "to convict of the felony of larceny, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the stolen property was more than two hundred dollars [now $1,000.00]; and, value in excess of two hundred dollars being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury"). As such, the trial court was required to instruct the jury regarding valuation of damages in excess of $1,000.00. *See Jones*, 275 N.C. at 436-37, 168 S.E.2d at 383 (stating that, "[t]he basis for this requirement is the elementary proposition that the credibility of the testimony, even though unequivocal and uncontradicted, must be passed upon by the jury").

The trial court here, however, failed to instruct the jury regarding the essential element of valuation. Absent such instruction, the jury did not fix the value of the damages as in excess of $1,000.00. Hence, the jury verdict did not establish defendant was guilty of the felony of damaging computers of a value in excess of $1,000.00. *See id*. (holding that, as the trial court did not instruct on the essential element of valuation for the crime of felonious larceny, the jury failed to find that the larceny of which the defendant was convicted related to property of a value of more than $200.00 (now $1,000.00), and the verdict had to therefore be considered a verdict of guilty of larceny of personal

property of a value of $200.00 (now $1,000.00) or less); *State v. Holloway*, 265 N.C. 581, 583, 144 S.E.2d 634, 635 (1965) (holding that, where no instructions are given on value, a judgment of felonious larceny must be vacated); *State v. Cooper*, 256 N.C. 372, 381, 124 S.E.2d 91, 98 (1962) (same); *State v. Keeter*, 35 N.C. App. 574, 575, 241 S.E.2d 708, 709 (1978) (noting that "although the judgment of felonious larceny must be vacated where no instructions were given on value, the verdict will stand, and the case is to be remanded for entering a sentence consistent with a verdict of guilty of misdemeanor larceny").

Moreover, the State presented no evidence that the damage caused by defendant to Dr. Kirby's computer exceeded $1,000.00. Neither Dr. Kirby nor Payne testified regarding the amount of any lost claims. Nor was evidence presented regarding the value of Payne's services in recovering any lost data. Although the indictment against defendant alleged economic harm in the amount of thirty thousand dollars, the State failed to introduce evidence at trial to support such a finding by the jury. We must therefore vacate defendant's judgment and remand this case for entry of judgment and sentencing on the misdemeanor of damaging computers.

II. Motion to Dismiss

[3] By further assignment of error, defendant contends the trial court erred in denying her motion to dismiss on the ground that the State failed to present evidence that she acted without authorization or that she damaged Dr. Kirby's computer. We disagree.

Defendant contends the State failed to present evidence that she acted without authorization when she removed the software from Dr. Kirby's computer. For computer-related crimes, "authorization" is defined as "having the consent or permission of the owner, or of the person licensed or authorized by the owner to grant consent or permission to access a computer, computer system, or computer network *in a manner not exceeding the consent or permission*." N.C. Gen. Stat. § 14-453(1a) (1999) (emphasis added). Defendant argues that, as the computer software belonged to her, she acted within her authority in removing it. Dr. Kirby testified, however, that defendant's actions in removing the software also resulted in a loss of all of his patient data stored on his computer's hard drive. Both the data and the computer hard drive were the property of Dr. Kirby. Although defendant was certainly authorized to access the computer, Dr. Kirby employed defendant to enter patient data onto his computer, not to delete such files. Such action clearly "exceeded the consent or per-

mission" of Dr. Kirby, the owner of the computer, and thereby violated the statute. The trial court did not err in denying defendant's motion to dismiss.

[4] Defendant also contends the State failed to prove that she damaged the computer because there was no evidence that she introduced a computer virus into Dr. Kirby's computer system. The version of section 14-455 of our General Statutes in effect on 20 October 2000 provided that:

> (a) It is unlawful to willfully and without authorization alter, damage, or destroy a computer, computer system, computer network, or any part thereof. A violation of this subsection is a Class G felony if the damage caused by the alteration, damage, or destruction is more than one thousand dollars ($1,000). Any other violation of this subsection is a Class 1 misdemeanor.
>
> (b) This section applies to alteration, damage, or destruction effectuated by introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer system, or computer network.

N.C. Gen. Stat. § 14-455 (1999). Defendant contends subsection (b) of section 14-455 in effect modifies subsection (a) to limit the crime of damage to computers to damages caused by computer viruses only. This argument has no merit. As the State notes, defendant erroneously asserts that the term " 'applies to' " means " 'is defined as.' " Under defendant's reasoning, both subsections refer to the same crime. We agree with the State that, rather than limiting subsection (a), subsection (b) creates a new separate offense relating to a computer virus. We overrule this assignment of error.

III. Indictment

[5] Finally, defendant argues that the charges against her should have been dismissed in that the indictment against her was fatally flawed. The indictment against defendant charged she damaged computers by "unlawfully, willfully and feloniously . . . entering a controlled computer system from an outside line without the knowledge or consent of the owner . . . for the purpose of damaging the system by deleting operational and system files causing a loss . . . of $30,000.00." Defendant contends the indictment nowhere alleges she " 'altere[d], damage[d] or destroy[ed]' " a computer and that a fatal

variance therefore exists between the indictment and the evidence adduced at trial. We disagree.

"An indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996).

> "An indictment is sufficient in form for all intents and purposes if it expresses the charge in a plain, intelligible and explicit manner. It will not be quashed 'by reasons of any informality or refinement, if[,] in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.' [*State v. Russell*, 282 N.C. 240, 244, 192 S.E.2d 294, 296 (1972)]. It is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended."

Id. at 66, 468 S.E.2d at 224 (citations omitted) (quoting *State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984)).

Here, the indictment was sufficiently plain and intelligible and charged defendant with all of the essential elements of the crime of damaging computers. The indictment alleged that defendant (1) "unlawfully, willfully and feloniously"; (2) "without the knowledge or consent of the owner"; (3) "enter[ed] a controlled computer system . . . for the purpose of damaging the system by deleting operational and system files"; thereby (4) "causing a loss." The State presented evidence at trial from which the jury could find defendant damaged Dr. Kirby's computer by deleting important patient and other data from the hard drive without authority or consent. The indictment against defendant was therefore not fatally flawed, and we overrule this assignment of error.

In conclusion, we hold the trial court erred in failing to instruct the jury on an essential element of the crime of felonious damage to computers. In light of our decision, we need not address defendant's remaining assignment of error. We vacate the judgment of the trial court and remand this case for entry of judgment and sentence on the misdemeanor crime of damaging computers.

Vacated and remanded.

Judges HUDSON and GEER concur.

STATE OF NORTH CAROLINA v. TAMBERLYN WARD ALDERSON, DEFENDANT

No. COA04-1178

(Filed 20 September 2005)

1. Drugs— possession with intent to manufacture, sell, and deliver methamphetamine—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession with intent to manufacture, sell, and deliver methamphetamine, because: (1) defendant testified that at age forty-nine, she knew she was assisting her husband in the manufacture of methamphetamine by ordering chemistry ware for him; (2) there was ample expert testimony that numerous items found within and just outside defendant's residence were consistent with the manufacture of methamphetamine; and (3) although defendant claims the 2.9 grams of methamphetamine found at her residence was for personal use, the State presented expert testimony that indicated the items found were consistent with material used in manufacturing methamphetamine and packaging controlled substances and that plastic bags such as those found at defendant's residence can be used to package controlled substances into smaller amounts for sale.

2. Drugs— manufacturing methamphetamine within 300 feet of a school—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of manufacturing methamphetamine within 300 feet of a school even though defendant contends there was insufficient evidence of manufacturing at the residence where there was testimony and physical evidence that manufacturing occurred in places other than the residence, because: (1) the jury could reasonably infer from the evidence that defendant used items seized from her outbuilding, such as tubing that had methamphetamine residue, acetone, and PVP piping together with items found in her residence to manufacture methamphetamine; and (2) the State presented physical evidence seized from inside and around defendant's residence that was consistent with methamphetamine manufacturing.

3. Evidence— expert testimony—radio scanner used for illegal activity

The trial court did not abuse its discretion in a drug case by admitting expert testimony that a radio scanner would be used for illegal activity, because: (1) an SBI agent's testimony, concerning a police frequency book and radio scanner allowing those acting illegally to have a jumpstart if they know which police frequencies to monitor, was within her expertise and was likely to assist the jury in inferring why such evidence was important and why it was seized during a search warrant of defendant's residence for a methamphetamine laboratory; and (2) even though defendant contends allowing the agent's testimony was prejudicial error since she was qualified as an expert and her testimony would be given more weight, defendant failed to acknowledge that another investigator testified without objection regarding defendant's police frequency and call number book as well as the radio scanner.

4. Appeal and Error— preservation of issues—failure to instruct on lesser-included offense—failure to request instruction—trial strategy

The trial court did not commit plain error by failing to instruct the jury on lesser-included offenses of possession of methamphetamine and manufacturing methamphetamine with respect to the charges of possession with intent to manufacture, sell, and deliver methamphetamine within 300 feet of a school and manufacturing methamphetamine within 300 feet of a school respectively, because: (1) defendant is barred by N.C. R. App. P. 10(b)(2) from assigning as error the trial court's failure to instruct on lesser-included offenses when she did not request these instructions; and (2) defendant's trial strategy of withholding from the jury's consideration any lesser-included offenses should not now entitle her to relief.

Judge WYNN concurring in the result.

Appeal by defendant from a judgment entered 1 April 2004 by Judge Ronald K. Payne in Watauga County Superior Court. Heard in the Court of Appeals 17 May 2005.

Attorney General Roy Cooper, by Assistant Attorney General, Amanda P. Little, for the State.

Thomas K. Maher for defendant-appellant.

BRYANT, Judge.

Tamberlyn Ward Alderson (defendant) appeals from a judgment entered 1 April 2004 after unanimous jury verdicts for: (1) possession with intent to manufacture, sell, and deliver 2.9 grams of methamphetamine within 300 feet of an elementary school; (2) manufacturing methamphetamine within 300 feet of an elementary school; (3) possession of methadone; (4) possession of hydrocodone; (5) possession of morphine; (6) possession of drug paraphernalia (glass smoking device); and (7) possession of amphetamine. Defendant was sentenced to consecutive active terms of imprisonment of twenty-nine to forty-four months on the convictions relating to methamphetamine and a suspended sentence on the remaining convictions.

At trial, the State's evidence showed on 27 January 2003, an officer from the State Bureau of Investigation (SBI) Agent Lisa Edwards, and Investigators Shane Robbins and Todd Phillips from the Watauga County Sheriff's Office executed a search warrant for defendant's residence and found: drug paraphernalia (glass smoking devices) containing methamphetamine; a college chemistry book; a bag containing 2.9 grams methamphetamine; various flasks, stir bars, a graduated cylinder, a box labeled "glassware" from "Lab and Safety Supply"; receipts from "Lab and Safety Supply" to defendant's attention indicating laboratory items had been ordered; a Coca-Cola tin containing marijuana, methadone, hydrocodone, and morphine; a Crown Royal bag[1] containing 3 straws with white powder residue; rolling papers; one tube of Orajel PM; one plastic bag containing more than 40 small plastic bags; hundreds of cut matchbook striker plates; a radio scanner; a glass spoon and mirror; a police frequency book which contained a list of local law enforcement channels; a list of all Watauga County Sheriff's Officers' names with officers' radio call numbers; internet articles concerning federal wiretap laws and federal legislation involving methamphetamine laboratory operations; and numerous other materials used in the production of methamphetamine. As part of the search, officers found in and around the outbuilding the following: tubing that had methamphetamine residue; acetone (a chemical precursor to the production of methamphetamine); PVC piping; 250 milliliter, 500 milliliter, and 1000 milliliter round bottom flasks; an empty forty-count box of cone coffee filters; and an unopened pack of disposable gloves, all which Agent Edwards testified were items consistent with the manufacture of methamphetamine. Agent Edwards also found clear plastic tubing with residue of

1. The Crown Royal bag also contained one Equate bottle with ibuprofen tablets and Investigator Robbins made a note that the 2.9 grams ("eight ball") of methamphetamine came from this bottle.

methamphetamine and amphetamine, along with several pieces of PVC piping, that in her opinion was a hydrochloric acid generator. The State also presented evidence that a school was within 300 feet of defendant's residence.

Defendant's evidence at trial indicated: defendant's husband admitted he and defendant regularly used methamphetamine and that he had manufactured methamphetamine, but denied defendant helped him and denied manufacturing or selling methamphetamine at his home; defendant, however, admitted she assisted in the production of methamphetamine; defendant admitted retrieving internet articles concerning federal wiretap laws, federal legislation and federal punishment guidelines relating to methamphetamine labs to educate herself; defendant testified she purchased the radio scanner; and defendant admitted on the date of the search (27 January 2003) that she possessed 2.9 grams of methamphetamine and drug paraphernalia inside her residence. Defendant's husband testified his vehicle was an incomplete "mobile methamphetamine lab."

In rebuttal, the State's evidence indicated: defendant's husband testified on 30 March 2004, he plead guilty as part of a plea bargain to manufacture of a schedule II controlled substance (methamphetamine) within 300 feet of a school and possession with intent to manufacture, sell and deliver a schedule II controlled substance (methamphetamine) within 300 feet of a school along with other related charges. Notwithstanding his plea of guilty to manufacturing methamphetamine within 300 feet of a school, defendant's husband denied he had ever manufactured methamphetamine in his home.

Defendant appeals.

The issues on appeal are whether the trial court erred in: (I) denying defendant's motion to dismiss the charge of possession with intent to manufacture, sell and deliver methamphetamine; (II) not dismissing defendant's charge of manufacturing methamphetamine within 300 feet of a school; (III) admitting expert testimony that a radio scanner would be used for illegal activity; and (IV) not instructing the jury on lesser included offenses.

I

[1] Defendant first argues the trial court erred in denying her motion to dismiss the charge of possession with intent to manufacture, sell and deliver methamphetamine.

In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged

has been presented, and that defendant was the perpetrator of the offense. *State v. Mlo*, 335 N.C. 353, 369, 440 S.E.2d 98, 105 (1994). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). The Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences that can be drawn from the evidence. *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518 (1994), *overruled on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). Therefore, it does not matter whether the State's evidence is direct, circumstantial, or both; the test for resolving a challenge to the sufficiency of the evidence is the same regardless. *Id.*

Manufacturing is broadly defined by N.C. Gen. Stat. § 90-87 (15) to include "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis [and] includes any packaging or repackaging of the substance or labeling or relabeling of its container." N.C.G.S. § 90-87 (15) (2003). Intent to sell or deliver can be inferred by the amount of the controlled substance, the manner of its packaging, along with the activities of a defendant, but no one factor is determinative. *See State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996).

Defendant testified, at age forty-nine, she knew she was assisting her husband in the manufacture of methamphetamine by ordering chemistry ware for him. There was ample expert testimony that numerous items found within and just outside defendant's residence were consistent with the manufacture of methamphetamine. Defendant's husband testified a "cook" usually produced about ten to fifteen grams of methamphetamine. One of the single plastic bags found at defendant's residence contained 2.9 grams of methamphetamine which defendant claims was for personal use. However, the State presented expert testimony that indicated the items found were consistent with materials used in manufacturing methamphetamine and packaging controlled substances and that plastic bags such as those found at defendant's residence can be used to "package controlled substances . . . into smaller amounts for sale." Even if we consider defendant's testimony regarding the materials found at her residence, the trial court properly denied defendant's motion to dis-

miss. *See State v. McCoy*, 303 N.C. 1, 23-24, 277 S.E.2d 515, 531 (1981) (In ruling upon a motion to dismiss, "[d]efendant's evidence may be considered insofar as it merely explains or clarifies or is not inconsistent with the [S]tate's evidence."). When viewed in the light most favorable to the State, there was substantial evidence from which a jury could reasonably find that defendant possessed methamphetamine with intent to manufacture, sell and deliver. This assignment of error is overruled.

II

[2] Defendant next argues the trial court erred in not dismissing defendant's charge of manufacturing methamphetamine within 300 feet of a school. More particularly, defendant challenges the sufficiency of the evidence to show any manufacturing that occurred was within 300 feet of a school.

Manufacturing methamphetamine within 300 feet of an elementary school, requires that a person who is "21 years old or older, knowingly, manufacture, methamphetamine, on property . . . within 300 feet of the boundary of real property used for an elementary school or secondary school." N.C. Gen. Stat. § 90-95 (e)(8) (2003). It is not in dispute that defendant is over twenty-one years of age, the controlled substance is methamphetamine, and that defendant's residence is within 300 feet of an elementary school. Defendant argues there was not sufficient evidence of manufacturing at the residence where there was testimony and physical evidence that manufacturing occurred in places other than the residence.

Expert testimony by Agent Edwards and Investigators Robbins and Phillips showed the following items consistent with manufacturing methamphetamine were found at defendant's residence: several variations of glassware seen generally only in laboratory settings, such as flasks, a graduated cylinder, stir bars, small vials; hundreds of cut matchbook striker plates; numerous plastic bags; sludge acidic material; and tubing with duct tape. From this, the jury could reasonably infer defendant used items seized from her outbuilding, such as tubing that had methamphetamine residue, acetone (a chemical precursor to the production of methamphetamine), and PVC piping together with items found in her residence to manufacture methamphetamine.

Defendant also contends production of methamphetamine in the outbuilding was not sufficient to support a conviction because it was located more than 300 feet from the school. However, the State

presented physical evidence seized from inside and around defendant's residence that was consistent with methamphetamine manufacturing. When viewed in the light most favorable to the State, there was sufficient physical and testimonial evidence from which a reasonable juror could find that defendant manufactured methamphetamine within 300 feet of an elementary school. The trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

III

[3] Defendant next argues the trial court erred in admitting expert testimony that a radio scanner would be used for illegal activity. Defendant contends such admission was prejudicial error requiring a new trial. We disagree.

The trial court is "afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. White*, 154 N.C. App. 598, 604, 572 S.E.2d 825, 830 (2002) (quotations omitted). The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion. *State v. Holland*, 150 N.C. App. 457, 461-62, 566 S.E.2d 90, 93 (2002), *cert. denied*, 356 N.C. 685, 578 S.E.2d 316 (2003).

Expert testimony is generally admitted:

> 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); *see also State v. O'Hanlan*, 153 N.C. App. 546, 551, 570 S.E.2d 751, 755 (2002), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397 (2004).

Here, SBI Agent Lisa Edwards was admitted as an expert in drug chemistry and she testified to her training in basic law enforcement and drug enforcement. She also testified regarding her training in clandestine laboratory investigation and to her work on tens of thousands of drug cases. In this case, Agent Edwards was called in to help with the clandestine laboratory investigation. At trial, she was allowed to give her opinion as to why the seizure of defendant's police frequency book was important, testifying that finding a police frequency book and a radio scanner can indicate those acting illegally

may have a "jumpstart" if they know which police frequencies to monitor. This testimony was within Agent Edwards' expertise and was likely to assist the jury in inferring why such evidence was considered important and why it was seized during a search warrant of defendant's residence for a methamphetamine laboratory. Defendant asserts the trial court committed prejudicial error by admitting Agent Edwards' testimony because her opinion would be given more weight since she qualified as an expert. It is ultimately for the jury "to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony." *State v. Martin*, 6 N.C. App. 616, 617, 170 S.E.2d 539, 540 (1969).

Moreover, we note that defendant fails to acknowledge Investigator Robbins testified without objection regarding defendant's police frequency and call number book as well as the radio scanner, stating that the items are used such that "if they were involved in criminal activity they would know we were in the area and they could cease that activity or try to conceal that activity. If we were going to do a raid . . . perhaps give them warning prior to our arrival." "Where evidence is admitted over objection and the same evidence has been previously admitted . . ., the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). This assignment of error is overruled.

IV

[4] Defendant argues the trial court committed plain error by not instructing the jury on lesser included offenses of possession of methamphetamine and manufacturing methamphetamine with respect to the charges of possession with intent to manufacture, sell and deliver methamphetamine within 300 feet of a school and manufacturing methamphetamine within 300 feet of a school, respectively. Defendant concedes that while he did not object at trial to the jury instructions, he now seeks this Court's plain error review.

When a defendant does not request instructions on lesser offenses she "is barred by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure from assigning as error the trial court's failure to instruct the jury on lesser[]included offenses supported by evidence at trial." *State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993).

Defendant did not object to the jury instructions at trial and now argues that the 2.9 grams of methamphetamine found in her home

was for personal use. She contends no manufacturing of methamphetamine occurred at their residence (within 300 feet of an elementary school), and therefore the jury could have convicted defendant of the lesser included offenses of possession of methamphetamine and manufacturing methamphetamine. For these reasons defendant argues she is entitled to plain error review. We disagree.

The plain error rule must be applied cautiously and only in exceptional cases. *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 60 (2000); *State v. Davis*, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977). Here, it is clear defendant's trial strategy was to have the jury consider only two possible verdicts on each offense without the option of a verdict on a lesser included offense. However, defendant's trial strategy of withholding from the jury's consideration any lesser included offenses should not now entitle her to relief. *See State v. Liner*, 98 N.C. App. 600, 391 S.E.2d 820 (defendant who voluntarily waives right to have trial court submit possible verdicts of lesser included offense may not thereafter assign as error on appeal trial court's failure to do so, even though evidence would support same), *disc. rev. denied*, 327 N.C. 435, 395 S.E.2d 693 (1990). Accordingly, defendant's assignment of error is overruled.

No error.

Judge JACKSON concurs.

Judge WYNN concurs in result only.

WYNN, Judge concurring in the result.

Under N.C. Gen. Stat. § 8C-1, Rule 702(a) (2004), an expert may present an opinion based upon his or her specialized knowledge if that opinion assists the trier of fact. In this case, I believe the trial court erred by allowing the expert in drug chemistry to testify, as an expert witness, about the use of a radio scanner and a police frequency book. However, I agree with the majority that the admission of this evidence was harmless under the facts of this case.

Rule 702(a) of the North Carolina Rules of Evidence provides that:

> 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(a) (emphasis added). If a trier of fact has the same knowledge about the evidence or use of the evidence as the "expert" witness, then that witness is not properly giving an "expert" opinion but merely a lay opinion. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2004).

In this case, SBI Agent Lisa Edwards, an expert in drug chemistry, testified, as an expert witness, about the use of a radio scanner and a police frequency book. Agent Edwards testified that the radio scanner and police frequency book were used to monitor "air traffic that is going on between officers[,]" and gave Defendant a "jumpstart" if "the law [] is coming their way[.]"

Agent Edwards' opinion is not based on scientific, technical, or other specialized knowledge that would be unknown to the average juror. Therefore, Agent Edwards' opinion on the use of the radio scanner and police frequency book should not have been admitted as an expert opinion, but as a lay witness opinion. *State v. Chavis*, 141 N.C. App. 553, 565, 540 S.E.2d 404, 413 (2000) ("To qualify as an expert, the witness need only be 'better qualified than the jury as to the subject at hand.' " (quoting *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993))). Accordingly, the trial court abused its discretion in allowing Agent Edwards to testify as an expert witness with regard to the radio scanner and police frequency book. *State v. Holland*, 150 N.C. App. 457, 461-62, 566 S.E.2d 90, 93 (2002), *cert. denied*, 356 N.C. 685, 578 S.E.2d 316 (2003).

However, while Defendant objected to Agent Edwards' testimony, he failed to object to Officer Robbins' testimony as an expert witness about the radio scanner and police frequency book. Thus, the trial court's error in allowing Agent Edwards' expert testimony was harmless, as the same expert opinion had previously been entered into evidence. *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995) ("Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.").

SUE ALLISON BROADWELL ROBERTS, PLAINTIFF v. RONALD WAYNE ROBERTS, DEFENDANT

No. COA04-1588

(Filed 20 September 2005)

1. Marriage— premarital agreement—outstanding indebtedness on real property—loans not secured by that property—not included

The phrase "outstanding indebtedness on" real property in a premarital agreement referred to unpaid debt supported by or attached to the property. The phrase does not include debts, such as personal loans, that are not secured by the property, regardless of whether the proceeds were applied toward purchase of the property.

2. Marriage— premarital agreement—property purchased in both names—marital property

Language in a premarital agreement dealing with retention of separate property and the marital property status of property purchased in both names, regardless of the source of funds, was not ambiguous when read with language in the introduction stating that each party would retain ownership of separate property except as otherwise provided.

3. Marriage— premarital property—gift to marriage—not relevant

The question of whether a down payment on real property was intended as a gift to the marriage would be relevant for equitable distribution, but was not for interpretation of a premarital agreement.

4. Appeal and Error— preservation of issues—attorney's affidavit—failure to object at trial

The admissibility of an affidavit from an attorney was not considered on appeal of a premarital agreement case where defendant did not object at trial.

5. Contracts— premarital agreement—specific performance—other parallel provisions

The question of whether the trial court's findings in a premarital agreement case supported a specific performance paragraph was not reached where that paragraph reiterated the

provisions of other paragraphs. The practical result would be the same if the specific performance paragraph was deleted.

6. Marriage— premarital agreement—contribution to joint account—language of agreement plain

The trial court erred by granting summary judgment for defendant on a claim for breach of premarital agreement terms concerning contributions to a joint account until an indebtedness on a property was satisfied. The language of the agreement was plain, the amount to be contributed was plainly stated and no further agreement was necessary, and defendant cited no authority that would allow a party to evade compliance with a valid contract on the grounds that the parties no longer had a relationship or that he no longer agreed with the contract.

7. Marriage— premarital agreement—attorney fees

An award of attorney fees under a premarital agreement was remanded where the agreement provided recovery of attorney fees for the prevailing party, but a part of the lower court's summary judgment was reversed.

Appeal by plaintiff from judgment and order entered 29 April 2004, by defendant from judgment and order entered 2 July 2004, and by plaintiff and defendant from order entered 28 September 2004, all orders entered by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 23 August 2005.

William G. Barbour, and Floyd and Jacobs, L.L.P., by Constance F. Jacobs, for plaintiff.

Mercedes O. Chut for defendant.

LEVINSON, Judge.

This appeal arises from the interpretation of a premarital agreement executed by plaintiff (Sue Roberts) and defendant (Ronald Roberts). We affirm in part and reverse and remand in part.

The relevant facts are largely undisputed and may be summarized as follows: The parties were married 9 September 2000 and separated 5 November 2002. Shortly before their marriage, plaintiff and defendant executed a premarital agreement, which included provisions defining separate and marital property, establishing a joint checking account, and addressing disposition of property in the event that they

separated. On 1 October 2002 plaintiff filed a claim against defendant, generally seeking enforcement of the premarital agreement. Plaintiff subsequently filed an amended complaint seeking damages for breach of the premarital agreement's terms regarding the parties' joint checking account, and for anticipatory breach of these terms. She also sought a declaratory judgment declaring the parties' rights under the agreement's provisions for disposition of marital real estate upon separation of the parties. On 4 March 2004 plaintiff filed a motion for summary judgment on all her claims. The trial court entered an order on 29 April 2004, granting summary judgment for defendant on plaintiff's claim arising from the parties' joint checking account, from which order plaintiff appealed. On 2 July 2004 the trial court granted summary judgment for plaintiff on her claims for breach of the real estate buyout provisions of the premarital agreement. Defendant has appealed this order. In addition, both parties have appealed the trial court's order of 28 September 2004, which awarded plaintiff a total of $19,007.00 in attorneys' fees.

Standard of Review

The parties appeal from orders granting summary judgment. Under N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003), 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." " 'An issue is genuine if it may be maintained by substantial evidence. An issue is material if the facts as alleged would constitute a legal defense, would affect the result of the action or would prevent the party against whom it is resolved from prevailing in the action.' " *Development Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980) (citing *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972)).

"The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact[,]" *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985), and "evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). However, when a summary judgment motion is "supported as provided in this rule, an adverse party . . . must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2003).

"Our Court's standard of review on appeal from summary judgment requires a two-part analysis. Summary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000).

[1] In the case *sub judice*, summary judgment was entered on claims arising from a premarital agreement, defined by N.C. Gen. Stat. § 52B-2 (2003) as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." A valid premarital agreement "must be in writing and signed by both parties," N.C. Gen. Stat. § 52B-3 (2003), and "becomes effective upon marriage." N.C. Gen. Stat. § 52B-5 (2003). "The principles of construction applicable to contracts also apply to premarital agreements[.]" *Harllee v. Harllee*, 151 N.C. App. 40, 46, 565 S.E.2d 678, 682 (2002) (citing *Howell v. Landry*, 96 N.C. App. 516, 525, 386 S.E.2d 610, 615 (1989)) (other citation omitted). Thus, "absent fraud or oppression . . . parties to a contract have an affirmative duty to read and understand a written contract before signing it." *Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 N.C. App. 120, 126, 582 S.E.2d 375, 380 (2003). And, when "interpreting contract language, the presumption is that 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." *Stewart v. Stewart*, 141 N.C. App. 236, 240, 541 S.E.2d 209, 212 (2000) (discussing *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)).

Defendant's Appeal—Real Estate Buyout Provision

Defendant appeals the trial court's order of summary judgment for plaintiff on claims based on the premarital agreement's real estate buyout provision. Defendant contends that the evidence raises genuine issues of material fact or, in the alternative, that he is entitled to summary judgment. We disagree.

The premarital agreement includes, in pertinent part, the following provisions:

. . . .

4. RETENTION OF SEPARATE PROPERTY. Except as otherwise provided herein, each party shall during his or her life-

time: A. Retain the sole and separate ownership of his or her respective separate property. . . .

5. DEFINITION OF SEPARATE PROPERTY. . . . [T]he term 'separate property' shall mean all of a party's right, title, claim and interest, . . . to all property, real or personal, . . . which was owned by each party at the time of their marriage. . . .

. . . .

10. JOINTLY HELD PROPERTY. . . . Joint property shall include all assets held in both names[.] . . . Each party shall have an undivided one-half interest in jointly held property no matter by whom purchased or the nature of funds used in making the purchase.

11. REAL PROPERTY. Real property purchased in Ron and Sue's joint names shall be marital property regardless of the source of the funds. . . . In the event of a separation, . . . either party may buy the other out for one half of the fair market value of the property less 6% (to reflect an imputed realtor's fee), less one half of the outstanding indebtedness on said property. . . .

The record evidence establishes the following undisputed facts: In June 2001 the parties purchased real property on Hobbs Road, in Greensboro, North Carolina (the "Hobbs Road property"), which is jointly owned and titled in the names of both parties. The Hobbs Road property purchase price of $250,000 was paid from two sources of funds. Defendant obtained a personal loan of approximately $100,000 from his separately owned brokerage account, and used the proceeds of this loan to pay the $100,000 down payment on the Hobbs Road property. In addition, the parties obtained a joint loan of $150,000 from Chevy Chase Bank, and jointly executed a promissory note for $150,000 and a deed of trust in favor of Chevy Chase Bank. The $150,000 loan secured by a deed of trust is the only lien on the Hobbs Road property.

The parties have agreed to divide the Hobbs Road property using the buyout provision of the premarital agreement; they also agree that the value of the property on the date of separation was $259,000.00, and that the amount of the imputed commission is $15,540.00. The parties disagree, however, on the proper interpretation of the phrase "outstanding indebtedness on said property." Defendant argues that, because he used the money borrowed from

his personal brokerage account for a down payment on the Hobbs Road property, his personal loan became part of the "outstanding indebtedness on" the property. Plaintiff, however, contends that "outstanding indebtedness on" the property properly refers only to debt secured by the property, which in this case is limited to the debt owed on the $150,000.00 promissory note secured by the deed of trust. We agree with plaintiff.

The phrase "outstanding indebtedness on" the property contains no obscure terms, and may be interpreted in light of the words' ordinary meaning in the context of a real estate transaction. Thus, "outstanding" means "unpaid; uncollected"; "indebtedness" is "something owed; a debt"; and "on" means "supported by or attached to." BLACK'S LAW DICTIONARY 771, 1129 (7th ed. 1999); THE OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY 1014 (Judy Pearsall & Bill Trumble, eds., Oxford University Press 2d ed. 1995). Accordingly, the "outstanding indebtedness on" the property may be rephrased as the "unpaid debt supported by or attached to" the property. This clearly includes the debt owed on the promissory note because it is secured by the Hobbs Road property, and thus is "supported by or attached to" the property. However, defendant's loan from the brokerage account is secured by his stocks and other assets he has in that account, and is not secured by the Hobbs Road property. Therefore, it is an indebtedness on the assets in his brokerage account, and not a debt on the Hobbs Road property. We conclude that the "outstanding indebtedness on" the property does not include debts, such as personal loans, that are not secured by the property, regardless of whether the proceeds of such a personal loan were applied towards the purchase of the property. Defendant cites no authority to the contrary and we find none.

[2] Defendant also argues that the premarital agreement is internally inconsistent and ambiguous, and that a jury must resolve the "ambiguity." The ambiguity posited by defendant is a purported "conflict" between (1) language in paragraph four stating that after marriage each party would retain "sole and separate ownership of his or her respective separate property," including defendant's brokerage account, and (2) language in paragraph eleven stating that "[r]eal property purchased in Ron and Sue's joint names shall be marital property regardless of the source of the funds."

Defendant's argument ignores the following introductory language of paragraph four: "Except as otherwise provided herein each party shall" retain the ownership of separate property. Para-

graph eleven does not conflict with paragraph four, but is merely one of the exceptions that are "otherwise provided herein." Defendant's argument was rejected by this Court in *Franzen v. Franzen*, 135 N.C. App. 369, 520 S.E.2d 74 (1999). The defendant in *Franzen*, like this defendant, argued that there was an internal inconsistency in a premarital agreement, based on a similar purported "ambiguity." This Court held:

> Defendant's claimed ambiguity is that the provision in Section Five that any property titled jointly is to be considered marital property clashes with the statement in Section Four that all separate assets are to remain separate, even if those assets change form. His argument, however, overlooks the language in Section Four that separate assets remain separate property unless otherwise provided in this Agreement. This caveat eliminates any ambiguity. Separate assets do remain separate property, even if they change form, but only if they do not become marital property.

Franzen, 135 N.C. App. at 372, 520 S.E.2d at 76. We find *Franzen* controlling on this issue.

[3] Defendant also argues that he did not "intend" for the down payment to be a "gift to the marriage." This issue is relevant when the trial court enters an order for equitable distribution. *See* N.C. Gen. Stat. § 50-20(b)(2) (2003). However, the instant case does not involve equitable distribution. Defendant offers no authority suggesting that consideration of his subjective intentions as to the down payment is germane to our interpretation of this premarital agreement, and we find none.

[4] Defendant next argues that the trial court erred by considering the affidavit of attorney Richard Shope, on the ground that the affidavit was not admissible under the North Carolina Rules of Evidence. However, defendant failed to object to this affidavit at the trial level. "[T]o preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1). In the instant case, defendant did not object to the trial court's consideration of the affidavit. "Since this issue was never considered by the trial court and is raised for the first time on appeal, it is not properly before this Court, and we decline to address it." *In Re Foreclosure of Brown*, 156 N.C. App. 477, 490, 577 S.E.2d 398, 406 (2003).

We have considered defendant's remaining arguments regarding the real estate buyout issue, and find them to be without merit. We conclude that the trial court did not err by granting summary judgment in favor of plaintiff on the issue of the real estate buyout.

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[5] Defendant argues next that, even assuming the court correctly entered summary judgment for plaintiff, it erred by including in its order a paragraph ordering "specific performance" of the premarital agreement contract. The relevant sections of the order are as follows:

> IT IS HEREBY ORDERED . . . as a matter of law, that Judgment shall be entered in favor of the Plaintiff, on the issues related to Defendant's buy out of Plaintiffs interest in the joint real estate/Hobbs Road Property. It is therefore ORDERED as follows:
>
> 1. Defendant shall pay Plaintiff, an amount equal to the fair market value of the Hobbs Road joint real estate ($259,000.00) less 6% imputed real estate commissions ($15,540.00), less the amount required to satisfy the joint mortgage lien indebtedness secured by the Hobbs Road joint real estate on August 4, 2002 and said net total being divided by two (FMV - indebtedness - 15,540.00 = x, x + 2).
>
> 2. Plaintiff shall execute a Quit Claim Deed in favor of Defendant to be delivered to the closing on the satisfaction of the joint indebtedness for recordation simultaneous with the satisfaction of the joint indebtedness and payment to Plaintiff as set forth above.
>
> 3. Plaintiff is entitled to the relief of specific performance of the Pre-Marital Agreement provisions requiring Defendant to pay Plaintiff for her interest in the joint real estate/Hobbs Road property in the amount equal to one-half of the fair market value of the property, stipulated to be $259,000.00 less an imputed 6% real estate commission, stipulated to be $15,540.00, less the amount required to satisfy the joint mortgage lien indebtedness secured by the property on August 4, 2002, said total being divided by two ($259,000 - $15,540.00 - balance owed on joint mortgage lien on August 4, 2002 = x, x + 2). Defendant shall pay all amortized principal, interest and late fees, if any, up to the date of settlement.

4. Defendant shall immediately take all steps necessary to satisfy the joint mortgage lien secured thereby, removing Plaintiff's name from the existing Note and Deed of Trust.

Defendant argues that the trial court erred by ordering specific performance of the premarital agreement without making a finding of fact that there was no adequate remedy at law. We conclude it is unnecessary to reach this issue on the facts of this case. The only reference to specific performance is in paragraph three of the decretal part of the order. Paragraph three basically reiterates the provisions of the other paragraphs in the order, and the "specific performance" described therein orders defendant to pay plaintiff the same amount of money that the court ordered in paragraph one. Because the practical result for the parties would be the same even if paragraph three were deleted, we conclude that it is unnecessary to reach the issue of whether the court's order of "specific performance" is adequately supported by its findings of fact. This assignment of error is overruled.

Plaintiff's Appeal—Joint Checking Account

[6] Plaintiff appeals the trial court's award of summary judgment for defendant on her claim for breach of the premarital agreement's terms pertaining to the parties' joint checking account. Plaintiff contends that summary judgment in her favor should have been granted.

The premarital agreement addressed the parties' joint checking account, in pertinent part, as follows:

. . . .

10. . . . The parties will open a joint checking account into which Ron and Sue will each contribute monthly amounts. The amount to be contributed by each spouse shall be mutually agreed upon by Ron and Sue. At the commencement of the marriage, the amount contributed will be $400 by Sue and $4,417 by Ron. . . . From said joint checking account shall be paid the routine living expenses of the parties including the house payment on the primary residence of the parties[.] . . . In the event that Ron and Sue separate, all jointly held property shall be divided equally between Ron and Sue. Until such time as any indebtedness on jointly held real property is satisfied, Ron and Sue will continue to contribute to the joint checking account.

The parties agree that the above-quoted language required that they open a joint checking account, into which plaintiff and defendant agreed to make monthly deposits of $400 and $4,417, respectively. It is also undisputed that the premarital agreement required that, if the parties separated, they would nonetheless "continue to contribute to the joint checking account" until "any indebtedness on jointly held real property is satisfied[.]" Thus, according to the plain language of the premarital agreement, we conclude the parties were to continue making monthly contributions to the joint checking account, even after separating, until resolution of the real estate buyout issue.

Defendant argues that the trial court correctly entered summary judgment in his favor. He first asserts that the statement in the premarital agreement that "[t]he amount to be contributed by each spouse shall be mutually agreed upon by Ron and Sue" reduces the provisions for a joint checking account to no more than an "agreement to agree" that is "unenforceable." Defendant's argument, that the parties never agreed on contribution amounts, is belied by the agreement itself, which plainly states that "At the commencement of the marriage, the amount contributed will be $400 by Sue and $4,417 by Ron." These are mutually agreed on amounts, and no further agreement was required unless the parties wanted to change these amounts.

In a related argument, defendant contends that the premarital agreement required the parties to contribute to the joint checking account "only as long as they agree[d]" to do so. Defendant asserts that once the parties ceased to have "a functional marriage," he no longer wanted to contribute to the joint checking account. Defendant's position is that, as soon as he stopped wanting to participate in the joint checking account, there was no longer the "mutual agreement" required under the premarital agreement. In a similar argument, defendant argues that he could disavow the joint checking account after the parties ceased to have a "functional" relationship. Defendant cites no authority that would allow a party to evade compliance with a valid contract on the grounds that he "no longer agreed" to it or because the parties ceased to have a relationship, and we find none.

We conclude that the premarital agreement required plaintiff and defendant to contribute to their joint checking account. We further conclude that they were required to continue these payments after their separation, until such time as their joint indebtedness on the

Hobbs Road property was satisfied. Accordingly, the trial court's order of summary judgment for defendant must be reversed, and this matter remanded for entry of summary judgment in favor of plaintiff on the issue of defendant's ongoing obligation to continue making payments to the joint checking account based on provisions of a valid, enforceable agreement.

Attorneys' Fees

[7] The parties have both appealed from the trial court's award of attorneys' fees, awarded pursuant to paragraph sixteen (16) of the premarital agreement. This paragraph provides that in "any proceeding to enforce the provisions of this Agreement, the party prevailing whether by adjudication or settlement shall recover reasonable attorney's fees from the other party." In the instant case, the trial court granted summary judgment for defendant on one claim, and summary judgment for plaintiff on the other. However, we have determined that plaintiff is entitled to at least partial summary judgment on the claim concerning the joint checking account, and have upheld summary judgment in her favor on the claim concerning the real estate buyout provision. As there is no way to ascertain the role that the trial court's order of summary judgment for defendant played in its award of attorneys fees, we reverse and remand with instructions to the trial court to enter a new award of fees as a part of its final order.

We conclude that the trial court's order of summary judgment for plaintiff on claims arising from the real estate buyout provision should be affirmed; the court's entry of summary judgment for defendant on claims arising from the parties' joint checking account should be reversed; and that the trial court's order for attorneys' fees should be reversed and remanded for entry of a new order.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and CALABRIA concur.

SAMMY JOHNSON AND VICI JOHNSON, PLAINTIFFS v. COLONIAL LIFE & ACCIDENT INSURANCE COMPANY, PAUL CLIFTON AND FRED RAAB, DEFENDANTS

No. COA04-1515

(Filed 20 September 2005)

1. Contracts— employment—termination for cause—issue of fact

The trial court correctly denied summary judgment for defendant and allowed a claim for breach of an employment contract to go to the jury where the issue was whether termination was for cause; defendant contended that the termination was for making false or misleading statements on claims; and plaintiff claimed that the termination was for helping policyholders fill out claim forms. The claim was properly submitted to the jury to weigh the evidence and judge the credibility of the witnesses. Moreover, there was sufficient evidence to support the damage award.

2. Unfair Trade Practices— breach of employment contract—aggravating factors

The judge properly found that the breach of an employment contract, accompanied by aggravating factors, satisfied a claim under N.C.G.S. § 75-1.1 for unfair trade practices.

3. Unfair Trade Practices— breach of contract—continuous transaction

A defendant may not divide a breach of contract action and the conduct which aggravated the breach when in substance there is but one continuous transaction amounting to unfair and deceptive trade practices. The trial court here did not err by trebling the breach of contract damages pursuant to an N.C.G.S. § 75-1.1 claim.

4. Unfair Trade Practices— trebled damages—prejudgment interest

The damages to be trebled on an unfair trade practices claim are those fixed by the verdict. The trial court here erred by awarding prejudgment interest on trebled damages rather than only on the damages awarded by the jury for breach of an employment contract.

5. Emotional Distress— intentional infliction—comments by employer—insulting and offensive—not beyond bounds of decency

The trial court erred by submitting to the jury the issue of intentional infliction of emotional distress. The comments made to plaintiff, though insulting and offensive, do not constitute conduct which is so egregious as to go beyond all possible bounds of decency.

6. Jurisdiction— COBRA claim—exclusively federal

The trial court did not have subject matter jurisdiction over a COBRA claim. It is clear that except for subsections (a)(1)(B) and (a)(1)(7) of 29 U.S.C. § 1132(c)(1) the district courts of the United States have exclusive jurisdiction over these claims.

Appeal by defendant (Colonial) from judgment and order entered 6 April 2004 and orders entered 15 June 2004, by Judge Clifton W. Everett, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 17 August 2005.

Kennedy Covington Lobdell & Hickman, L.L.P., by John L. Sarratt and Ann M. Anderson, for defendant appellant.

The Blount Law Firm, P.A., by Marvin K. Blount, Jr., Rebecca C. Blount, and Harry H. Albritton, Jr.; and Brooks Pierce McLendon Humphrey & Leonard, by Jeffrey E. Oleynik, for plaintiff appellee.

McCULLOUGH, Judge.

Defendant (Colonial) appeals from a superior court order awarding a jury verdict, adding interests and costs, trebling damages and making an award under COBRA, for $4,138,276.92 plus post-judgment interest. We affirm in part, vacate in part, reverse in part and remand.

Facts

Plaintiff (Mr. Johnson) was a sales representative for Colonial Life beginning in 1982 and was employed on a contractual basis. The contract provided for termination for cause. It further provided the acts which would give rise to termination for cause. One of those proscribed acts was: "Makes or knowingly allows to be made false or misleading statements on any application or claim or other document or communication submitted to Colonial."

On 29 September 1996 Mr. Johnson filed a claim giving notice to Colonial of an eye injury received on 18 August 1996. Colonial's evidence tended to show that a doctor's statement with no patient name was attached to the claim form for treatment of a facial cut. Upon investigation, Colonial found that a similar doctor's statement had been filed by another policyholder. Colonial became suspicious that Mr. Johnson had manipulated another policyholder's doctor's statement and submitted the statement with his own claim. Mr. Johnson denied having ever attached a doctor's statement to the claim that was filed in regard to his eye injury.

After the claim was filed by Mr. Johnson, a meeting was held between Mr. Johnson and Colonial representatives to discuss suspicions about the claim. At the meeting Mr. Johnson was accused of attempting to steal $198.00 from Colonial, threatened with the loss of his job, loss of medical insurance, and the filing of a report with the fraud division of the North Carolina Insurance Commissioner's Office. Along with the threat of losing his medical insurance, Mr. Johnson was told to "see how you take care of a wife with a history of cancer now."

On 8 May 1997 Mr. Johnson received a letter terminating his contract with Colonial. The letter stated that a claim had been filed for benefits and that a report had been filed of suspected fraudulent activity with the North Carolina Department of Insurance. Mr. Johnson states that the accusation of filing a fraudulent claim was not the real reason for termination of his contract, but rather that Colonial's displeasure with Mr. Johnson's assisting policyholders in filling out insurance claims was the basis. Mr. Johnson was even told by Colonial representatives prior to termination that if he did not discontinue the practice of filling out insurance claims for policyholders that he would be terminated and would lose his medical insurance.

The Johnsons filed a complaint in the Superior Court of Pitt County. Colonial then gave a notice of removal to federal court on the grounds of diversity citizenship. The case was then remanded back to superior court for lack of diversity due to the joinder of non-diverse parties. There was no objection or motion to preserve any of the claims in the federal court.

At trial Colonial made a motion for summary judgment as to all claims brought by the Johnsons. The motion was deferred until the close of the evidence upon which the trial judge entered an order denying the motion as to the issues of (1) breach of contract,

(2) wrongful termination, (3) COBRA benefits, (4) intentional infliction of emotional distress upon Mr. Johnson, (5) punitive damages, (6) negligence and gross negligence, (7) violation of N.C. Gen. Stat. § 75-1.1, (8) declaratory relief, and (9) equitable accounting.

The verdict sheet was submitted to the jury with nine issues. In the verdict sheet the jury first had to determine whether Colonial had breached its contract with Mr. Johnson. Upon answering yes to this issue, the jury was then to determine the amount of damages that Mr. Johnson was entitled to as a result of the breach. The jury was then required to determine whether Colonial had engaged in any of three aggravating circumstances related to the breach of the contract.

The jury found that Colonial had breached its contract with Mr. Johnson and that as a result he was entitled to $537,887.00. The jury also found that Colonial had engaged in two of the three aggravating circumstances associated with the breach. In addition, the jury found that Colonial had intentionally inflicted emotional distress on Mr. Johnson and awarded him $1,075,774.00 as a result.

Mr. Johnson then made a motion for trebling damages and attorneys' fees under N.C. Gen. Stat. §§ 75-1.1 and 75-16. The trial judge entered an order finding as a matter of law that where the jury found that there was a breach of contract committed by Colonial and where the jury also found that Colonial engaged in two of three aggravating circumstances associated with the breach, that Colonial had engaged in unfair and deceptive trade practices entitling Mr. Johnson to treble damages.

Judgment was entered 6 April 2004 awarding $537,887.00 for breach of contract with $297,561.02 in pre-judgment interest, these two amounts were added together and trebled for an award of $2,506,344.06. The amount of $1,075,774.00 was awarded for intentional infliction of emotional distress with $414,984.68 in pre-judgment interest, $1,900.00 for COBRA violations in respect to Mr. Johnson with $734.00 in interest, and $73,000.00 for COBRA violations with respect to Mrs. Johnson with $28,160.00 in interest. Costs were also awarded in the amount of $37,380.18. The total damages awarded were $4,138,276.92 along with any post-judgment interest.

Colonial then made a motion to alter or amend the judgment based on the order trebling the pre-judgment interest on the breach of contract award which was denied by the trial judge in order entered 15 June 2004. Colonial also made a motion for judgment

notwithstanding the verdict, or, in the alternative, for a new trial, which was also denied in order entered 15 June 2004.

Colonial now appeals.

I

[1] In its first argument on appeal, Colonial contends that the trial court erred in submitting the issue of breach of contract to the jury and further that there is insufficient evidence to support the damages awarded. We disagree.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). On a motion for summary judgment, "[t]he evidence is to be viewed in the light most favorable to the nonmoving party." *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998) (citation omitted). When determining whether the trial court properly ruled on a motion for summary judgment, this court conducts a *de novo* review. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). "The elements of a claim for breach of contract are (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).

In the instant case, Colonial motioned for summary judgment as to all of the Johnsons' claims. Mr. Johnson claimed that the termination of his employment contract was a breach in violation of the terms of the contract. Both parties agreed that the contract was valid and that termination could only be made for cause. The question in contention was whether the termination was for cause. Colonial contends that the reason for termination fell within the following term of the contract: "Makes or knowingly allows to be made false or misleading statements on any application or claim or other document or communication submitted to Colonial." Mr. Johnson on the other hand claims that he never filed the false or misleading claim which Colonial has accused him of doing, but rather that this is a mere pretext for the actual reason he was fired. Mr. Johnson instead presented evidence showing Colonial's dissatisfaction with his practice of helping policyholders fill out claim forms as the reason for termination and evidence of threats made by Colonial representatives to fire him

if he did not discontinue this practice. Where there was a genuine issue as to a material fact, whether or not there was a breach, the claim for breach of contract was properly submitted to the jury to weigh the evidence and judge the credibility of the witnesses. *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003), (holding that summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist), *aff'd per curiam*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004).

Colonial also contends that there was insufficient evidence to support the breach of contract damages found by the jury. The gravamen of this argument is that Colonial would have preferred that the jury accept their evidence as to mitigation instead of accepting the evidence presented by the Johnsons. However, it is evident after reviewing the record that there was sufficient evidence to support the breach of contract damages awarded by the jury.

II

Next, Colonial contends that the trial court erred in the following three determinations:

A. In determining that there was a violation of N.C. Gen. Stat. § 75-1.1. We disagree.

B. In trebling the breach of contract damages pursuant to an N.C. Gen. Stat. § 75-1.1 claim. We disagree.

C. In trebling the pre-judgment interest before awarding damages. We agree.

A

[2] " '[I]t is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.' " *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367-68, 533 S.E.2d 827, 832-33 (citation omitted), *cert. denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). Thus, "plaintiff must show 'substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages.' " *Id.*

The verdict sheet as submitted to the jury first asked the jury to find whether there was a breach of contract. Immediately following

the breach of contract claim the verdict sheet asked the jury to determine whether Colonial engaged in one of the following actions:

1. Failed to adequately investigate the allegation that Sammy Johnson submitted a false or fraudulent claim before submitting a fraud report to the North Carolina Department of Justice.

2. Colonial submitted, without knowing or having reasonable cause to believe, a report to the North Carolina Department of Insurance concerning Sammy Johnson.

3. Wrongfully used the accusation of a false claim as a pretext for terminating Sammy Johnson when there was otherwise no cause, as defined in the contracts.

The jury returned the verdict finding aggravating factors 1 and 3 from the verdict sheet to be present. Mr. Johnson presented evidence that false accusations were deceptively made against him as a pre-text forming the basis of termination and the jury agreed. Therefore, where the jury found that there was a breach of contract accompanied by aggravating factors, it was proper for the judge to conclude as a matter of law that a claim under N.C. Gen. Stat. § 75-1.1 had been satisfied.

B

[3] The amount to be trebled is "the amount fixed by the verdict." N.C. Gen. Stat. § 75-16 (2003). The only damages that may be trebled are those which are proximately caused by a violation of N.C. Gen. Stat. § 75-1.1. *See Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 529 S.E.2d 676, *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000). However, "Where the same course of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1 . . . ." *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981).

Colonial argues that there should be a division of the breach of contract action and the § 75-1.1 claim. However, as evidenced by the jury verdict, the breach of contract accompanied by aggravating factors is what gave rise to the § 75-1.1 claim. Moreover, the court will not allow a defendant to divide the breach of contract action and the

conduct which aggravated the breach when in substance there is but one continuous transaction amounting to unfair and deceptive trade practices. *See Garlock v. Henson*, 112 N.C. App. 243, 435 S.E.2d 114 (1993) (holding that where there was a breach of contract accompanied by aggravating factors that it was proper to treble the breach of contract damages).

C

[4] Pre-judgment interest may be awarded on compensatory damages for breach of contract. N.C. Gen. Stat. § 24-5(a) (2003). However, according to N.C. Gen. Stat. § 75-16, *inter alia*, the amount of damages to be trebled are those fixed by the verdict. Moreover, damages for unfair and deceptive trade practices under North Carolina law are awarded as a penalty rather than to compensate. *See Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 338 S.E.2d 918, *disc. review denied and cert. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986). This Court has held that a pre-judgment interest award should not attach to the trebled damages, but only to the actual damages awarded for the breach of contract that was found to be an unfair trade practice. *See Sampson-Bladen Oil Co. v. Walters*, 86 N.C. App. 173, 179, 356 S.E.2d 805, 809, *disc. review denied*, 321 N.C. 121, 361 S.E.2d 597 (1987).

The federal courts of this district have suggested that where the North Carolina Supreme Court held in *Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 463 S.E.2d 199 (1995), that post-judgment interest could be added to the trebled damages, that in turn the same reason follows for pre-judgment interest. However, this Court is bound by our prior decisions and these decisions can only be overcome by the North Carolina Supreme Court.[1]

In the instant case, the trial judge awarded pre-judgment interest on the trebled damages rather than the actual damages awarded by the jury for breach of contract. This was error. Mr. Johnson was only entitled to pre-judgment interest on the breach of contract damages, not the damages arising out of the unfair and deceptive practices claim. Therefore the award of damages should be reduced.

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1. *In the Matter of Appeal from Civil Penalty*, 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.").

III

[5] Colonial next contends that the trial court erred in submitting to the jury the issue of intentional infliction of emotional distress. We agree.

"The essential elements of an action for intentional infliction of emotional distress are '1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress.' " *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (citation omitted). "Conduct is extreme and outrageous when it is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Guthrie v. Conroy*, 152 N.C. App. 15, 22, 567 S.E.2d 403, 408-09 (2002) (citation omitted). The determination of whether conduct rises to the level of extreme and outrageous is a question of law. *Id.* at 21, 567 S.E.2d at 408.

The evidence presented at trial as to extreme and outrageous conduct consisted of several meetings over a course of time in which threats to Mr. Johnson were made concerning losing his job and health insurance and accusations in regard to submitting a false claim. These comments, although insulting and offensive to Mr. Johnson, do not constitute conduct which is so egregious as to go "beyond all possible bounds of decency." *See Guthrie*, 152 N.C. App. at 22, 567 S.E.2d at 409 (holding that "mere insults, indignities, and threats" are not extreme and outrageous acts). Therefore, as a matter of law, the trial judge erred in submitting the intentional infliction of emotional distress claim to the jury where the evidence failed to show extreme and outrageous conduct.

IV

[6] Lastly, Colonial argues that the trial court did not have subject matter jurisdiction over the COBRA claim. We agree.

Lack of subject matter jurisdiction may always be raised by a party, or the court may raise such defect on its own initiative, even after an answer has been filed. *See Jackson Co. v. Swayney*, 75 N.C. App. 629, 331 S.E.2d 145 (1985), *aff'd in part and rev'd in part on other grounds*, 319 N.C. 52, 352 S.E.2d 413, *cert. denied*, 484 U.S. 826, 98 L. Ed. 2d 54 (1987). COBRA claims are governed by 29 U.S.C. § 1132 (2005). The code provides that as to jurisdiction:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have **exclusive** jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1)[29 USCS § 1021(f)(1)]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 U.S.C. § 1132(e)(1) (emphasis added).

In the instant case, the COBRA action was brought under 29 U.S.C. § 1132(c)(1) to enforce the late-notice penalties. The case was removed to federal court and then remanded in its entirety due to lack of complete diversity jurisdiction. It is clear that except for subsections (a)(1)(B) and (a)(1)(7) "the district courts of the United States have **exclusive jurisdiction**" over civil actions brought under this section. 29 U.S.C. § 1132(e)(1) (emphasis added). Therefore the trial court lacked subject matter jurisdiction over the COBRA claim.

Accordingly, we affirm the trial court with respect to breach of contract, breach of contract damages, and § 75-1.1 claim and damages. We vacate the trial court's decision with respect to intentional infliction of emotional distress and damages pursuant to that claim and assertion of jurisdiction over the COBRA claim. We reverse the trial court on the issue of trebling pre-judgment interest and remand to the trial court to enter an amount of damages in accordance with this opinion.

Affirmed in part, vacated in part, reversed in part, and remanded.

Judges TYSON and BRYANT concur.

IN RE C.C., J.C.

[173 N.C. App. 375 (2005)]

IN THE MATTER OF: C.C., J.C., MINOR CHILDREN

No. COA04-1448

(Filed 20 September 2005)

1. Appeal and Error; Termination of Parental Rights— appealability—death of child—mootness

Although one of respondent mother's minor children took his own life after the filing of respondent's notice of appeal in this termination of parental rights case, his death does not render this appeal moot with regard to this child because respondent continues to have parental rights of the child which continue after his death including inheritance rights. Further, an order terminating parental rights can form the basis of a subsequent proceeding to terminate the parental rights of another child under N.C.G.S. § 7B-1111(a)(9).

2. Termination of Parental Rights— neglect—sufficiency of evidence

The trial court erred in a termination of parental rights case by concluding that there was sufficient evidence to find that respondent mother neglected her children under N.C.G.S. § 7B-1111(a)(1), because: (1) a prior adjudication of neglect alone cannot justify termination of parental rights; (2) DSS presented no evidence that respondent could not, at the time of the hearing, adequately parent her children; and (3) no evidence was presented and no finding was made that a probability of repetition of neglect existed at the time of the termination hearing.

3. Termination of Parental Rights— willfully leaving child in DSS custody—sufficiency of evidence

The trial court erred in a termination of parental rights case by concluding that respondent mother willfully left her children in DSS's custody for more than twelve months without showing reasonable progress in correcting those conditions which led to the removal of the children, because: (1) the trial court failed to find that respondent acted willfully as required under N.C.G.S. § 7B-1111(a)(2); and (2) the trial court failed to make adequate findings of fact on respondent's progress.

IN RE C.C., J.C.

[173 N.C. App. 375 (2005)]

Appeal by respondent mother from order entered 9 June 2004 by Judge Lisa C. Bell in Mecklenburg County District Court. Heard in the Court of Appeals 17 August 2005.

Mecklenburg County Attorney's Office, by J. Edward Yeager, Jr., for petitioner-appellee Mecklenburg County Department of Social Services.

Klein & Freeman, PLLC, by Katherine Freeman, for petitioner Guardian Ad Litem.

Mercedes O. Chut, for respondent-appellant.

TYSON, Judge.

T.C.W. ("respondent") appeals from order terminating her parental rights to her two minor children, C.C. and J.C. (collectively, the "children"). We reverse.

I. Background

J.C. was born on 26 February 1993 and C.C. was born on 27 April 1995. In May 2000, the two children were referred to the Mecklenburg County Department of Social Services ("DSS"). Respondent agreed to a case plan designed to improve the children's living conditions. This case plan addressed three areas of concern: (1) lack of supervision for the children; (2) the mental health of respondent; and (3) living conditions in the home. Respondent agreed to provide better supervision of the children, attend parenting classes, continue mental health counseling, and provide sanitary living conditions for the children. She also agreed to monthly meetings with a social worker monitoring their case.

Giovanna Wilson ("Ms. Wilson") was the social worker assigned to the children from December 2000 to May 2001. Ms. Wilson "visited the home regularly" during that time and testified it "[t]ypically . . . was straightened up." In May 2001, Ms. Wilson found the house in a "very dirty" condition with dirty dishes all over the kitchen, "[t]he trash can was full and trash was coming out of the trash can," a full trash bag sitting on the kitchen floor, clothes strewn about on the steps, no sheets on the bed, and roaches in empty soda cans in respondent's room.

During that time period, respondent did not attend all of her mental health appointments. Ms. Wilson "received a lot of calls from the school that the children were not attending." These calls made Ms.

Wilson suspect respondent was not properly supervising the children. On occasion, Ms. Wilson found the children outside playing while respondent was in bed upstairs. Ms. Wilson also received reports the children were having behavioral problems at school. She encouraged respondent to address these issues, but was unaware of any attempt by respondent to do so.

In May 2001, Ms. Wilson picked up the children from school one day after she could not reach respondent. When Ms. Wilson arrived at respondent's home, respondent was upstairs and offered no explanation where she had been. Upon returning home, six-year-old C.C. "put a pan on the stove and he was attempting to open up a can to cook."

On 3 May 2001, Ms. Wilson filed a juvenile petition. The petition alleged the children lacked proper parental supervision, did not attend school regularly, and lived in an "unkempt and unsanitary" home. Respondent did not contest the facts alleged in the petition. On 2 July 2001, the trial court accepted the facts as alleged in the petition with minor modifications and adjudicated the children to be neglected.

After assuming custody of the children, DSS continued to work with respondent to reunite the family. Starting in August 2001, social worker Kate Koebel ("Ms. Koebel") was assigned to the family. She augmented respondent's previous case plan after the children were found to be neglected. Under the amended case plan, respondent was also encouraged to: (1) obtain "a job or some other means of legal income;" (2) stay in contact with the children's therapist; (3) regularly attend therapy; (4) "participate in Family Preservation Services and in-home education services;" (5) "pay all of her bills in a timely manner;" and (6) to "maintain housing."

Respondent was unemployed when the children were initially taken into DSS custody. She obtained stable employment with the Charlotte Observer almost two years later, in April 2003, earning $6.50 per hour selling newspaper subscriptions by telephone and worked approximately seventeen hours per week. She voluntarily resigned from this job in early 2004. Prior to the Charlotte Observer job, she worked as a cashier for Jack-In-The-Box in Pineville, North Carolina where she worked for only two weeks earning approximately $100.00. Previous to the Jack-In-The-Box job, she worked "on and off" for her pastor "[f]iling, answering the phone, and cleaning" and earned approximately $150.00 per month.

Respondent began to receive Supplemental Security Income in January 2004. She received disability income due to her "[s]leep apnea, severe back pain and depression." Initially, she received $389.50 per month. However, by 30 April 2004, she was receiving $564.00 per month. Respondent testified she was still looking for work as of April 2004. When asked what work she was seeking, respondent replied she had "an internet marketing business going on." Between August 2001 and May 2003, respondent was in danger of eviction on "a couple of occasions." Her monthly rent ranged between $25.00 and $40.00 per month.

Ms. Koebel characterized respondent's contact with the children's therapists as "not always consistent." After March 2003, the children's therapist requested respondent not be present at the children's counseling sessions. Respondent's attendance at her own counseling sessions was likewise sporadic until June 2003. Respondent participated in the Family Intervention Program and complied with the in-home education services.

Initially, the children had very limited visitation with respondent. They were allowed to visit for one hour each week at Walton Plaza. Soon after Ms. Koebel was assigned to the case, the family enjoyed visitation in respondent's home. The visits became progressively longer. Two hours each week unsupervised visitation became overnight visits, and finally evolved to weekend visitation. On at least one occasion, respondent elected not to have weekend visitation with the children because they had been especially rowdy the previous weekend. Respondent seemed to have an especially conflicted relationship with J.C. The visitation periods culminated in a month-long visitation with C.C. in January 2003. However, C.C. was removed from the home again because he was "not consistently getting his medication," missed some school, exhibited behavior problems at school, and was not consistently finishing his homework.

After June 2003, respondent attended all of her counseling sessions with her therapist Ms. Linda Lee Woodburn and showed progress. Ms. Koebel testified that in the year and one-half leading up to the hearing, respondent stabilized her housing situation and appropriately maintained it for the children. Respondent completed family education sessions with Ms. Angela Howard in September 2002 and completed another set of parenting classes on her own in February 2004.

In the court summary dated 20 May 2003, DSS recommended "the goal be changed to termination of parental rights and adoption regarding both children." On 28 October 2003, DSS filed petitions to terminate respondent's parental rights to J.C. and C.C. The petitions alleged the following grounds for termination of respondent's parental rights: (1) neglect; and (2) willfully leaving the children in foster care for more than twelve months without showing reasonable progress under the circumstances in correcting the conditions which led to the removal of the children.

The termination hearing was conducted over three days in March and April 2004. On 9 June 2004, the trial court entered an order terminating respondent's parental rights on both grounds alleged in the petitions. Respondent appeals.

II. Mootness

[1] J.C. took his own life on 29 August 2004 after the filing of respondent's notice of appeal in this matter. DSS argues J.C.'s death renders this appeal moot with regard to him. We disagree.

Respondent continues to have parental rights of J.C. which continues after his death. Respondent may also have inheritance rights. N.C. Gen. Stat. § 29-15 (2003). Also, pursuant to N.C. Gen. Stat. § 7B-1111(a)(9) (2003), an order terminating parental rights can form the basis of a subsequent proceeding to terminate the parental rights of another child:

> (a) The Court may terminate parental rights upon a finding of one or more of the following.
>
> . . . .
>
> (9) The parental rights of a parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

N.C. Gen. Stat. § 7B-1111(a)(9) (2003).

Respondent's parental rights of J.C. survive his death. The termination of parental rights can form the basis of a subsequent proceeding to terminate the rights of another child of respondent. We decline to dismiss this appeal as moot with respect to J.C.

III. Issues

The issues on appeal are whether: (1) respondent and the children were properly served; (2) sufficient evidence exists to support various findings of fact; (3) the findings of fact and evidence in the record support the statutory ground to terminate parental rights due to neglect; (4) the trial court committed reversible error in concluding as a matter of law that respondent willfully left her children in foster care for more than twelve months without showing reasonable progress; (5) the trial court erred in taking judicial notice of various materials; (6) the trial court committed reversible error in terminating respondent's parental rights without specific reference to the statutory grounds for doing so; (7) findings of fact and evidence in the record support the finding that it is in the best interest of the children to terminate parental rights; and (8) the trial court committed reversible error in failing to conduct a separate dispositional hearing during the best interests phase of the proceedings.

IV. Termination of Parental Rights

A. Standard of Review

A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). A different standard of review applies to each stage. *Id.* In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists. *Id.* The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. rev. denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). "Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985) (citation omitted).

If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child. The standard of review of the dispositional stage is

whether the trial court abused its discretion in terminating parental rights. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

B. Neglect

[2] Respondent argues insufficient evidence supports findings of fact to conclude respondent neglected her children. We agree.

N.C. Gen. Stat. § 7B-1111(a)(1) (2003) provides a ground to terminate parental rights where "the parent has abused or neglected the juvenile." A neglected juvenile is defined as follows:

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

N.C. Gen. Stat. § 7B-101(15) (2003).

It is well-established that "[a] finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect *at the time of the termination proceeding*." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (emphasis supplied). "[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984).

If the child is removed from the parent before the termination hearing, as in this case, then "the trial court *must* also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232 (emphasis supplied). In those circumstances, "parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a *probability of repetition of neglect* if the juvenile were returned to [his] parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (emphasis supplied). A prior adjudication of neglect alone cannot justify termination of parental rights.

DSS presented no evidence that respondent could not, *at the time of the hearing*, adequately parent her children. *In re Young*, 346

N.C. at 248, 485 S.E.2d 612 at 615. Likewise, no evidence was presented and no finding was made that a probability of repetition of neglect existed at the time of the termination hearing. *In re Ballard*, 311 N.C. at 713-14, 319 S.E.2d at 231.

The hearing to terminate respondent's parental rights was held in March and April 2004. Petitioner called three witnesses to testify: Ms. Wilson, Angela Howard, and Ms. Koebel. Ms. Wilson worked as the social worker for the children between December 2000 and May 2001. Ms. Wilson testified that during the time she was involved with the family, there were concerns regarding the supervision of the children, the cleanliness of the house, and respondent's attendance at her counseling appointments. Ms. Wilson's involvement with respondent ended almost *three years* before the hearing to terminate respondent's parental rights. Because Ms. Wilson had no involvement with the family for almost three years before the termination proceeding, she was unable to testify whether neglect existed at that time and whether it was likely to occur in the future.

Ms. Howard provided family education services to respondent from June 2001 through September 2002. Respondent periodically contacted Ms. Howard after her family education sessions ended to ask for advice and to review the parenting videos. The most recent contact between respondent and Ms. Howard occurred the day before the hearing. Ms. Howard's testimony presents no evidence of events or circumstances in the time period between September 2002, when the family education sessions ended, and Spring 2004, when the hearing was held, to show respondent neglected the children. Ms. Howard could not testify whether neglect existed at the time of the hearing and did not offer any evidence of the probability of neglect in the future.

Ms. Koebel became the social worker for the children on 20 August 2001 and was their social worker at the time of the hearing. Even though Ms. Koebel's relationship with the family continued until the hearing, she presented no evidence that respondent was unfit as a parent at the time of the hearing. None of DSS's three witnesses testified to a probability of repetition of neglect.

The trial court erred in concluding as a matter of law that respondent willfully neglected the children. DSS failed to present any evidence showing neglect at the time of the termination hearing or the probability of repetition of neglect if the children were returned to respondent.

C. Reasonable Progress

[3] Respondent next argues that the trial court erred in concluding that she willfully left the children in DSS's custody for more than twelve months without showing reasonable progress in correcting those conditions which led to the removal of the children. We agree.

N.C. Gen. Stat. § 7B-1111(a)(2) (2003) provides that the court has grounds to terminate parental rights where:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

It is undisputed that the children had been in foster care for more than twelve months at the time DSS filed the petitions to terminate respondent's parental rights.

During the adjudicatory stage, "[t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2003). Here, the trial court failed to find that respondent acted willfully as required under N.C. Gen. Stat. § 7B-1111(a)(2).

A finding of willfulness does not require a showing that the parent was at fault. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001).

The trial court's order is devoid of any finding that respondent was "unwilling to make the effort" to make reasonable progress in remedying the situation that led to the adjudication of neglect. *Id.* The evidence presented at the hearing is directly contrary.

Respondent attended family education sessions with Ms. Howard and continued to contact Ms. Howard after the sessions ended to ask

for advice and to review parenting videos. In February 2004, respondent completed another set of parenting classes on her own volition that she paid for herself. Ms. Koebel testified that respondent acquired appropriate housing, improved the conditions of her home so that they were appropriate, and maintained the conditions of her home. Respondent also attended therapy. Ms. Linda Lee Woodburn was respondent's therapist from July 2001 until February 2004. Ms. Woodburn testified that when she began seeing respondent, respondent's attendance at the therapy sessions was sporadic. Beginning 6 June 2003, respondent attended all therapy sessions. Ms. Woodburn testified that respondent had made progress in therapy.

Because the trial court's order does not contain adequate findings of fact that respondent acted "willfully" or made adequate findings on respondent's progress, the trial court erred in concluding that respondent willfully left the children in foster care for a period exceeding twelve months without making reasonable progress under the circumstances.

V. Conclusion

The trial court erred in concluding that respondent neglected the children and willfully left the children in foster care for a period exceeding twelve months without making reasonable progress under the circumstances. In light of our decision, we do not address respondent's remaining assignments of error. The trial court's order terminating respondent's parental rights is reversed.

Reversed.

Judges McCULLOUGH and BRYANT concur.

MILLER v. FORSYTH MEM'L HOSP., INC.

[173 N.C. App. 385 (2005)]

CYNTHIA GAIL MILLER AND GUY MORRIS MILLER, PLAINTIFFS V. FORSYTH MEMORIAL HOSPITAL, INC. D/B/A "PIEDMONT MEDICAL SPECIALISTS"; PIEDMONT MEDICAL SPECIALISTS, P.L.L.C.; NOVANT HEALTH, INC.; AND NOVANT HEALTH TRIAD REGION, L.L.C., DEFENDANTS

No. COA04-1179

(Filed 20 September 2005)

1. Appeal and Error— preservation of issues—motion in limine—failure to object at trial

Plaintiff did not object at trial and therefore did not preserve for appeal the question of whether the trial court erred in granting defendants' pretrial motion in limine. The ruling on the evidence was made before 1 October 2003, the effective date of the amendment to N.C.G.S. § 8C-1, Rule 103, concerning the need for renewing objections.

2. Witnesses— expert—doctor—testimony limited—no abuse of discretion

The trial court did not abuse its discretion in a medical malpractice trial where plaintiffs presented a doctor as an expert in anesthesiology and pain management; the court permitted him to testify concerning his diagnosis of sciatic neuropathy, but did not allow him to testify concerning demyelination of the sciatic nerve since he relied on another doctor's diagnosis in that regard; the court did not allow him to testify about causation because he had not performed any independent diagnostic studies; and the doctor who performed the diagnostic studies was allowed to testify about causation.

3. Costs— mediation fees—witness fees—depositions—exhibits

The trial court erred in a medical malpractice case by not taxing mediation costs against plaintiffs, but did not err by not taxing costs for expert witness fees, exhibits, and depositions. N.C.G.S. §§ 6-20, 7A-305(d).

Appeal by plaintiffs from judgment entered 6 October 2003 and cross-appeal by defendants from judgment entered 31 October 2003 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 12 May 2005.

Elliot Pishko Morgan, P.A., by David C. Pishko, for plaintiff-appellant.

Wilson & Iseman, L.L.P., by Tamura D. Coffey, Linda L. Helms, Kevin B. Cartledge and Maria C. Papoulias, for defendant-appellees.

Glenn, Mills & Fisher, P.A., by William S. Mills for the North Carolina Academy of Trial Lawyers; and Roberts & Stevens, P.A., by Peter Buckley McGuire for the North Carolina Association of Defense Attorneys, amicus curiae.

STEELMAN, Judge.

Plaintiffs, Cynthia and Guy Miller, appeal the trial court's judgment dismissing their complaint based upon the jury's verdict. Defendants cross-appeal the trial court's denial of their motion to tax costs against plaintiffs.

Plaintiffs commenced this action seeking damages for Mrs. Miller's personal injuries, which were alleged to have been caused as a result of defendants' medical negligence. Piedmont Medical Specialists (Piedmont) is a physician practice owned by defendant Forsyth Memorial Hospital, which is in turn, a wholly-owned subsidiary of Novant Health, Inc. Plaintiff, Mr. Miller, sought damages for loss of consortium.

On 31 December 1999, Mrs. Miller was suffering from bronchitis and went to Piedmont's offices for treatment. John Edwards, a physician's assistant, examined Mrs. Miller and prescribed an injection of Rocephin, an antibiotic. Nurse Linda Smith administered the injection in Mrs. Miller's right buttock. Upon receiving the injection, Mrs. Miller contends she felt intense pain and a burning sensation in her buttock. Upon leaving the doctor's office, she became faint and was taken back to an examining room where Edwards ordered blood work to determine the cause. Since receiving the injection, Mrs. Miller contends she has suffered continuous pain and discomfort in her lower back, right hip, and right leg. She received medical treatment from Dr. Richard Bey, a neurologist, and Dr. T. Stuart Meloy, a pain management specialist. Dr. Bey diagnosed Mrs. Miller's condition as "sciatic neuropathy with demyelination" and stated the condition was caused by the injection she received from Nurse Smith.

The matter came on for jury trial at the 22 September 2003 session of superior court. The jury returned a verdict in favor of defend-

ants on 1 October 2003, finding Mrs. Miller was not injured by defendants' negligence. Plaintiffs appealed. Following the entry of judgment, defendants filed a motion for the costs of the action to be taxed against plaintiffs. The trial court ordered plaintiffs to pay court costs, but denied defendants' motion seeking other costs, including deposition costs, mediation costs, expert witness fees, and exhibit costs. Defendants appeal.

I. Plaintiffs' Appeal

[1] In plaintiffs' first argument, they contend the trial court erred in granting defendants' pretrial motion *in limine*, which found certain matters plaintiffs sought during discovery were protected under the peer review privilege. We disagree.

On 7 February 2003, plaintiffs served Forsyth with their first set of interrogatories and first request for production of documents. Defendants asserted that certain documents were protected from discovery under the peer review privilege as set forth in N.C. Gen. Stat. § 90-21.22 and refused to produce these documents. Plaintiffs filed a motion to compel discovery, and also sought an order compelling Edwards, the physician's assistant, and Dr. Marx to answer related questions asked during their respective depositions. On 6 August 2003, Judge L. Todd Burke denied plaintiffs' motion to compel and granted defendants' motion for a protective order prohibiting plaintiffs from obtaining the requested documents. Before trial, defendants filed a motion *in limine* to prohibit plaintiffs from offering evidence regarding the peer review process, certain affidavits, and offering evidence that defendants failed to prepare an incident report. On 22 September 2003, prior to the commencement of the trial, Judge Davis granted defendant's motion *in limine*, but emphasized the conditional nature of his ruling, instructing the parties:

> Well, all orders in limine are conditional and even if a motion is granted that does not mean that the party affected may not raise an issue during trial if evidence has been received that would make it necessary or desirable for portions of evidence that is subject to the order in limine to be presented to the jury.
>
> In that light, I will grant the motion which we will call for convenience sake the peer review motion and the three elements that are delineated in that. And that is, of course, subject to the conditional nature of such orders.

During the hearing on the motion *in limine*, plaintiffs indicated they understood the conditional nature of the judge's ruling, stating they would question certain witnesses during the trial concerning the peer review process, and upon defendants' objection, they understood the trial court would determine whether the elicited testimony was privileged. The case then proceeded to trial before a jury.

A trial court's pretrial ruling on a motion *in limine* is merely "preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial." *Gregory v. Kilbride*, 150 N.C. App. 601, 611, 565 S.E.2d 685, 693 (2002). The trial court's grant or denial of a motion *in limine* is not appealable. *Id.* In order to preserve the evidentiary issues for appeal where such a motion had been granted, the party objecting to the grant of the motion "must attempt to introduce the evidence at trial." *Id.* In this case, even though the trial court brought the conditional nature of its ruling to plaintiffs' attention, they did not attempt to introduce any evidence regarding defendants' peer review process or that an internal investigation had occurred following the injection.

Effective 1 October 2003, the rule requiring that a party attempt to offer evidence in order to preserve the evidentiary issue for appeal was changed, so 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) (2004)[1]. However, the amendment applies only to rulings on evidence made on or after 1 October 2003. *State v. Pullen*, 163 N.C. App. 696, 701, 594 S.E.2d 248, 251-52 (2004) (citing 2003 N.C. Sess. Laws ch. 101).

The trial court granted defendants' motion *in limine* on 22 September 2003. Plaintiffs rested their case-in-chief on 29 September 2003. Defendants presented their evidence on 29 and 30 September 2003. Plaintiffs offered no rebuttal evidence. The trial court conducted the charge conference and counsel made their final arguments to the jury on 30 September 2003. On 1 October 2003 the trial court instructed the jury, the jury deliberated, and returned its verdict. At no time during the trial did plaintiffs attempt to present the evidence, which was the subject of the motion *in limine*, to the jury.

1. We note that on 19 July 2005 this Court, in *State v. Tutt*, 171 N.C. App. 518, 524, —— S.E.2d ——, —— (2005), held the 2003 amendment to Rule 103 of the Rules of Civil Procedure was unconstitutional. This holding does not impact our analysis in this case as we are applying the pre-amendment version of Rule 103.

Plaintiffs did not move to reopen the evidence. The only ruling upon this evidence was made on 22 September 2003. As such, the ruling is governed by the previous version of Rule 103(a)(2) of the Rules of Civil Procedure and not the version applicable to rulings made on or after 1 October 2003. By failing to offer this evidence at trial, plaintiffs failed to preserve this issue on appeal. This argument is without merit.

[2] In plaintiffs second argument, they contend the trial court erred in excluding the opinion testimony of Dr. Meloy as to the cause of Mrs. Miller's nerve injury. We disagree.

Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert testimony, providing: "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(a) (2004). "It is well-established that trial courts must decide preliminary questions concerning . . . the admissibility of expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). As such, trial courts are afforded a wide latitude when determining the admissibility of expert testimony. *Id.* at 458, 597 S.E.2d at 686. Therefore, we will not overturn the trial judge's ruling in such a situation absent a showing that the trial court abused its discretion. *Id.* An abuse of discretion occurs when the trial court's ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

Howerton sets forth a three-step test for determining the admissibility of expert testimony: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" 358 N.C. at 458, 597 S.E.2d at 686 (internal citations omitted). The issue presented in this case concerns only the second step of the inquiry, since plaintiffs do not challenge the trial court's ruling based upon the first or third steps.

" 'The essential question in determining the admissibility of opinion evidence is whether the witness, through study and experience, has acquired such skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies.' "

State v. Fuller, 166 N.C. App. 548, 560 (2004) (quoting *State v. Phifer*, 290 N.C. 203, 213, 225 S.E.2d 786, 793 (1976)). Dr. Meloy is an anesthesiologist who specializes in pain medicine. He graduated from an accredited medical school, is board-certified by the American Board of Anesthesia, and holds a sub-certification in pain medicine.

Plaintiffs tendered Dr. Meloy as an expert in the fields of anesthesiology and pain management. Defendants objected to Dr. Meloy testifying in the field of neurology or giving an opinion concerning the etiology of Mrs. Miller's pain. During a brief *voir dire* hearing, Dr. Meloy testified he was not a neurologist, he did not interpret any EMG or nerve conduction studies, and had not performed any independent diagnostic studies to determine the cause of Mrs. Miller's pain. The trial court ruled that Dr. Meloy could testify as an expert witness in the fields of anesthesia and pain management, but deferred ruling on the objection to potential causation testimony until further testimony was received.

Upon defendants' objection to a question concerning the causation of Mrs. Miller's pain, a second *voir dire* hearing was conducted. Dr. Meloy testified his diagnosis was based upon Dr. Bey's EMG study showing demyelination with the sciatic nerve. He further stated he made his own diagnosis, independent of Dr. Bey, of sciatic neuropathy, but that "the demyelination aspect was based on the test that [Dr. Bey] had performed." On cross-examination, Dr. Meloy acknowledged he did not make his own neurological diagnosis of Mrs. Miller. Following the *voir dire* hearing, the court ruled Dr. Meloy was "[p]ermitted to testify with respect to his finding or determination consistent with sciatic neuropathy." Subsequent to this ruling, plaintiffs elicited testimony from Dr. Meloy on *voir dire* that Mrs. Miller had sciatic neuropathy caused by the Rocephin injection on 31 December 1999.

The trial court permitted Dr. Meloy to testify as to the diagnosis he made, that of sciatic neuropathy. However, the trial court refused to allow him to testify as to the diagnosis of demyelination of the sciatic nerve since he did not make such a diagnosis himself, but relied on Dr. Bey's diagnosis. Further, the trial court did not allow Dr. Meloy to testify as to causation since he had not performed any independent diagnostic studies to determine the cause of Mrs. Miller's pain. Further, Dr. Meloy never testified that he relied upon Dr. Bey's reports or diagnosis in giving an opinion that Mrs. Miller's sciatic neuropathy was caused by the injection of Rocephin. It should be noted

that Dr. Bey did testify that Mrs. Miller's condition was caused by the Rocephin injection. Based on the evidence presented to the trial court, we discern no abuse of discretion on the part of the trial judge. This argument is without merit.

II. Defendants' Cross-Appeal

[3] Defendants cross-appeal from the trial court's denial of their motion to tax costs following a favorable jury verdict.

N.C. Gen. Stat. § 6-1 provides: "To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter." N.C. Gen. Stat. § 7A-305 governs the costs which are assessable in civil actions. In addition, N.C. Gen. Stat. § 6-20 provides for the taxation of costs in the court's discretion. In analyzing whether the trial court properly denied defendants' motion for cost we must undertake a three-step analysis. *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 734, 596 S.E.2d 891, 895 (2004). First, we must determine whether the cost sought is one enumerated in N.C. Gen. Stat. § 7A-305(d); if so, the trial court is required to assess the item as costs. *Id.* Second, where the cost is not an item listed under N.C. Gen. Stat. § 7A-305(d), we must determine if it is a "common law cost" under the rationale of *Charlotte Area. Id.* (defining " 'common law' costs as being those costs established by case law prior to the enactment of N.C. Gen. Stat. § 7A-320 in 1983.") Third, if the cost sought to be recovered is a "common law cost," we must determine whether the trial court abused its discretion in awarding or denying the cost under N.C. Gen. Stat. § 6-20. *Id.*

In this case, defendants seek recovery for costs related to (1) deposition fees; (2) mediation costs; (3) expert witness fees; and (4) trial exhibit costs. We address each of these in turn.

A. Deposition Costs

Deposition costs are not listed as a recoverable cost under N.C. Gen. Stat. § 7A-305(d). However, they have been allowed at common law. *Cunningham v. Riley*, 169 N.C. App. 600, 605, 611 S.E.2d 423, 426 (2005); *Dep't of Transp. v. Mfd. Housing, Inc.*, 160 N.C. App. 461, 586 S.E.2d 780 (2003). We may only overturn the trial court's denial of defendants' deposition costs upon a showing of abuse of discretion. *Id.* Defendants do not argue in their brief that the trial court abused its discretion in refusing to award this item as costs, nor do we discern any abuse of discretion.

B. Mediation Costs

N.C. Gen. Stat. § 7A-38.1 mandates that a mediated settlement conference be held in all civil actions. In this case, the parties participated in mediation with a court-appointed mediator. As a result, defendants' incurred a mediator fee of $350.00. Mediation fees are recoverable under N.C. Gen. Stat. § 7A-305(d)(7), thus the trial court was required to tax this cost against plaintiffs. *Lord*, 164 N.C. App. at 736, 596 S.E.2d at 896 (citing *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 500 S.E.2d 732 (1998), *rev'd on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999)). The trial court erred in failing to assess this item as costs against plaintiffs.

C. Expert Witness Fees

Pursuant to N.C. Gen. Stat. § 7A-305(d)(1) witness fees are assessable as costs "as provided by law." "This refers to the provisions of N.C. Gen. Stat. § 7A-314 which provides for witness fees where the witness is under subpoena." *Id.* at 735, 596 S.E.2d at 895. The trial judge only has the authority to award witness fees where the witness was under subpoena. *Id.* In this case, none of defendants' expert witnesses were under subpoena. As a result, the trial court could not award defendants' expert witness fees pursuant to N.C. Gen. Stat. § 7A-305(d). *Accord id.* Nor does the authority to tax expert witness fees exist as a "common law" cost under N.C. Gen. Stat. § 6-20. *Id.*

D. Exhibit Costs

Costs associated with trial exhibits are not listed as a recoverable expense under N.C. Gen. Stat. § 7A-305(d). However, opinions of this Court have, at times, found exhibit costs allowable at common law, *see Coffman v. Roberson*, 153 N.C. App. 618, 629, 571 S.E.2d 255, 262 (2002); *Lewis v. Setty*, 140 N.C. App. 536, 539-40, 537 S.E.2d 505, 507 (2000); *Smith v. Underwood*, 127 N.C. App. 1, 12-13, 487 S.E.2d 807, 814-15 (1997), and at other times, disallowed exhibit costs, see *Charlotte Area*, 160 N.C. App. at 472, 586 S.E.2d at 786. The trial court chose not to allow the request for exhibit costs. Thus, we are unable to say the trial court erred in denying defendants these costs.

We hold that defendants were entitled to recover costs from plaintiffs as provided by law, and should recover from plaintiffs $350.00 for the cost of court ordered mediation. We reverse and remand to the trial court for entry of an order consistent with this opinion.

NO ERROR AS TO TRIAL; AFFIRMED IN PART AND REVERSED AND REMANDED IN PART AS TO COSTS ORDERED.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. WESLEY SHANE THORNE

No. COA04-546

(Filed 20 September 2005)

1. Constitutional Law— right to confrontation—testimony about lost surveillance videotape—opportunity for cross-examination

The trial court did not violate defendant's Sixth Amendment right to confront the witnesses against him in a robbery with a firearm case by denying defendant's motion in limine requesting an order prohibiting witnesses from testifying about the contents of a lost surveillance videotape of the bank robbery, because: (1) defendant's cross-examination was neither restricted by the law nor did the trial court limit the scope of such examination; (2) defendant's only limitation in cross-examining the officer was his inability to play the lost videotape to the jury, but defendant had ample opportunity to cross-examine the officer regarding the quality of the videotape, his viewing of the videotape, and his personal knowledge of defendant's gait; and (3) North Carolina's Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. U.S. Const. amend. VI; N.C. Const. art. I, § 23.

2. Evidence— testimony about contents of lost videotape—identity—failure to show prejudicial error

The trial court did not abuse its discretion in a robbery with a firearm case by allowing an officer to testify at trial regarding the contents of a lost videotape allegedly in violation of N.C.G.S. § 8C-1, Rules 403 and 701, because: (1) the testimony of the officer that he observed defendant's gait in the past, observed the robber's gait on the videotape several times, and perceived the two gaits to be similar bore on the jury's determination of the identity of the perpetrator; (2) the jurors' inability to view

the lost videotape does not, per se, result in a violation of Rule 403 since defendant does not assert the State destroyed or lost the videotape in bad faith, and thus secondary evidence such as the officer's testimony is expressly permitted under N.C.G.S. § 8C-1, Rule 1004 if otherwise admissible under the Rules of Evidence; and (3) although prejudicial, defendant has made no showing that the prejudice was unfair or had the undue tendency to suggest a decision on an improper basis.

3. Constitutional Law— effective assistance of counsel—failure to object or move to strike

Defendant did not receive ineffective assistance of counsel in a robbery with a firearm case by his counsel's failure to object to or move to strike the prior out-of-court statements of two witnesses admitted for corroborative purposes because even without the out-of-court statements, defendant has failed to show that there is a reasonable probability that absent the alleged error the trial result would have been different.

Appeal by defendant from judgment entered 21 November 2003 by Judge Benjamin G. Alford in Onslow County Superior Court. Heard in the Court of Appeals 16 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge for the State.

Paul F. Herzog for defendant-appellant.

CALABRIA, Judge.

Wesley Shane Thorne ("defendant") appeals a judgment entered on a jury verdict of guilty of robbery with a firearm. We find no error.

The State presented evidence that sometime around 4:00 p.m. on 3 November 1998, defendant and his girlfriend, Maxine Little ("Maxine"), drove defendant's car to the end of a dead end street near the woods behind the Marine Federal Credit Union (the "Credit Union") in Jacksonville, North Carolina to smoke marijuana. Defendant exited the car, opened the trunk, and left for approximately seven minutes. During this time, defendant entered the back entrance of the Credit Union wearing a black top, black pants, a black ski mask, and sunglasses. Defendant was armed with a sawed-off shotgun and was carrying a black pillowcase. He ordered the tellers to fill the pillowcase with money and threatened to harm

the tellers and customers if anyone moved or did anything wrong. Defendant took the money and exited the bank through the same door he entered.

Defendant returned to the car, and Maxine observed he was out of breath and was wearing a black, hooded sweatshirt that was different from the shirt he had been wearing when he exited the car. When defendant later opened the trunk of the car, Maxine noticed a small rifle or shotgun and a black pillowcase with money hanging out of it. Two days after the robbery, defendant paid cash for the balance of the restitution he owed on his probation sentence. The following month, defendant paid $740.94 in cash for new furniture and $600.00 in cash towards the rent on a new apartment.

Members of the Jacksonville Police Department and the State Bureau of Investigation arrived at the Credit Union shortly after the robbery. An audit revealed the total amount stolen during the robbery was $10,884.00. Captain Tim Malfitano ("Captain Malfitano") of the Jacksonville Police Department viewed the Credit Union's surveillance tape of the robbery several times and informed the police detectives that the "characteristic of the [robber's] walk" was similar to that of defendant. During the investigation, Thomas Rafferty of the Onslow County Sheriff's Department also recovered a pair of sunglasses that were on the ground behind the Credit Union, and they were later identified as being similar to sunglasses normally worn by defendant. That night, police obtained defendant's consent to search his bedroom, where they found and seized a black pillowcase. Defendant was not taken into custody and the robbery case was classified inactive. Subsequently, the Jacksonville Police Department lost the surveillance videotape of the robbery.

On 22 May 2000, Detective David Kaderbek ("Detective Kaderbek"), the detective assigned to the case, obtained statements from four separate people who linked defendant to the robbery. The first statement was by Sharon Gardner ("Gardner"), Maxine's mother. She stated that Kristin Elkert ("Elkert") informed her that Maxine was involved in the robbery. The second statement by Elkert revealed that Maxine told her that she and defendant had robbed the Credit Union. Hilton Scott ("Scott") also gave a statement that defendant told him that he obtained his money by robbing a bank. The last statement, given by Maxine, identified defendant as the robber of the Credit Union on 3 November 1998. On 4 August 2000, a warrant was issued for defendant's arrest, and he was indicted for robbery with a dangerous weapon on 11 February 2003.

Prior to trial, defendant made a motion *in limine* to prohibit any witnesses who had viewed the surveillance tape of the robbery from testifying about the contents of the videotape at trial. The trial court denied the motion *in limine* and Captain Malfitano subsequently testified at trial, over defendant's objection, that the gait of defendant was similar to that of the person seen robbing the bank on the surveillance tape. At trial, Elkert and Scott also read into evidence the statements they had previously made. Maxine, pursuant to plea bargain, also testified.

On 21 November 2003, the jury returned a verdict of guilty of robbery with a firearm. The trial court determined defendant's prior record level was a level four and sentenced defendant to a term of 117 to 150 months in the North Carolina Department of Correction. Defendant appeals.

[1] Defendant first assigns error to the trial court's denial of his motion *in limine*, in which he requested an order prohibiting witnesses from testifying about the contents of the lost surveillance videotape of the bank robbery. Defendant's only specific contention properly before this Court is that the denial of the motion *in limine* violated his constitutional right to confront the witnesses against him under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution.[1] Defendant claims that by allowing Captain Malfitano to testify about the contents of the videotape, the trial court interfered with his right of effective cross-examination because he had no way to test the credibility of the witness. Specifically, defendant argues "[h]e could not show the tape to the jury during cross-examination, and ask the witness specific questions about the basis of the opinion, with the jurors watching both the tape and the witness."

It is well-settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated. *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001). Under the Confrontation Clause of the Sixth Amendment, a defendant is guaranteed the right to effectively cross-examine a witness,

1. Although defendant briefly cites authority regarding his right to present evidence under the Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution, he does not argue this right; therefore, pursuant to N.C. R. App. P. 28(b)(6), it is deemed abandoned. We note parenthetically defendant's concession that the videotape was not lost or destroyed in bad faith obviates any due process claim that his right to present evidence under the United States or North Carolina Constitution has been violated. *See Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281 (1988); *State v. Hunt*, 345 N.C. 720, 483 S.E.2d 417 (1997).

which includes the opportunity to show that a witness is biased or that the testimony is exaggerated or unbelievable. *United States v. Abel*, 469 U.S. 45, 50, 83 L. Ed. 2d 450, 456 (1984). The right to effectively cross-examine a witness, however, does not guarantee a defendant a "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19 (1985) (*per curiam*). Indeed, the right to confront one's accusers is generally satisfied if defense counsel receives wide latitude at trial to question witnesses. *Fensterer*, 474 U.S. at 22, 88 L. Ed. 2d at 21.

In *Fensterer*, the defendant was convicted, in part, on the testimony of the State's expert witness, who could not recall which scientific test he used to form his opinion. *Id.*, 474 U.S. at 17, 88 L. Ed. 2d at 18. Despite his inability to recall limited defense counsel's efforts to discredit the testimony, the Supreme Court held that there was no Sixth Amendment violation. The Court held that because the scope of defendant's cross-examination was not restricted by the trial court or by law, the defendant had a full "opportunity for effective cross-examination." *Id.*, 474 U.S. at 19-20, 88 L. Ed. 2d at 19.

In *State v. Zinsli*, 156 Or. App. 245, 966 P.2d 1200 (1998), the Oregon Court of Appeals, considered a Confrontation Clause challenge on facts similar to the case at bar. In *Zinsli*, the defendant was driving under the influence of intoxicants and the administered field sobriety tests were videotaped. *Id.*, 156 Or. App. at 247, 966 P.2d at 1201. The videotape was later destroyed inadvertently. *Id.* The trial court granted the defendant's motion to dismiss, finding that the loss of the videotape violated defendant's right to confrontation. *Id.* On appeal, the Oregon Court of Appeals found the Supreme Court's decision in *Fensterer* to be controlling and found no Confrontation Clause violation since the arresting officer would be available to testify at trial and his cross-examination would not be restricted by the trial court. *Id.*, 156 Or. App. at 251, 966 P.2d at 1203.

Similarly, in this case, defendant's cross-examination was neither restricted by the law nor did the trial court limit the scope of such examination. Instead, defendant's only limitation in cross-examining Captain Malfitano was his inability to play the lost videotape to the jury. Nonetheless, defendant had ample opportunity to cross-examine Captain Malfitano regarding the quality of the videotape, his viewing of the videotape, and his personal knowledge of defendant's gait. In fact, defendant concedes in his brief that "defense counsel [had] the

opportunity to question Captain Malfitano about what he saw on the videotape[.]" Accordingly, defendant's confrontation rights under the Sixth Amendment were vindicated, and we find no error.

Article I, Section 23 of the North Carolina Constitution also provides a defendant the right to cross-examine adverse witnesses through the constitutional guarantee of the right of confrontation. N.C. Const. Art. I, § 23. *State v. Watson*, 281 N.C. 221, 229, 188 S.E.2d 289, 294, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972). However, our Supreme Court, in interpreting Article I, Section 23 has followed the United States Supreme Court in holding that, "[North Carolina's] Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *State v. McNeil*, 350 N.C. 657, 676, 518 S.E.2d 486, 498 (1999) (citing *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19 (1985) (*per curiam*)). Although our courts have not examined the meaning of "effective" cross-examination when evidence has been lost and is unavailable to the defendant, we find the reasoning set forth in *Fensterer* to be persuasive and applicable. Under these facts, we hold that defendant's right to confrontation under Article I, Section 23 of the North Carolina Constitution has not been violated, and accordingly, we find no error.

[2] In defendant's second assignment of error he asserts the trial court committed reversible error in allowing Captain Malfitano to testify at trial regarding the contents of the lost videotape in violation of N.C. Gen. Stat. § 8C-1, Rules 403 and 701 (2003). Specifically, defendant argues that the absence of the videotape failed to allow "the jurors . . . to effectively evaluate the worth, value and credibility of the opinion testimony of the witness[] who made the identification from the surveillance [videotape]." Defendant ostensibly contends that the unavailability of the videotape affects the decision to admit lay opinion testimony concerning its contents and argues that this is "a new sort of hybrid for North Carolina." We disagree.

Lay witness "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2003). "[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). Captain Malfitano testified that as part of his training as an under-

cover narcotics officer, he studied different mannerisms and characteristics of people and was "trained to notice differences in the actual ways people walk." Furthermore, Malfitano was experienced in watching people both in person and on film and had attended several schools for electronic and technical surveillance. Malfitano testified that he had observed defendant's gait in the past, observed the robber's gait on the videotape several times, and perceived the two gaits to be similar. Such testimony bore on the jury's determination of the identity of the perpetrator. Accordingly, this evidence was not barred by Rule 701, and the trial court did not abuse its discretion in admitting Captain Malfitano's testimony.

Defendant next asserts the trial court erred in balancing the prejudicial effect of the testimony against its probative value. Specifically, defendant argues that the jurors' inability to view the contents of the tape unfairly prejudiced him at trial. We note at the outset that the jurors inability to view the lost videotape does not, *per se*, result in a violation of Rule 403. Indeed, our Rules of Evidence allow for the admissibility of secondary evidence where the original is lost or destroyed. N.C. Gen. Stat. § 8C-1, Rule 1004 (2003). Relevant to the instant case, defendant does not assert the State destroyed or lost the videotape in bad faith; therefore, secondary evidence, such as Captain Malfitano's testimony, is expressly permitted under Rule 1004 if otherwise admissible under the Rules of Evidence.

"[R]elevant [] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2003). "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Hoffman*, 349 N.C. 167, 184, 505 S.E.2d 80, 91 (1998) (internal quotation and citation omitted). However, " '[u]nfair prejudice,' . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (internal quotation mark and citation omitted). Whether to exclude relevant evidence pursuant to Rule 403 is a decision within the trial court's discretion and will remain undisturbed on appeal absent a showing that an abuse of discretion occurred. *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992).

In the instant case, the trial court did not abuse its discretion in balancing the probative value of the detective's testimony against its prejudicial effect. The testimony provided evidence of the identity of

the perpetrator, who was disguised with sunglasses and wore a dark covering over his face. Although prejudicial, defendant has made no showing that the prejudice was unfair or had the undue tendency to suggest a decision on an improper basis. As noted *supra*, the unavailability of the videotape does not make the testimony unfairly prejudicial, as the admission of such testimony is expressly contemplated under the Rules of Evidence. This assignment of error is overruled.

[3] In defendant's last assignment of error, he argues that his defense counsel provided ineffective assistance when he failed to object to or move to strike the prior out-of-court statements of Scott and Elkert. The trial court admitted the statements as corroborative of their trial testimony; however, defendant argues on appeal that the statements contained additional or "new" information and discrepancies.

"To successfully assert an ineffective assistance of counsel claim, defendant . . . must show that [(1)] [his] counsel's performance fell below an objective standard of reasonableness [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. Blakeney*, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000) (citations omitted). Even without the out-of-court statements by Scott and Elkert, the evidence presented at trial included the following: (1) testimony by Maxine, defendant's accomplice, that defendant robbed the bank; (2) testimony from witnesses describing the weapon and container used in the robbery corroborating Maxine's testimony that she saw a black pillowcase filled with money and a shotgun in the trunk of defendant's car; (3) Elkert's trial testimony that Maxine told her she and defendant had robbed a bank and hid in the woods; (4) Scott's testimony that when he asked defendant where he had gotten his extra money, defendant responded that the money, "c[a]me from a bank"; (5) testimony from a witness that a dark-colored car was parked at the end of Commerce Road near the woods behind the bank around the time of the robbery that matched Maxine's testimony that she and defendant drove defendant's dark blue car to the end of Commerce Road before the robbery to smoke marijuana; (6) testimony that defendant paid off a number of debts shortly after the robbery and appeared to have access to more money after the robbery; (7) Maxine's testimony that defendant told her, prior to the robbery, how easy it would be to rob the Credit Union; and (8) testimony by several witnesses, including Maxine, that the sunglasses found behind the Credit Union after the robbery matched those normally worn by defendant.

Therefore, even without the out-of-court statements, defendant has failed to show that there is a reasonable probability that absent the alleged error the trial result would have been different. Accordingly, this assignment of error is overruled.

Affirmed.

Judges HUNTER and JACKSON concur.

D.B. ON HER OWN BEHALF, AND ON BEHALF OF HER DAUGHTER, A.L., PETITIONER V. BLUE RIDGE CENTER, AND THE DIVISION OF MENTAL HEALTH, DEVELOPMENT DISABILITIES AND SUBSTANCE ABUSE SERVICES, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENTS

No. COA04-1440

(Filed 20 September 2005)

Administrative Law— judicial review of final agency decision—specific findings required

The superior court erred by dismissing an adoptive parent's petition for judicial review of a final agency decision concerning Medicaid services for the child and by denying all relief, and the case is vacated and remanded to the superior court with instructions to remand to the agency for specific findings why the agency did not adopt the recommended decision of the ALJ, because: (1) the superior court exceeded its authority under the pre-2001 version of the Administrative Procedure Act, which is applicable in this case, when N.C.G.S. § 150B-51(a) requires a superior court to make two threshold determinations before determining whether there is substantial evidence to support an agency decision and the superior court failed to do so; (2) a threshold determination must be made by the superior court to determine whether an agency rejected an ALJ decision without stating the specific reasons for doing so, and if the agency does not provide specific reasons, the superior court is not permitted to conduct substantive review but must reverse or remand on the procedural issue; and (3) in the absence of stated reasons by the agency as to why it rejected the ALJ decision, the courts cannot reasonably determine from the record whether the petitioner's asserted grounds for challenging the substance of the agency's

final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b).

Appeal by petitioner from judgment entered 12 May 2004 by Judge E. Penn Dameron, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 17 August 2005.

Legal Services of Southern Piedmont, by Douglas Stuart Sea; and National Health Law Program, by Sarah Somers, for petitioner appellant.

Attorney General Roy Cooper, by Assistant Attorney General M. Janette Soles; and Matney & Associates, P.A., by David E. Matney, III, for respondent appellees.

McCULLOUGH, Judge.

Petitioner (D.B.) appeals from a superior court order dismissing her petition for judicial review of a final agency decision and denying all relief. We vacate and remand.

Facts

D.B. and her husband are the adoptive parents of A.L. At an early age A.L. was removed from the home of her biological parents by the Buncombe County Department of Social Services because she had been severely neglected and abused. A.L. was placed in the foster care of D.B. and her husband and then later, in 1999, adopted as a special needs child. Because A.L. is a special needs child, she is eligible for Medicaid coverage until she is at least 21. Since the time A.L. was adopted by D.B. and her husband, A.L.'s care has been coordinated, paid for, and provided by Blue Ridge Center (BRC).

Due to the abuse suffered by A.L. in her early childhood, she has been diagnosed with numerous medical conditions including rage disorder, borderline personality disorder, bipolar disorder and post-traumatic stress disorder. At times A.L. experienced violent rages and attempted to injure herself and others, including her family. A.L.'s physicians determined that she needs crisis intervention and stabilization services in order to help with her dangerous rages.

Before 2000, under the supervision of Dr. Kim Masters, crisis intervention and stabilization services were provided by Charter Psychiatric Hospital in Asheville, North Carolina. When this treatment was being provided to A.L., her condition gradually improved

and there was a time period in which A.L. was not required to be placed outside of the home for treatment. However, Charter closed in February 2000. Mission-St. Joseph's, the hospital located closest to A.L.'s home, does not offer services any less restrictive than full psychiatric commitment.

On several occasions after the closing of Charter, A.L. again began to have rage outbursts that escalated out of control. On two occasions, A.L. experienced severe episodes of rage, and D.B. contacted BRC's triage line to request services to stabilize A.L. On both occasions, D.B. was informed that the only crisis service available was to find a magistrate, obtain a commitment order, then call the police who would take A.L. to the local emergency room for possible involuntary commitment. D.B. did not think this course of action was appropriate and believed that it was harmful to A.L.'s overall health.

Due to repeated denials of crisis intervention and stabilization services requested by D.B. for A.L., D.B. filed a grievance with the North Carolina Department of Health and Human Services, Division of Mental Health, Developmental Disabilities and Substance Abuse Services (DMH). In her grievance, D.B. requested in-home emergency after-hours crisis service and therapeutic foster bed service. BRC denied D.B.'s request on 9 October 2000 stating,

> Blue Ridge Center's after hours emergency service is provided via telephone and on-site at Mission-St. Joseph's Emergency Room. Blue Ridge Center presently has no crisis therapeutic foster bed providers. We continually seek such providers including providers in our own therapeutic foster care program.

After receiving this denial, D.B. filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH) on 6 December 2000. A hearing was held before Administrative Law Judge (ALJ) James L. Connor, II, where evidence was heard as to the denial of requested relief, medical diagnosis of A.L., prescribed treatment and framework for the provision of Medicaid services to children. The ALJ issued a recommended decision on 19 May 2003.

At the hearing before the ALJ, D.B. offered statements from a Dr. Masters, one of A.L.'s treating physicians, to show that in her opinion A.L. needed 24 hours a day and 7 days a week crisis and community based wrap-around services. Another treating physician, Dr. Patrick Lilliard, also testified as to the need for crisis intervention and stabilization services. When asked directly whether, in his clinical opinion, the provision of effective crisis intervention and stabilization services

were medically necessary for A.L., Dr. Lilliard answered that the absence of such services put A.L. at risk and that they were essential to her psychiatric care. He declined to state that the requested services were medically necessary. Dr. Munger, a non-treating physician, testified that "crisis stabilization" was a medical necessity for A.L. but that he did not believe that it was medically necessary that the initial intervention occur in A.L.'s home. The ALJ concluded that the requested crisis intervention and stabilization services had been proven by a preponderance of the evidence to be medically necessary. In the ALJ's recommended decision, he recommended that the denial for the requested services be reversed and that BRC and DMH

> provide to A.L. 24 hour per day, 7 day per week crisis intervention and stabilization services in a form consistent with the direction of her treating physicians. This need not include having a therapeutic foster bed always empty and available for A.L., but should include a sufficient number of such beds, given the population who need them, so as to make such beds usually available when needed. To the extent A.L. is living at home with D.[B.], these services should also include the 24/7 availability of a properly trained person to come to A.L.'s home during severe crises for therapeutically appropriate interventions.

DMH and BRC filed exceptions and objections to the ALJ's recommended decision on 15 August 2003. In its final agency decision, the agency declined to adopt the entire recommended decision of the ALJ. The final agency decision stated,

> [i]t is recommended that a comprehensive person centered plan be developed that includes a 24/7 crisis plan among other identified treatment and supports. This plan should identify the desired outcomes for A.L.['s] health, safety and well being in order to meet the mental needs identified by a comprehensive assessment. These services should be covered by EPDST.

However, the agency's final decision failed to state its reasons for refusing to accept the recommended decision of the ALJ.

D.B. then filed a petition for judicial review on 14 November 2003 in Buncombe County Superior Court. The superior court vacated the final agency decision, concluded as a matter of law that the requested Medicaid relief was not medically necessary, and reinstated the original denial of relief by BRC. From the superior court's order, D.B. now appeals.

Analysis

On appeal D.B. contends, *inter alia*, that the superior court exceeded its authority under the pre-2001 version of the Administrative Procedure Act, which is applicable in the instant case. We agree.

We note that, although the Administrative Procedure Act (APA) has been amended to make new procedures and standards applicable, the amendments only apply to cases commenced on or after January 2001. N.C. Gen. Stat. § 150B-151 (2003). Because the present case was commenced with a December 2000 filing in the OAH, the procedures and standards afforded in the pre-2001 statute apply.

When under the applicable version of the APA a petition for review of an agency decision is filed in superior court, the superior court acts as an appellate court; both this court and the superior court must utilize the same standard of review. *See Teague v. Western Carolina University*, 108 N.C. App. 689, 691, 424 S.E.2d 684, 686, *disc. review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993). "If it is alleged that an agency's decision was based on an error of law then a *de novo* review is required. A review of whether the agency decision is supported by the evidence, or is arbitrary or capricious, requires the court to employ the whole record test." *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). The whole record test generally requires examination of the entire record, including the evidence which detracts from the agency's decision. *Id.* at 503, 402 S.E.2d at 354. " 'The "whole record" test does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views; however, it does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached.' " *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987) (citations omitted), *disc. review denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). "Ultimately, the reviewing court must determine whether the administrative decision had a rational basis in the evidence." *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988).

In the instant case, the requisite substantive and procedural review to be conducted by the judiciary is established by the following statutory provision:

> (a) In reviewing a final decision in a contested case . . . **[f]irst**, the court shall determine whether the agency heard new evidence after receiving the recommended decision. If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record. **Second**, if the agency did not adopt the recommended decision, the court shall determine whether the agency's decision states the specific reasons why the agency did not adopt the recommended decision. If the court determines the agency did not state specific reasons why it did not adopt a recommended decision, the court shall reverse the decision or remand the case to the agency to enter specific reasons.

N.C. Gen. Stat. § 150B-51(a) (1999) (emphasis added). The plain language of this statute requires the trial court to make these two threshold determinations **before** determining whether there is substantial evidence to support an agency decision: "After making the determinations, if any, required by subsection (a), the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings." *Id.*[1] The superior court's failure to apply the appropriate standard of review does not necessarily require remanding the case to the superior court if this Court is able to "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)." *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 instant case, the superior court did not make the procedural inquiry required by N.C. Gen. Stat. § 150B-51(a) before undertaking a substantive review of the agency's decision. Further, upon making its substantive review of the final agency decision, the superior court improperly entered an order containing new findings of fact. *See N.C. Dep't of Env't & Natural Res.*, 358 N.C. at 662, 599

1. The statute also gives the appellate court the authority to "reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are: (1) In violation of constitutional provisions; (2) In excess of statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or (6) Arbitrary or capricious." N.C. Gen. Stat. § 150B-51(b) (1999). However, this part of the statute is not determinative in this case because this determination can only be made after meeting the requirements of N.C. Gen. Stat. § 150B-51(a) which was not done in this case.

S.E.2d at 896 ("In a contested case under the APA . . . 'there is but one fact-finding hearing of record when witness demeanor may be directly observed.' Thus, the ALJ who conducts a contested case hearing possesses those 'institutional advantages,' that make it appropriate for a reviewing court to defer to his or her findings of fact.") (citations omitted). Moreover, the superior court's order fails to indicate that it employed the "whole record" test in reviewing the final agency decision. The trial court's actions may be unproblematic under the amended APA; however, the superior court was bound by the pre-2001 APA in the present case. N.C. Gen. Stat. § 150B-51 (2003) (In the event that the agency does not adopt the recommended decision of the ALJ, the court must review the official record *de novo* and shall make findings of fact and conclusions of law, giving no deference to prior decisions made in the case and unbound by the findings of fact and conclusions of law made in the final agency decision.).

In the instant case, there were conflicting views between the physicians who testified whether A.L.'s requested crisis intervention and stabilization services were medically necessary. Some of the testifying physicians opined that the requested services were medically necessary, while others thought of these services as merely medically desirable. On these facts, the ALJ found by a preponderance of the evidence that the Medicaid services requested for A.L. were medically necessary and therefore made a recommended decision that A.L. be provided with crisis intervention and stabilization services in accordance with the recommendations of her treating physicians. In making its final decision, the agency decided not to adopt the recommended decision of the ALJ, but it failed to state the specific reasons for this course of action.

We note that, given the breadth of medical opinions offered which constitutes substantial evidence, the final agency decision would be affirmed under the whole record test if the agency had stated appropriate reasons for rejecting the ALJ's decision. *See In re Community Association*, 300 N.C. 267, 282-83, 266 S.E.2d 645, 656 (1980) (holding that, where the case is one of conflicting views, the court is not permitted to replace the agency's view with views of its own where the reasons for adopting this view, in light of the whole record, appear to be implicit in the order). However, N.C. Gen. Stat. § 150B-51 (1999) dictates the precise procedural steps that must be followed by appellate courts. The superior court, acting as an appellate court, did not follow these standards.

N.C. Gen. Stat. § 150B-51 requires, *inter alia*, that a threshold determination be made by the superior court to determine whether an agency rejected an ALJ decision without stating the specific reasons for doing so; if the agency had not provided specific reasons, the court is not permitted to conduct substantive review and instead must reverse or remand on the procedural issue. In the absence of such stated reasons, the courts cannot "reasonably determine from the record whether the petitioner's asserted grounds for challenging the [substance of the] agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b)." *N.C. Dep't of Env't & Natural Res.*, 358 N.C. at 665, 599 S.E.2d at 898.

Accordingly, given that the agency failed to provide a rationale for rejecting the ALJ's recommendation in the case *sub judice*, the superior court could not make a reasonable determination as to whether the agency's conclusions were supported by substantial evidence. The failure of the superior court to remand on this ground constituted reversible error.

Accordingly, we remand to the superior court with instructions to remand to the agency for specific findings why the agency did not adopt the recommended decision of the ALJ. In light of our disposition it is unnecessary to address the remaining issues briefed on appeal.

Vacated and remanded.

Judges TYSON and BRYANT concur.

TIMOTHY EARL WALLEN, PLAINTIFF v. RIVERSIDE SPORTS CENTER, A GENERAL PARTNERSHIP, JOHN M. ROSE, JR. AND SOL C. ROSE, DEFENDANTS

No. COA03-1679

(Filed 20 September 2005)

Premises Liability— natural hazard on real property—liability of owner—constructive notice—foreseeability—issues of fact

Defendants had a duty on these facts to exercise reasonable care regarding natural conditions on their lands lying adjacent to a public highway (a navigable river), provided that they had

notice of a dangerous condition. The trial court erred by granting summary judgment for defendants on a negligence claim for injuries suffered when a decayed tree fell on plaintiff while his boat was tied to a pylon at defendants' boat ramp. The urban-rural distinction in older cases is no longer clear.

Appeal by plaintiff from judgment entered 9 October 2003 by Judge Steve A. Balog in Cumberland County Superior Court. Heard in the Court of Appeals 2 September 2004.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Jerome P. Trehy, Jr., for plaintiff-appellant.

Horton and Gsteiger, P.L.L.C., by Urs R. Gsteiger, for defendant-appellants.

STEELMAN, Judge.

Plaintiff, Timothy Earl Wallen, appeals the superior court's order granting defendants' motion for summary judgment and dismissing plaintiff's action with prejudice. For the reasons discussed herein, we reverse.

Since 1977, brothers John and Sol Rose have operated Riverside Sports Center. Defendants lease twenty-five acres of largely undeveloped land fronting the Cape Fear River off of Person Street in Fayetteville, North Carolina. On a portion of the leased property, defendants operate a small bait and tackle shop and a Quonset hut for boat repairs. Incident to this business, defendant's obtained a permit from the Army Corps of Engineers to construct a boat ramp, providing access to the Cape Fear River. As part of the construction of the boat ramp, defendants also installed wooden "pylons" in the river. These pylons, also called "fender piles," were placed both upstream and downstream from the boat ramp to prevent logs floating downstream from harming the boat dock or ramp. Defendants' customers frequently tied their boats to the pylons while waiting to use the ramp to remove their boats from the river.

On 31 August 2001, plaintiff met Rick George and his son at Riverside to go fishing. At approximately 4:00 p.m., George paid the access fee and launched his pontoon boat into the river using Riverside's ramp. After the party had fished for a while, the wind picked up and dark clouds rolled in. They decided to get off of the river until the storm passed. By the time plaintiff and George got back to the Riverside boating facility, it was raining and there were four

boats ahead of them waiting to use the ramp to get off the river. George tied his boat to one of the downstream pylons. Plaintiff and George began putting a tarp over the boat to keep it dry. George said he heard a loud noise, like an artillery round, and felt something hit the boat. When he turned, he saw plaintiff lying on his back, unconscious. George was able to revive plaintiff using CPR. While waiting for an ambulance to arrive, he noticed a large log broken in half, lying on the bow of his boat. A Boxelder tree had fallen and struck plaintiff, leaving him with a horseshoe-shaped gash on the back of his head, extending from ear to ear. As a result of his injuries, plaintiff was rendered a paraplegic.

Plaintiff brought suit against defendants, alleging he was injured by defendants' negligence. Plaintiff asserted that defendants failed to exercise reasonable care to keep their premises in reasonably safe condition, and more specifically, that defendants failed to properly inspect their property and remove any dead trees around the pylons, and as a result of their negligence, plaintiff was injured. On 28 August 2003, defendants filed a motion for summary judgment, contending plaintiff: (a) failed to show defendants owed any duty to plaintiff; (b) failed to show defendants were negligent; and (c) failed to show that his injury was reasonably foreseeable to defendants. On 9 October 2003, the trial court granted defendants's motion for summary judgment. Plaintiff appeals.

Summary Judgment

In plaintiff's only assignment of error, he contends the trial court erred in granting defendants' motion for summary judgment because there existed genuine issues of material fact. We agree.

We review the trial court's grant of summary judgment *de novo*. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713, *disc. review denied*, 358 N.C. 545, 599 S.E.2d 409 (2004). Summary judgment is proper when the pleadings, together with depositions, interrogatories, admissions on file, and supporting affidavits show that no genuine issue of material fact exists between the parties with respect to the controversy being litigated and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2004). In considering such a motion, the court must view the evidence in the light most favorable to the nonmovant. *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). The party moving for summary judgment bears the burden of establishing the lack of any triable issue of fact.

Id. at 681, 565 S.E.2d at 146. This burden may be met " 'by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim . . . .' " *Id.* (citations omitted).

Summary judgment is seldom appropriate in a negligence action. *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79 (2002). A trial court should only grant such a motion where the plaintiff's forecast of evidence fails to support an essential element of the claim. *Id.* In order to establish a *prima facie* case of negligence against the defendant, a plaintiff must show: "(1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered damages as a result of the injury." *Vares v. Vares*, 154 N.C. App. 83, 87, 571 S.E.2d 612, 615 (2002), *disc. review denied*, 357 N.C. 67, 579 S.E.2d 576 (2003).

Duty

Historically, the law pertaining to a landowner's responsibility for natural conditions occurring on his or her real property has been:

> § 363 Natural Conditions
>
> (1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.
>
> (2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

Restatement (Second) of Torts § 363 (1965). Many of the older cases dealing with this issue rigidly applied an urban-rural distinction to hold that a rural landowner had no duty under circumstances where a duty would exist for an urban landowner. This state and country have changed greatly since these principles were first enunciated. At that time, there existed stark differences between urban and rural settings. Today, these distinctions are not so clear. There are many areas that share both traditional urban and rural characteristics.

Defendants' property is an example of this. It has many urban characteristics: it is zoned industrial; it is located within the corporate limits of Fayetteville; it is located upon a major thoroughfare; and it adjoins a railroad track. It also has many rural characteristics: it adjoins the Cape Fear River; it is heavily wooded at the river; and its primary use is recreational.

Increasingly, the courts of various states have moved away from the rigid urban-rural analysis towards imposing a duty of reasonable care upon a landowner based on the attendant circumstances. *See e.g.*, *Meyers v. Delaney*, 529 N.W.2d 288, 290 (Iowa 1995); *Ivancic v. Olmstead*, 488 N.E.2d 72, 73 (N.Y. 1985); *Sprecher v. Adamson Cos.*, 636 P.2d 1121, 1128-29 (Cal. 1981); *Miles v. Christensen*, 724 N.E.2d 643, 646 (Ind. App. 2000); *Willis v. Maloof*, 361 S.E.2d 512, 513 (Ga. App. 1987); *Burke v. Briggs*, 571 A.2d 296, 299-300 (N.J. Super. App. Div. 1990); *Dudley v. Meadowbrook, Inc.*, 166 A.2d 743, 744 (D.C. 1961).

In *Gibson v. Hunsberger*, this Court adopted this approach in a case involving a tree falling on a highway, in what was clearly a rural setting. 109 N.C. App. 671, 428 S.E.2d 489, *disc. review denied*, 334 N.C. 433, 433 S.E.2d 177 (1993). After reciting section 363 of the Restatement of Torts, this Court stated:

> We adopt the foregoing analysis and hold that a landowner has a duty to exercise reasonable care regarding natural conditions on his land which lies adjacent to a public highway in order to prevent harm to travelers using the highway. A landowner is subject to liability only if he had actual or constructive notice of a dangerous natural condition.
>
> To impose a liability upon defendant landowners, plaintiffs had to prove not only that the tree constituted a dangerous condition to the travelers of the adjacent public road, but that the landowners had actual or constructive notice of the dangerous condition.

Id. at 675, 428 S.E.2d at 492. This statement of the law is consistent with our Supreme Court's holding in *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). In *Nelson*, the Supreme Court abolished the trichotomy of trespasser-licensee-invitee for purposes of premises liability law and instead imposed the "duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors" upon owners and occupiers of the land. *Id.* at 632, 507 S.E.2d at 892.

We hold that defendants in the instant case had a duty to exercise reasonable care with respect to natural conditions on their land, which was adjacent to a public highway. Provided, however, defendants are subject to liability *only* if they had actual or constructive notice of a dangerous natural condition existing upon their land.

Cape Fear River Is a "Public Highway"

At the time plaintiff was injured he was on a "public highway," since "[n]avigable waters constitute a public highway." *Cromartie v. Stone*, 194 N.C. 663, 668, 140 S.E. 612, 615 (1927) (holding the Cape Fear River was a public highway). *State v. Glen*, 52 N.C. 321, 325 (1859) (holding all rivers with sufficient depth for floatage are "public highways by water").

Constructive Notice

This case is devoid of any evidence that defendants had any actual notice of the decayed condition of the Boxelder tree. Thus, our analysis turns on whether plaintiff presented sufficient evidence that defendants had constructive notice of the tree's condition to withstand defendants' motion for summary judgment. Each party offered affidavits from expert arborists expressing opinions about the condition of the Boxelder tree.

In their brief, defendants argue it was within the trial court's discretion to ignore the proffered affidavit from plaintiff's expert since it was incompetent on the issue of causation. This is incorrect. The trial court's order clearly states that it denied the parties' cross-motions to strike the affidavits of the other's expert and that it considered both experts' affidavits. We further note that the affidavit of plaintiff's expert, Kenneth Knox, is directly contradicted by the affidavit of defendants' expert, David Lusk. It is not the trial court's role to resolve conflicts in the evidence presented on a motion for summary judgment. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002). Rather, the trial court's duty is "strictly confined to determining whether genuine issues of material fact exist[.]" *Id.* In doing so, it must consider the evidence in the light most favorable to plaintiff, as the non-moving party. *Id.*

The evidence presented, taken in this light, tends to show the following: Riverside Sports Center has been in business since 1977. The premises includes a wooden dock located on the Cape Fear River, with a concrete boat ramp extending on both sides of the dock. Defendants placed pylons out into the river, both upstream and

downstream from the dock, to protect the dock and ramps from trees and other debris floating in the river. Defendants knew that their customers routinely tied their boats to the downstream pylons to prevent their boats from drifting downstream while they waited for the ramp to clear so they could remove their boats from the river. There were trees along the bank of the river, the limbs of which hung over the river in the area of the downstream pylons. Defendants admitted they had previously trimmed the trees on both sides of the ramp. The affidavit and report of plaintiff's expert, Kenneth Knox, who specializes in hazard tree analysis, stated that "the only tree in the area of the incident that could possibly have caused the damage to [George's] boat was an 18.5" diameter (dbh) Boxelder/Ashleaf Maple." Mr. Knox inspected the trees along the river bank at the downstream pylon on 16 September 2003. He stated the trunk of this tree snapped off approximately thirteen feet above the ground, approximately two years earlier, based on the ages of the epicormic branches that grew from the vicinity of the break. Further, a portion of the upper tree trunk had broken off six to ten years earlier, causing the tree bark to be stripped, and created a V-shaped wound on the tree, which accelerated the interior decay of the tree. The trunk of the Boxelder tree was leaning at a "very pronounced angle, from the top of the bank" out over the river in the direction of the fourth pylon, where the George boat was tied. Knox opined that the tree was approximately 40'-60' feet in length and was definitely capable of striking George's boat. Knox further stated:

> [I] further believe that it was obvious that this Boxelder had been extensively decayed for many years prior to its breaking (on August 31, 2001), that it exhibited a number of conspicuous dead branches and external trunk decay, and that these obvious symptoms of decline and hazard-potential (dead branches and trunk decay), should have been observed with considerable concern by the owners of the property (particularly because of the strong lean of the tree towards the water), and that this tree should have been cut before it fell and harmed Mr. Wallen.

We hold that the evidence presented to the trial court, taken in the light most favorable to plaintiff, presented a genuine issue of material fact on the issue of constructive notice.

Negligence

Defendants had a duty to exercise reasonable care regarding natural conditions on their lands lying adjacent to a public highway.

Gibson, 109 N.C. App. at 675, 428 S.E.2d at 492. In this case, the parties' use of the pylons to temporarily secure the boat was directly related to their use of defendants' boat ramp, for which they paid a fee. Defendants knew their pylons were regularly used by their customers to tie their boats while waiting to use the boat ramp. The Boxelder tree, which fell on the boat, had broken off once before the 31 August 2001 incident and exhibited signs of decay. This tree also hung out over the river and the pylon to which George had tied his boat.

As noted above, summary judgment is seldom appropriate in a negligence action. Further, taken in the light most favorable to plaintiff, the evidence presented to the trial court presented a genuine issue of material fact on the issue of defendants' negligence.

We caution that this holding is based upon the particular facts present in this case, and is not intended to place an absolute duty upon persons owning property located along a river or other public highway to inspect or trim trees adjoining that public highway.

Foreseeability

The final basis of defendants' motion for summary judgment was foreseeability. In order for a defendant to be liable for a negligence claim, the injury must be reasonably foreseeable. *Winters v. Lee*, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124 (1994). Thus, a plaintiff must show that " 'a man of ordinary prudence would have known that [plaintiff's injury] or some similar injurious result was *reasonably foreseeable* . . . .' " *Id.* (citations omitted). Given the facts as recited above in our discussion of duty, constructive notice, and negligence, we hold that the evidence taken in the light most favorable to plaintiff demonstrates there existed a genuine issue of material fact on the issue of foreseeability.

REVERSED AND REMANDED.

Judges CALABRIA and ELMORE concur.

GOLDSTON v. STATE

[173 N.C. App. 416 (2005)]

W.D. GOLDSTON, JR., JAMES E. HARRINGTON, AND CITIZENS, TAXPAYERS AND BONDHOLDERS SIMILARLY SITUATED, PLAINTIFFS v. STATE OF NORTH CAROLINA AND MICHAEL F. EASLEY, GOVERNOR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA04-593

(Filed 20 September 2005)

Jurisdiction— subject matter—standing—taxpayers

The trial court properly dismissed plaintiffs' complaint challenging a $125 million loan from the Highway Trust Fund (HTF) for general expenditures authorized by the General Assembly for the 2002-03 fiscal year and the $80 million transfer authorized by the Governor in its summary judgment order based on lack of standing to bring suit, because: (1) the cases that plaintiffs rely upon to show they have standing do not authorize citizens to sue for a court declaration that past government action, and unthreatened recurrences, are unlawful; (2) plaintiffs' complaint did not claim that they suffered injury from the collection of the taxes which benefit the HTF, but instead the complaint challenged only certain withdrawals of taxpayer money from the HTF which affected the present plaintiffs in the same way that it affected all citizens and taxpayers of this state; (3) although plaintiffs filed an affidavit alleging that a demand for action by the appropriate authorities had been refused, the trial court excluded this affidavit from consideration and plaintiffs have not appealed from this decision; (4) plaintiffs' action as citizens was for an advisory declaration, which they had no standing to seek; and (5) although plaintiffs' complaint was purportedly filed on behalf of affected holders of Highway Bonds, plaintiffs do not own any of these bonds.

Appeal by plaintiffs from judgment entered 29 January 2004 by Judge Joseph R. John, Sr., in Wake County Superior Court. Heard in the Court of Appeals 13 June 2005.

Boyce & Isley, PLLC, by G. Eugene Boyce, R. Daniel Boyce, and Philip R. Isley; and Brannon Strickland, PLLC, by Anthony M. Brannon, for plaintiff appellants.

Attorney General Roy Cooper, by Chief Deputy Attorney General Grayson G. Kelley, Special Deputy Attorney General Norma S. Harrell, and Special Deputy Attorney General John F. Maddrey, for defendant appellees.

McCULLOUGH, Judge.

Plaintiffs, W.D. Goldston, Jr., and James E. Harrington, appeal from summary judgment entered in favor of defendants, the State of North Carolina and Governor Michael F. Easley. We conclude that the trial court properly dismissed plaintiffs' complaint in its summary judgment order because they lacked standing to bring suit.

Facts

The North Carolina Highway Trust Fund (hereinafter "HTF") was established by the General Assembly pursuant to Chapter 692 of the 1989 Session Laws (hereinafter "the Act"). The Act created a special account with the State Treasury comprised of funds from the following sources: a portion of the revenue from a motor fuel excise tax; a portion of revenue from an alternative fuel excise tax; a portion of revenue from an excise tax on carriers using fuel purchased outside of the State; a portion of the revenue from a motor vehicle use tax; the revenues from motor vehicle title and registration fees; and interest and income earned by the funds in the account. 1989 N.C. Sess. Laws ch. 692, § 1.1. As originally enacted, the Act provided that the HTF could only be used to fund the following items: expenses to administer the HTF; specific projects of the Interstate Highway System; specific urban loop highways designated by number and location; supplemental appropriations to cities for city streets; and supplemental appropriations for specific secondary road construction identified by a minimum traffic flow. *Id.* The General Assembly also enacted legislation directing the State Treasurer to make an annual transfer of $170 million from the HTF to the General Fund, which is used to pay the general obligations of this state. *Id.* § 4.1. Thereafter, the General Assembly provided for additional transfers to be made from the HTF to the General Fund in specific fiscal years. 2001 N.C. Sess. Laws ch. 424, § 34.24(c).

In a 1996 referendum, the voters of this state authorized the issuance of up to $950 million in bonds to expedite HTF projects. Pursuant to this authority, in November 1997 the State Treasurer issued and sold $250 million in bonds (hereinafter "Highway Bonds"), which are secured by the full faith and credit of this state. The debt service that must be paid on these bonds is approximately $25 million annually, which is paid from amounts deposited in the HTF. Though no additional bonds have been issued, the State Treasurer is authorized, upon approval of the Council of State, to issue and sell an additional $700 million in Highway Bonds.

For reasons related to a budget shortfall, the General Assembly borrowed $125 million from the HTF for the 2002-03 fiscal year. *See* 2002 N.C. Sess. Laws ch. 126 §§ 2.2(g), 26.14. The borrowed money was placed in the General Fund. In addition, Governor Michael F. Easley issued executive orders which authorized the Office of State Management and Budget to transfer Funds from the HTF to the General Fund, as necessary, to further ease the effects of the budget shortfall. Pursuant to one of these executive orders, $80 million was transferred from the HTF to the General Fund on 8 February 2002.

On 14 November 2002, plaintiffs W.D. Goldston, Jr., and James E. Harrington filed an action on behalf of themselves and "citizens, taxpayers and bondholders similarly situated" challenging the $125 million loan from the HTF authorized by the General Assembly for the 2002-03 fiscal year and the $80 million transfer authorized by the Governor. The complaint alleged that these withdrawals from the HTF violated the North Carolina Constitution in that (1) funds were applied to an unauthorized purpose in violation of N.C. Const. art. V, § 5; (2) the Governor exceeded the authority given by N.C. Const. art. III, §§ 4 and 5 and violated art. VI, § 7; and (3) bondholder contracts were impaired in violation of N.C. Const. art. I, § 19. Plaintiffs sought declaratory relief and a judgment requiring the return of any wrongfully withdrawn funds.

The parties entered into an extensive stipulation as to the facts of the case, and both parties moved for summary judgment. While awaiting a hearing on the summary judgment motions, plaintiffs filed an untimely motion to consider additional evidence in the form of plaintiff Goldston's affidavit. In this affidavit, Goldston stated that he had contacted the State Attorney General and an employee in the Governor's Office and requested that each of them investigate the legality of removing money from the HTF for general expenditures, but that he never received a response. The trial court denied the motion to consider Goldston's affidavit.

Prior to the adjudication of the summary judgment motions, plaintiffs withdrew their request for a judgment directing the return of funds to the HTF. Thus, the only relief sought by plaintiffs was a declaration that the Governor and the General Assembly had acted unlawfully.

In an order entered 29 January 2004, the trial court granted summary judgment in defendants' favor and dismissed plaintiffs' claims. From this order, plaintiffs now appeal.

Analysis

The dispositive issue on appeal is whether plaintiffs had standing to pursue their lawsuit against defendants in superior court. We hold that they did not.

"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. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16, *disc. review denied*, 359 N.C. 632, 613 S.E.2d 688 (2005). Standing consists of three main elements:

> "[1] 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical[;] . . . [2] the injury [must be] fairly traceable to the challenged action of the defendant[;] and . . . [3] it [must be] 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) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992) (citations omitted)), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628-29 (2003). This Court may review the standing of litigants in a particular case on its own motion and for the first time on appeal; our review on this issue is *de novo*. *Henke v. First Colony Builders, Inc.*, 126 N.C. App. 703, 704, 486 S.E.2d 431, 432, *appeal dismissed*, *disc. review denied*, *cert. denied*, 347 N.C. 266, 493 S.E.2d 455 (1997).

"Generally, an individual taxpayer has no standing to bring a suit in the public interest." *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). However, the taxpayer may have standing if he can demonstrate that

> [a] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose[;] that the carrying out of a challenged provision "will cause him to sustain personally, a direct and irreparable injury[;]" or that he is a member of the class prejudiced by the operation of [a] statute.

Texfi Industries v. City of Fayetteville, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979) (citations omitted), *disc. review allowed in part and denied in part*, 299 N.C. 741, 267 S.E.2d 671, *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980).

A taxpayer who otherwise lacks standing may nevertheless bring an action on behalf of a public agency or political subdivision, if " 'the proper authorities neglect or refuse to act.' " *Guilford County Bd. of Comrs. v. Trogdon*, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996) (quoting *Branch v. Board of Education*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951)), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 52-53 (1997). "To bring this type of action, taxpayers must show they are a taxpayer of the public agency or political subdivision and must further establish that either: 1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the agency or subdivision; or 2) a demand on the proper authorities would be useless." *Id.* (citing *Branch*, 233 N.C. at 626, 65 S.E.2d at 126-27).

The present plaintiffs claim to have standing under the foregoing principles and also by virtue of a doctrine they refer to as "constitutional standing." By "constitutional standing" plaintiffs refer to the axiom that, "[i]f the governing authorities [are] preparing to put public property to an unauthorized use, citizens and taxpayers ha[ve] the right to seek equitable relief." *Wishart v. Lumberton*, 254 N.C. 94, 96, 118 S.E.2d 35, 36 (1961). However, the cases that have applied this axiom have involved action the government was preparing to take, which threatened the rights of the suing taxpayers, and which could still be restrained. *See Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975) (holding that citizens could bring an action to prevent the building commission from constructing an unauthorized building with tax funds appropriated solely for the purpose of building an art museum), *superseded on other grounds by statute as recognized in Corum v. University of North Carolina*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992); *Shaw v. Asheville*, 269 N.C. 90, 96, 152 S.E.2d 139, 144 (1967) (holding that citizens and taxpayers of a municipality had standing to bring a suit challenging the validity of an agreement between a municipality and a private company which authorized the company to, *inter alia*, lay cables under municipal streets and set cable poles because the taxpayers could incur significant expense if the agreement was later adjudged void); *Wishart*, 254 N.C. at 96, 118 S.E.2d at 36 (holding that a municipality's citizens and taxpayers had standing to seek an injunction prohibiting the municipality from unlawfully converting a public park into a parking lot). Thus, these cases do not authorize citizens to sue for a court declaration that past government action, and unthreatened recurrences, are unlawful. *Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 52 (noting that standing requires an actual or immi-

nent injury that is likely to be redressed by a favorable decision). To the contrary, "[i]t is no part of the function of the courts to issue [such] advisory opinions." *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 408, 584 S.E.2d 731, 740, *reh'g denied*, 357 N.C. 582, 588 S.E.2d 891-92 (2003).

The present plaintiffs are North Carolina taxpayers. However, their complaint did not claim that they suffered injury from the collection of the taxes which benefit the HTF. Rather, the complaint challenged only certain withdrawals of taxpayer money from the HTF, which affected the present plaintiffs in the same way that it affected all citizens and taxpayers of this state. Thus, plaintiffs lacked standing to bring their action directly as injured taxpayers. *See Texfi Industries*, 44 N.C. App. at 270, 261 S.E.2d at 23.

Moreover, although plaintiffs filed an affidavit alleging that a demand for action by the appropriate authorities had been refused, the trial court excluded this affidavit from consideration. Because plaintiffs have not appealed from this decision of the trial court, the exclusion of the affidavit is binding, and we must rule as if no evidence of demand and refusal existed. *See Kelly v. Kelly*, 167 N.C. App. 437, 443, 606 S.E.2d 364, 369 (2004) (noting that an order which is not appealed from is " 'the law of the case' ") (citation omitted). Further, we are unpersuaded that the record indicates that such a demand would have been futile. Thus, plaintiffs failed to demonstrate that they had derivative standing as taxpayers to sue on behalf of a public agency or subdivision. *See Guilford County Bd. of Comrs.*, 124 N.C. App. at 747, 478 S.E.2d at 647.

The present plaintiffs are also North Carolina citizens, and they contend that, as citizens, they had "constitutional standing" to bring their action in superior court. However, during the course of the litigation before the trial court, plaintiffs abnegated their prayer for *mandamus*. Thus, plaintiffs were no longer seeking to have the allegedly wrongly withdrawn funds replenished, and their remaining requests for relief sought only a judicial declaration that the legislative and executive branches should not have made the challenged withdrawals from the HTF and should not make such withdrawals again. Notably, plaintiffs did not allege that a recurrence of the alleged misconduct was imminent. Therefore, plaintiffs' action as citizens was for an advisory declaration, which they had no standing to seek. *See Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 52 (requiring, as a basis for standing, that the relief sought by a plaintiff be likely to redress his claimed injury); *see also*

Wise, 357 N.C. at 408, 584 S.E.2d at 740 (noting that advisory court opinions are improper).

Furthermore, although plaintiffs' complaint was purportedly filed on behalf of affected holders of Highway Bonds, plaintiffs do not own any of these bonds. Therefore, even assuming *arguendo* that a bondholder would have standing to sue over the HTF withdrawals at issue in the instant case, the named plaintiffs could not demonstrate that they were members of this class, whose repayment was alleged to be jeopardized by the withdrawals. *See Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 52 (requiring, as a basis for standing, that a suing plaintiff suffer injury); *Texfi Industries*, 44 N.C. App. at 270, 261 S.E.2d at 23 (requiring, as a basis for standing, that a suing taxpayer be a member of the class that is prejudiced).

Thus, as of the hearing on the cross-motions for summary judgment, the facts and circumstances of the instant case revealed that the present plaintiffs lacked standing to pursue their action against defendants. Accordingly, to the extent that the trial court's order is a dismissal for lack of standing, it is affirmed. This holding makes it unnecessary for us to address the remaining issues briefed by the parties.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

JOYCE BROWN McGHEE, EMPLOYEE, PLAINTIFF v. BANK OF AMERICA CORPORATION, EMPLOYER, EBI/ROYAL AND SUNALLIANCE INSURANCE CO., CARRIER, DEFENDANTS

No. COA04-1428

(Filed 20 September 2005)

1. Workers' Compensation— timeliness of claim—last medical payment—foreign jurisdiction

A workers' compensation claim was timely filed because it was within two years of the last medical compensation paid by defendants, even though the payment was to medical providers in Virginia. Nothing in the statutory definition of medical compensation limits the location to North Carolina, nor is there an ex-

ception for the employer's presumption that the claim will be in a foreign jurisdiction. N.C.G.S. § 97-24.

2. Workers' Compensation— timeliness of claim—short-term disability payments—not "other compensation"

Short-term disability benefits paid in lieu of workers' compensation were not paid pursuant to the Workers' Compensation Act, and did not qualify as "other compensation" for timeliness purposes under N.C.G.S. § 97-24.

3. Workers' Compensation— appeal—failure to assign error—findings binding

Failure to assign error in a workers' compensation case to findings about plaintiff's medical history and incapacity for employment meant that those findings were binding on appeal. The Industrial Commission's conclusion that plaintiff is totally disabled was upheld.

4. Workers' Compensation— offered part-time employment—make-work

The evidence in a workers' compensation case supported the finding that a part-time position offered to plaintiff was make-work and did not constitute other employment as defined by N.C.G.S. § 97-2(9).

5. Workers' Compensation— medical care—effectiveness

The Industrial Commission did not err in a workers' compensation case by ordering defendants to pay for medical care which defendants contended was ineffective. There was substantial evidence of record that plaintiff's care was necessary to provide relief.

6. Workers' Compensation— attorney fees—no abuse of discretion

There was no abuse of discretion in the award of attorney fees in a workers' compensation action.

Appeal by defendants from opinion and award entered 16 June 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 May 2005.

Fred D. Smith, Jr., for plaintiff appellee.

Wilson & Ratledge, PLLC, by Maura K. Gavigan and Kristine L. Prati, for defendant appellants.

McCULLOUGH, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission ("the Commission") awarding plaintiff total disability compensation, medical expenses, and attorneys' fees. Defendants argue that plaintiff's claim was not timely filed, and that the Commission therefore lacked jurisdiction to hear the claim. Defendants further contend the Commission erred in concluding that plaintiff is totally disabled, and erred in awarding her medical expenses and attorneys' fees. We affirm the opinion and award of the Commission.

The facts of the instant case, as found by the Commission, are as follows: plaintiff was employed as an assistant vice-president in marketing and training by defendant Bank of America ("BOA"), where she had worked for nearly eighteen years. BOA's home office was located in Charlotte, North Carolina; however, plaintiff's place of employment was Richmond, Virginia, where she resided.

On 1 August 1998, plaintiff was returning to Richmond from a business trip to Florida. Plaintiff's manager had instructed her to drive her personal vehicle home and then fly back to Florida at defendants' expense. While driving from Florida to Richmond on 1 August, plaintiff sustained injuries to her head, neck, left shoulder, and ribs when her vehicle was "T-boned" with considerable force by another vehicle in Wilmington, North Carolina. Plaintiff received emergency care in Wilmington, where she was diagnosed with a head injury and multiple acute strain secondary to the motor vehicle accident. When she returned to Richmond, plaintiff continued to receive medical care over the next two years for a variety of conditions arising from the accident, including cerebral concussion with persistent post-concussive disorder, cervical whiplash, cognitive defects, attention problems, persistent chronic pain, a blind spot in her left eye, and neurosensory hearing loss in the left ear.

Between 1 August 1998 and 14 August 2000, plaintiff received either her full salary or short-term disability payments from defendants. While plaintiff received short-term disability she was not working. During the weeks plaintiff received her full salary, she worked between three to six hours per day performing menial, "make work" tasks. The Commission found, and defendants have excepted, that these tasks did not constitute "other employment" pursuant to section 97-2(9) of the General Statutes.

On 5 September 2000, plaintiff attempted full-time employment at National Catalog in Martinsville, Virginia. Due to her chronic headaches, however, plaintiff was unable to perform her job duties, and National Catalog terminated her employment on 7 November 2000. Plaintiff received unemployment compensation benefits from the Virginia Employment Security Commission between 27 November 2000 and 15 May 2001 as a result of her termination by National Catalog.

Following her move to Martinsville, Virginia, plaintiff continued to receive medical care for a variety of conditions arising from her 1 August 1998 injury, including chronic pain, major depression, post-traumatic stress disorder, and cognitive defects. Two of plaintiff's treating physicians testified that plaintiff remains incapable of employment.

Upon presentation of the evidence, the Commission found and concluded that plaintiff was totally disabled and entered an award granting her total disability compensation, medical expenses, and attorneys' fees. From the opinion and award of the Commission, defendants appeal.

Defendants argue the Industrial Commission erred by (1) concluding that plaintiff's claim was timely filed; (2) concluding that plaintiff is totally disabled; (3) finding that the part-time position offered to plaintiff did not constitute "other employment" as defined in section 97-2(9) of the General Statutes; (4) ordering defendants to pay for medical treatment for plaintiff; and (5) awarding plaintiff attorneys' fees. For the reasons stated herein, we affirm the opinion and award of the Commission.

[1] By their first assignment of error, defendants contend the Commission erred in finding and concluding that plaintiff's claim was timely filed. Defendants correctly note that, pursuant to section 97-24 of our General Statutes, the right to workers' compensation for an injury by accident claim is "forever barred" unless the claimant files a claim with the Industrial Commission either (1) within two years of the accident or (2) "within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established." N.C. Gen. Stat. § 97-24 (2003). Defendants argue that plaintiff neither filed her claim within two years of the accident, nor within two years after the last payment of medical compensation by defendants. We disagree.

Plaintiff's accident occurred on 1 August 1998. Plaintiff filed a Form 18 Notice of Accident with the North Carolina Industrial Commission on 9 August 2001. Thus, she did not file her claim within two years of the accident. However, the Commission found that defendants last paid medical compensation for plaintiff's compensable injuries in August of 2000. Plaintiff therefore filed her claim within the two-year period following the last payment of medical compensation by defendants. At that time, defendants had paid no other compensation pursuant to the Workers' Compensation Act, nor had their liability been otherwise established. Plaintiff's claim was thus timely filed. *See* N.C. Gen. Stat. § 97-24.

Defendants assign error to the Commission's finding that they last paid medical compensation for plaintiff's injuries in August of 2000. Defendants argue that the payment at issue, $72,554.38 paid to medical providers in Virginia, does not meet the statutory definition of "medical compensation" under section 97-2(19) of the North Carolina General Statutes, because when defendants made the payment, they presumed that plaintiff would be filing a workers' compensation claim in Virginia, rather than North Carolina. We find no merit to defendants' argument.

Section 97-2(19) of the North Carolina General Statutes defines medical compensation as

> medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

N.C. Gen. Stat. § 97-2(19) (2003). Nothing in the definition limits the geographical locale of the medical treatment to North Carolina, nor does the definition create exceptions based upon an employer's "impression" of a "presumed claim" in a foreign jurisdiction.

In their answers to plaintiff's second interrogatories, defendants responded to the following question: "Did [defendants] pay for either medical, surgical, hospital, nursing, rehabilitative services, or medicine for injuries sustained by [plaintiff] on August 1, 1998?" Defend-

ants responded "Yes." Defendants also affirmed that they had made such payments through August of 2000. Thus, by their own admission, defendants paid medical compensation to plaintiff in August of 2000. The Commission did not err in finding that defendants last paid medical compensation to plaintiff in August of 2000.

[2] Defendants argue that plaintiff received "other compensation" in the form of short-term disability benefits such that the provisions of section 97-24 are inapplicable. We disagree. "Compensation" under the Workers' Compensation Act means "the money allowance payable to an employee or to his dependents *as provided for in this Article*, and includes funeral benefits provided herein." N.C. Gen. Stat. § 97-2(11) (2003) (emphasis added). Defendants concede that the short-term disability benefits paid to plaintiff were in lieu of workers' compensation benefits and not made payable to plaintiff pursuant to the Workers' Compensation Act. The short-term disability benefits therefore do not qualify as "other compensation" under section 97-24 of the General Statutes. We overrule defendants' assignment of error.

[3] Defendants next contend the Commission erred in concluding that plaintiff is totally disabled. Defendants argue plaintiff failed to produce evidence that she is incapable of work in any employment. Defendants' argument has no merit.

The Commission made numerous findings detailing plaintiff's medical history and her incapability for employment. Defendants failed to assign error to these findings and they are therefore binding upon appeal. For example, the Commission found that, due to her 1 August 1998 head trauma, plaintiff

> suffers impairments for attention, recall, perception, construction in the visual channel, mild impairments for short-term memory, below average visual delayed memory, striking impairments on visual spatial construction, and markedly deteriorated intellectual functioning from pre-morbid functioning due to her reductions in both verbal and non-verbal functioning.

Two of plaintiff's treating physicians testified that she was "incapable of sustaining competitive employment" and was "totally disabled."

The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998). "Thus, on appeal, this Court 'does not have the right to weigh the evidence and decide

the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Id.* (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). In the present case, the Commission based its finding that plaintiff was totally disabled on substantial competent evidence of record. We overrule this assignment of error.

[4] By further assignment of error, defendants contend the Commission erred in finding that the part-time position offered to plaintiff did not constitute "other employment" as defined by section 97-2(9) of the General Statutes. Defendants argue plaintiff offered insufficient evidence that her part-time employment was not generally available on the market. Defendants also contend the Commission "applied a standard that was not considered since plaintiff was working in Virginia and presumably pursuing a claim in Virginia."

Defendants' presumptions aside, plaintiff offered substantial evidence that the position offered to her upon her return was "make work" rather than "other employment." Plaintiff testified when she returned to BOA on a part-time basis, her work consisted of

> help[ing] . . . make copies, sort the copies. I would go to, maybe, the copying company and pick up copies for them and have them made. I'd either, maybe, do their supplies, make sure they had their supplies, and most of the time I did—played games on the computer from the time—from the time that I got there. Usually, maybe they would let me work, maybe, just two hours sorting stuff or whatever, and the rest of the time I was just playing games on the computer.

This evidence supports the Commission's finding that plaintiff's part-time position was "make-work." We overrule this assignment of error.

[5] Defendants further argue the Commission erred in ordering defendants to pay for plaintiff's medical care after August of 2000. Defendants assert that the evidence tended to show that the medical care provided to plaintiff was ineffective in lessening her disability or providing relief. Defendants point to such notations by plaintiff's physicians that plaintiff "continues to have pain" and "still having increased anxiety and problems sleeping" as proof that the medical care was ineffective. Defendants argue the Commission thus erred in concluding that the medical care provided to plaintiff since August of

2000 was "reasonably necessary to effect a cure and provide relief to plaintiff." We disagree.

Apparently, defendants believe that if a particular medication or treatment does not produce the precise desired result, an employer should not be responsible for payment of any of an injured worker's medical care for chronic pain arising from a compensable injury. There was substantial evidence of record that plaintiff's medical care was necessary to provide her with relief. We overrule this assignment of error.

[6] Finally, defendants argue the Commission erred in awarding attorneys' fees to plaintiff. The decision of whether to award attorneys' fees, however, is within the sound discretion of the Industrial Commission. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 397, 298 S.E.2d 681, 683 (1983). Defendants fail to demonstrate on what basis the Commission abused its discretion in awarding attorneys' fees, and we likewise have discerned none.

The opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and STEELMAN concur.

WILLIAM M. WILDER, PETITIONER v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT

No. COA04-1520

(Filed 20 September 2005)

1. Unemployment Compensation— Trade Adjustment Assistance—suitable employment—eighty percent of former wages

The Employment Security Commission erred in a case involving federal benefits for laid off workers by disregarding the requirement that suitable employment must be for a minimum of eighty percent of former wages.

2. Unemployment Compensation— Trade Adjustment Assistance—second master's degree

The Employment Security Commission did not err by finding that a second master's degree was not suitable for the intent of a federal assistance program for laid off workers. In light of the goal of providing training opportunities for the largest number of adversely affected workers at the lowest reasonable cost, an individual who already possesses a marketable degree bears a heavy burden to establish that an additional professional degree is suitable.

Appeal by petitioner from judgment entered 27 August 2004 by Judge Evelyn W. Hill in Alamance County Superior Court. Heard in the Court of Appeals 11 May 2005.

Smith, James, Rowlett & Cohen, L.L.P., by Norman B. Smith, for petitioner-appellant.

Regina S. Adams for respondent-appellee.

HUNTER, Judge.

William M. Wilder ("petitioner") appeals from an order of the superior court affirming a denial entered 27 April 2004 by the Employment Security Commission of North Carolina ("ESC") of Trade Adjustment Assistance ("TAA") benefits. As the findings of fact support the conclusion that petitioner's requested training was not suitable, we affirm the superior court's order.

Petitioner was employed by Lucent Technology for approximately twenty years in the telecommunications industry. Petitioner had a degree in electrical engineering from the United States Naval Academy and a master's degree in computer science from California Polytechnical State University. Petitioner was laid off while employed by Lucent at their Research Triangle Park location, due to that facility's closure. Petitioner was re-employed by Lucent in Massachusetts for approximately one year, but was again laid off.

Petitioner returned to Greensboro and applied for TAA benefits as an adversely affected worker under the Trade Act of 1974. Petitioner sought retraining in the form of a second master's degree in mathematics from the University of North Carolina at Greensboro. The ESC Appeals Referee found that "suitable employment [was] available to the claimant" and that "a second masters degree was not

considered to be suitable for the intent of this program." Petitioner's request was denied.

Petitioner appealed the decision to the full ESC, which entered a final decision affirming the Referee's order. Petitioner then appealed to the superior court. The superior court, after review of the record, found that the order's findings of fact were based upon competent evidence and that the findings properly supported the conclusions of law. The superior court affirmed the decision in its entirety and petitioner appeals from that judgment.

I.

[1] Petitioner first contends the ESC erred in disregarding the federal statutory and regulatory requirement that suitable employment must be for a minimum of eighty percent (80%) of former wages. We agree.

We first address the appropriate standard for review of a decision by the ESC. "The standard of review for a decision by the Employment Security Commission is whether (1) the evidence before the Commission supports its findings of fact and (2) the facts found by the Commission sustain its conclusions of law." *Williams v. Davie County*, 120 N.C. App. 160, 164, 461 S.E.2d 25, 28 (1995).

19 U.S.C. § 2296 (2004) provides for training of workers in industries that have been adversely affected by import competition. *Id.* Regulations governing the program state that the administering State agency "shall" approve training for an adversely affected worker when six criteria are established. Approval of Training, 20 C.F.R. § 617.22 (2004). The first criterion is a finding that "there is no suitable employment (which may include technical and professional employment) available for an adversely affected worker[.]" 19 U.S.C. § 2296 (a)(1)(A). The corresponding regulation states that a determination of suitable employment means "work of a substantially equal or higher skill level than the worker's past adversely affected employment, and wages for such work at not less than 80 percent of the worker's average weekly wage" which is available "either in the commuting area . . . or outside the commuting area in an area in which the worker desires to relocate with the assistance of a relocation allowance[.]" 20 C.F.R. § 617.22 (a)(1)(i).

Here, the ESC found that petitioner was referred to two potential jobs in electrical engineering paying between $45,000.00 and $50,000.00 per year, and one computer programming job paying in excess of $50,000.00 per year. The ESC also found that petitioner had

earned between $80,000.00 and $100,000.00 in his final year of employment at Lucent. The ESC concluded that suitable employment was available to petitioner. However, the findings regarding available jobs made by the ESC do not provide salaries equaling eighty percent (80%) of petitioner's average weekly wage at his prior job, as the ESC concedes in its argument to this Court. As 20 C.F.R. § 617.22(a)(1)(i) specifically defines suitable employment as "work of substantially equal or higher skill level . . . [paying] wages . . . not less than 80 percent of the worker's average weekly wage[,]" the ESC's findings do not supports its conclusion of law that suitable employment was available to petitioner.

As we find the ESC erred in its conclusion of law that suitable employment existed, we do not address petitioner's second assignment of error that the ESC erred in its findings as to why petitioner failed to pursue the available suitable employment. As petitioner must establish all six of the required criteria for an award of benefits, however, *see* 20 C.F.R. § 617.22, we now address petitioner's challenge of the ESC's conclusion as to the sixth criteria.

II.

[2] Petitioner next contends the ESC erred in finding that a second master's degree was not suitable for the intent of the program. We disagree.

19 U.S.C. § 2296 (a)(1)(F) states as its final criterion for approval of training for an adversely affected worker that "such training is suitable for the worker and available at a reasonable cost[.]" *Id.* 20 C.F.R. § 617.22(a)(6) provides additional guidelines for these requirements. 20 C.F.R. § 617.22(a)(6)(i) states that training is suitable for a worker when "appropriate . . . given the worker's capabilities, background and experience." *Id.*

Our Courts have not previously addressed this statute and accompanying regulations and we look to jurisprudence from our sister states for guidance. In *Marshall v. Com'r of Jobs & Training*, 496 N.W.2d 841, 843 (1993), the Minnesota Court of Appeals considered the issue of suitability of training for workers who already possessed advanced degrees. *Marshall* stated:

> This statute was designed to give workers whose job functions have virtually disappeared because of foreign competition an opportunity to become proficient in a new trade. Although professional training is allowed under the statute . . . the statute is

> not meant to allow a person with a professional degree who has reasonable job prospects or options the opportunity to acquire a second professional degree simply to enhance employability. Thus, the applicant wanting to enhance an already existing professional degree bears a heavy burden to demonstrate that such training is reasonable and necessary.

Id. Further, we note the United States Department of Labor has addressed the issue of suitability and reasonable cost of training, stating:

> The 1988 Amendments clearly provide that State administering agencies shall approve training for individual workers at the lowest reasonable cost which will lead to employment and will result in training opportunities for the largest number of adversely affected workers. This means that State administering agencies should avoid approving training for occupations that require an extraordinarily high skill level relative to the worker's current skills level and for which total costs of training, including transportation and subsistence, are excessively high.

Trade Adjustment Assistance for Workers; Amendment of Regulations, 59 Fed. Reg. 906, 924 (Jan. 6, 1994) (to be codified at 20 C.F.R. pt. 617). We note that our Supreme Court has recognized that " '[i]t is well established "that an agency's construction of its own regulations is entitled to substantial deference." ' " *Morrell v. Flaherty*, 338 N.C. 230, 237, 449 S.E.2d 175, 179-80 (1994) (citations omitted).

After careful review of the governing statute and regulations, we agree that, in light of the goal of providing training opportunities for the largest number of adversely affected workers at the lowest reasonable cost, an individual who already possesses a marketable professional degree bears a heavy burden to establish that an additional professional degree is suitable. We therefore conclude that the ESC may, after application of the governing criteria, determine that a second professional degree is not suitable training for an individual.

Here, the ESC found that petitioner had a bachelor of science degree in electrical engineering from the United States Naval Academy and a master's degree in computer science from California Polytechnical State University, which the ESC characterized as a "marketable master[']s degree." Further, the ESC found that petitioner had twenty-one years of experience in the telecommunications

field. Based on these findings, the ESC concluded that a second master's degree in mathematics for petitioner was not suitable for the intent of the program.

As the ESC made sufficient findings that petitioner had both a marketable advanced degree and significant industry experience, we find the ESC did not err in concluding a second master's degree in mathematics was not suitable given the worker's capabilities, background, and experience. As approval of TAA training benefits under 19 U.S.C. § 2296 requires a finding of suitability of training, we hold the superior court properly affirmed the ESC's denial of petitioner's application for benefits.

Affirmed.

Judges HUDSON and GEER concur.

STATE OF NORTH CAROLINA v. JOHNNIE A. WARE

No. COA04-1203

(Filed 20 September 2005)

Juveniles— committed youthful offender—consecutive sentences—total exceeding twenty years

N.C.G.S. § 148-49.14 (now repealed) does not prohibit the imposition of separate consecutive sentences for a committed youthful offender which do not exceed twenty years respectively. The trial court here correctly denied a motion for appropriate relief that challenged consecutive sentences for multiple offenses as exceeding twenty years in total.

Appeal by defendant from an order entered 30 April 2002 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 April 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Thomas H. Moore, for the State.

Reita P. Pendry for defendant-appellant.

HUNTER, Judge.

Johnnie A. Ware ("defendant") appeals a denial of a motion for appropriate relief from two sentences entered 26 March 1996 pursuant to a plea agreement as to charges of robbery with a dangerous weapon, safecracking, breaking and entering, larceny, second degree kidnapping, and assault with a deadly weapon.

On 19 March 1994, defendant, seventeen at that time, was involved in a series of criminal acts for which he was indicted on 23 May 1994, including robbery with a dangerous weapon, safecracking, felonious breaking and entering, two counts of first degree kidnapping, one count of second degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant pled guilty to the charges of robbery with a dangerous weapon, safecracking, felonious breaking and entering, second degree kidnapping, and assault with a deadly weapon inflicting serious injury in exchange for consolidation of the robbery, safecracking, breaking and entering, and larceny charges for a term of twenty years as a committed youthful offender, consolidation of the second degree kidnapping and assault charges for a term of fifteen years as a committed youthful offender, and dismissal of the additional charges. The trial court accepted the plea and sentenced defendant, as specified in the plea agreement, to two consolidated terms of twenty years and fifteen years respectively, and further indicated that defendant should serve both as a committed youthful offender pursuant to Chapter 148, Article 3B.

On 15 November 2001, defendant moved for appropriate relief, contending that N.C. Gen. Stat. § 148-49.14 (repealed 1993) (repeal effective 1 October 1994) required that a sentence under that act should "not . . . exceed the limit otherwise prescribed by law for the offense of which the person is convicted or 20 years, whichever is less[,]" and that his sentences exceeded that amount. The trial court denied defendant's motion. Defendant filed a petition for writ of certiorari in this Court, which was allowed on 26 March 2003.

Defendant contends in his sole assignment of error that the trial court erred in denying his motion for appropriate relief as the consecutive sentences imposed under the plea bargain agreement violated N.C. Gen. Stat. § 148-49.14, governing sentences of committed youthful offenders at the time of defendant's convictions. Defendant contends the language of the statute prohibits the imposition of sentences under section 148-49.14, which exceed twenty years in their

totality. It appears this is a question of first impression for our courts. We therefore begin with an examination of the statute.

"Statutory interpretation properly begins with an examination of the plain words of the statute. The legislative purpose of a statute is first ascertained by examining the statute's plain language." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citation omitted). " 'When the language of a statute is clear and unambiguous, there is not 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.' " *State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (citations omitted).

N.C. Gen. Stat. § 148-49.14 provided for sentencing of individuals below the age of twenty-one determined to be committed youthful offenders. The statute stated:

> As an alternative to a sentence of imprisonment as is otherwise provided by law, when a person under 21 years of age is convicted of an offense punishable by imprisonment and the court does not suspend the imposition or execution of sentence and place him on probation, the court may sentence such person to the custody of the Secretary of Correction for treatment and supervision as a committed youthful offender. . . . At the time of commitment the court shall fix a maximum term not to exceed the limit otherwise prescribed by law for the offense of which the person is convicted or 20 years, whichever is less. . . . If the court shall find that a person under 21 years of age should not obtain the benefit of release under G.S. 148-49.15, it shall make such "no benefit" finding on the record.

Id. Thus the critical portion of the statute contested by defendant is the requirement that the court must fix a maximum term for the offense of which the person is convicted which does not exceed twenty years. Defendant appears to argue that the term offense should be read to encompass all crimes for which defendant is indicted and convicted as a whole, and contends that federal jurisprudence on the Federal Youth Corrections Act is persuasive on this point. *See Price v. United States*, 384 F.2d 650, 652 (10th Cir. 1967) (stating that when a defendant is sentenced as a youth offender, cumulative or consecutive sentences on several counts would not fit the design and purpose of the Federal Youth Corrections Act).

A review of N.C. Gen. Stat. § 148-49, Article 3B, Facilities and Programs for Youthful Offenders, the Article containing section 148-49.14 reveals that no definition of the term "offense" was provided in that Article. However, our Supreme Court has held that "[a] defendant may be convicted of and sentenced for each specific criminal act which he commits." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). "[W]here there are several counts and each count is for a distinct offense, a general verdict of guilty will authorize the imposition of a judgment on each count." *State v. Austin*, 241 N.C. 548, 549, 85 S.E.2d 924, 926 (1955). We find that the plain language of the statute is "clear and unambiguous," as it refers to an offense in the singular, that is a specific criminal act, thus permitting the trial court to sentence a defendant to a maximum of twenty years for each specific criminal act of which a defendant is convicted. *See Carr*, 145 N.C. App. at 343, 549 S.E.2d at 902. We further note that section 148-49.14 did not preclude the imposition of consecutive sentences and defendant cites no precedent to the contrary.

Defendant contends, however, that such a reading of the plain language violates the intent of the statute. The purposes and intent of N.C. Gen. Stat. § 148-49, Article 3B were stated in N.C. Gen. Stat. § 148-49.10 (repealed 1993):

> The purposes of this Article are to improve the chances of correction, rehabilitation, and successful return to the community of youthful offenders sentenced to imprisonment by preventing, as far as practicable, their association during their terms of imprisonment with older and more experienced criminals, and by closer coordination of the activities of sentencing, training in custody, parole, and final discharge. It is the intent of this Article to provide the courts with an additional sentencing possibility to be used in the court's discretion for correctional punishment and treatment in cases, where in the opinion of the court, a youthful offender requires a period of imprisonment, but no longer than necessary for the Parole Commission to determine that the offender is suitable for a return to freedom and is ready for a period of supervised freedom as a step toward unconditional discharge and restoration of the rights to citizenship.

Id. Defendant contends that the imposition of multiple sentences, the total of which would exceed twenty years, is irreconcilable with the stated purpose of the Article.

As discussed in *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977), our Supreme Court stated that the purposes of the Article governing committed youthful offenders were

> to improve the chances of rehabilitating youthful offenders: (1) by segregating them, as far as practicable, from older and more experienced criminals; and (2) by providing the court with "an additional sentencing possibility" to be used for correctional punishment and treatment in cases where, in its opinion, a youthful offender required imprisonment only for the time necessary for the Board of Paroles to determine his suitability for a return to supervised freedom.

Niccum, 293 N.C. at 280, 238 S.E.2d at 144. As *Niccum* noted, the "Board of Paroles was authorized to release a committed youthful offender under supervision at any time after reasonable notice to the Commissioner." *Id.* at 281, 238 S.E.2d at 145. Thus, the Act's alternative sentencing method provided increased flexibility to permit a case-by-case determination of the progress towards correction, rehabilitation, and successful return to the community of youthful offenders. Such a purpose is not irreconcilable with the imposition of multiple sentences under section 148-49.14. Rather it reflects the discretionary nature of the statute; recognizing the gravity of the offense by permitting a sentence of up to twenty years for each offense, while still providing the possibility of early parole for youthful offenders who made successful progress and were determined suitable for a return to supervised freedom.

We finally note that although defendant contends federal case law concerning the Federal Youth Corrections Act should be persuasive to this Court, *see State v. Mitchell*, 24 N.C. App. 484, 211 S.E.2d 645 (1975) (comparing N.C. Gen. Stat. § 148-49, Article 3A (repealed 1977) with the Federal Youth Corrections Act of 1950), a review of the sentencing requirements of the federal statute, 18 U.S.C. §§ 5005-5023 (repealed 1984) with N.C. Gen. Stat. § 148-49, Article 3B, as modified and amended in 1977, reveals substantial differences in the substance of those statutes. We therefore decline to consider federal case law with regards to this matter.

As we conclude that N.C. Gen. Stat. § 148-49.14 does not prohibit the imposition of separate consecutive sentences which do not exceed twenty years respectively, we find the trial court properly denied defendant's motion for appropriate relief.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

FRANK EASTON, Employee Plaintiff v. J.D. DENSON MOWING, Employer, GREAT AMERICAN INSURANCE COMPANY, Carrier, Defendants

No. COA04-1548

(Filed 20 September 2005)

1. Workers' Compensation— suspension of benefits—incarceration of plaintiff

The Industrial Commission did not err in a workers' compensation case by authorizing defendant to suspend payment of plaintiff's workers' compensation disability payments as a result of plaintiff's incarceration, because: (1) the denial of benefits is reasonable where the state purposefully deprives that person of the right to earn wages caused by the imprisonment and not by the injury; (2) the issue presented in this case is identical to that presented in *Parker v. Union Camp Corp.*, 108 N.C. App. 85 (1992), and thus the Court of Appeals is bound by that decision; (3) contrary to plaintiff's assertion, *Parker* was not overruled by the case of *Harris v. Thompson Contractors, Inc.*, 148 N.C. App. 472 (2002), aff'd, 356 N.C. 664 (2003), but *Harris* merely distinguished *Parker* since plaintiff did not suffer a work-related injury while on work release; and (3) neither *Parker* nor *Harris* states that the outcome of the case would have been different had there been any dependents, and that decision is best left to the General Assembly.

2. Workers' Compensation— incarceration of plaintiff—credit to employer for payments made during incarceration

The Industrial Commission did not err in a workers' compensation case by permitting defendant to take an immediate credit for payments made during plaintiff's incarceration by reducing his ongoing payments by $100.00 per week allegedly in violation of N.C. Gen. Stat. § 97-42, because: (1) where an award of compensation is for an indefinite period of time, it is not possible to shorten the period during which compensation must be paid and therefore the Commission may order the employer to reduce the amount of the employee's payments in order to allow the

employer to recoup the amount of the credit; and (2) in the instant case the Commission awarded plaintiff temporary total disability which has no specific ending time, and there is nothing in the record to suggest that plaintiff will or will not ultimately receive a permanent partial disability award.

Appeal by plaintiff from opinion and award entered 30 August 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 August 2005.

Scudder & Hedrick, by Samuel A. Scudder, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce A. Hamilton and William A. Bulfer, for defendants-appellants.

STEELMAN, Judge.

The facts of this matter are not in dispute. Plaintiff, Frank Easton, was injured after falling from a tractor while working for J.D. Denson Mowing Company. Pursuant to an opinion and award filed 16 October 2000, plaintiff was awarded temporary total disability benefits for the compensable work-related injury he sustained. This Court affirmed that award in an unpublished opinion, *Easton v. J.D. Denson Mowing Co.*, 148 N.C. App. 405, 560 S.E.2d 885 (2002) (unpublished). Plaintiff was awarded $365.78 per week in disability payments beginning on 3 September 1997, continuing until plaintiff was able to return to work or until otherwise ordered by the Industrial Commission. While receiving these disability payments, plaintiff was incarcerated for a probation violation from 22 January 2003 until 8 September 2003. Plaintiff's counsel informed defendants of plaintiff's possible incarceration on 4 April 2003, and confirmed the incarceration on 3 June 2003. On 24 July 2003, defendants filed a Form 24 seeking authorization to suspend defendant's disability payments until plaintiff's release from jail, which was granted on 28 August 2003. Plaintiff appealed and the Deputy Commissioner affirmed the suspension of benefits and allowed defendants a credit for the amounts previously paid while plaintiff was incarcerated. Plaintiff appealed to the Full Commission, which affirmed the Deputy Commissioner's ruling by an Opinion and Award entered 30 August 2004. Plaintiff appeals.

[1] In plaintiff's first argument, he contends the Industrial Commission erred in authorizing defendant to suspend payment of plaintiff's

workers' compensation disability payments as a result of his incarceration. We disagree.

This Court definitively addressed this issue in *Parker v. Union Camp Corp.*, 108 N.C. App. 85, 422 S.E.2d 585 (1992). In *Parker*, the plaintiff suffered a compensable work-related injury and was receiving workers' compensation benefits. *Id.* at 86, 422 S.E.2d at 585. While receiving benefits, the plaintiff was convicted and sentenced to prison. This Court held the plaintiff was not entitled to receive workers' compensation benefits while in prison. *Id.* at 88, 422 S.E.2d at 587. This Court reasoned that the denial of benefits is reasonable where the state "purposefully deprives that person of the right to earn wages." *Id.* at 87, 422 S.E.2d at 586. The rationale behind this decision was that "while he was in prison Mr. Parker did not have the right to earn wages; his incapacity to earn was caused by his imprisonment, not by his injury." *Id.* at 88, 422 S.E.2d at 586.

Plaintiff first asserts that *Parker* is based upon an erroneous interpretation of the law and asks this Court to overrule *Parker*. This we cannot and will not do. We are bound by opinions of prior panels of this Court deciding the same issue. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). The issue presented in this case is identical to that presented in *Parker*, thus we are bound by that decision.

Plaintiff next contends *Parker* has been overruled by the case of *Harris v. Thompson Contractors, Inc.*, 148 N.C. App. 472, 558 S.E.2d 894 (2002), *aff'd*, 356 N.C. 664, 576 S.E.2d 323 (2003). This is incorrect. In *Harris*, the plaintiff was serving a sentence in the Department of Corrections. After he was incarcerated, Harris was allowed to work for defendant-employer under a work release program pursuant to N.C. Gen. Stat. § 148-33.1. This Court held Harris was entitled to receive compensation, stating:

> *Parker* is distinguishable from the instant case. In *Parker*, the claimant was injured on the job before his incarceration and was already receiving benefits. *Parker* at 86, 422 S.E.2d at 585. Here, plaintiff was already incarcerated at the time of his injury and was involved in the work release program when his work related injury occurred.

Id. at 479, 558 S.E.2d at 899. Thus, *Harris* did not overrule *Parker*, nor could it. *Civil Penalty*, 324 N.C. at 379 S.E.2d at 37. Rather, *Harris* clearly distinguished *Parker*, and is not applicable to the

instant case since plaintiff did not suffer a work-related injury while on work release.

Plaintiff next asserts that the combination of *dicta* in *Parker* and the decision in *Harris* mandates that we reverse the Industrial Commission in this matter.

In *Parker*, the majority noted that its ruling may work a hardship to a plaintiff's dependents by suspending compensation benefits during periods of incarceration and suggested that the General Assembly may wish to examine this issue. *Parker*, 108 N.C. App. 88, 422 S.E.2d at 587. Plaintiff asserts that this language, coupled with the holding in *Harris*—that plaintiff's compensation could be paid to the Department of Corrections for disbursement in accordance with the work release program, requires reversal because of the adverse impact upon plaintiff's dependents in this case. The language in *P*arker discussing a plaintiff's dependents was *dicta*, not necessary to the resolution of the case. *See State v. Jackson*, 353 N.C. 495, 500, 546 S.E.2d 570, 573 (2001) (noting statements made in an opinion which are not determinative of the issue before the reviewing court are *dicta* and not binding). This Court did not state that the outcome of the case would have been different had there been any dependents. Rather, the opinion suggested that the General Assembly may want to consider changing the law to prevent dependents from being harmed by a plaintiff's incarceration. The legislature has not amended the relevant statutes since this Court rendered its decision in *Parker*.

Finally, there is no indication in *Harris* that dependents were in any way implicated. The award entered by the Industrial Commission, and affirmed by this Court, simply directed that the compensation be paid to the Department of Corrections for disposition in accordance with the work release program. *Harris*, 148 N.C. App. at 479, 558 S.E.2d at 899. Each of plaintiff's arguments, along with any other assertions made under this argument, are without merit.

[2] In plaintiff's second argument, he contends that if defendant was entitled to suspend his workers' compensation benefits while he was incarcerated, the Industrial Commission erred in permitting defendant to take an immediate credit for payments made during plaintiff's incarceration by reducing his ongoing payments by $100.00 per week, in violation of N.C. Gen. Stat. § 97-42. We disagree.

It is within the Commission's discretion to award an employer who makes payments that are not due and payable a credit for those payments pursuant to N.C. Gen. Stat. § 97-42. *Thomas v. B.F.*

Goodrich, 144 N.C. App. 312, 319, 550 S.E.2d 193, 197, *disc. review denied*, 354 N.C. 228, 555 S.E.2d 276 (2001). We note that plaintiff does not contest the Commission's authority to award a credit, but rather contests the manner in which the Commission assessed the credit.

When the Commission grants a credit to an employer for payments made under N.C. Gen. Stat. § 97-42, it must be made by shortening the period during which payments are due. *Id.* at 318, 550 S.E.2d at 197. In *dicta*, however, this Court stated that "[w]hen . . . an employee receives an award of permanent disability to be paid during his lifetime, it is not possible to 'shorten[] the period during which compensation must be paid.' " *Id.* Thus, in order to give an employer a credit, this Court reasoned that the Commission could order the employer to reduce the amount of the employee's weekly payments in order to recoup the amount of the credit. *Id.* This Court reasoned that to hold otherwise would contravene the legislature's intent of encouraging employer's to make voluntary payments while the employee's claim was being litigated. *Id.*

We find the reasoning in *Thomas* to be persuasive. The fact the plaintiff was permanently disabled was not key to this Court's reasoning in *Thomas*. Rather, the fundamental principle enunciated was that where an award of compensation is for an indefinite period of time, it is not possible to shorten the period during which compensation must be paid; therefore, the Commission may order the employer to reduce the amount of the employee's payments in order to allow the employer to recoup the amount of the credit. *Id.* This is such a case. Here, the Commission awarded plaintiff total temporary disability, which has no specific ending time. In fact, plaintiff has already received total temporary disability for eight years, with little likelihood of plaintiff ever returning to work. If plaintiff never returns to work, his benefits will end at his death, and there will be no opportunity to shorten the period of disability. If plaintiff returns to work, his entitlement to any temporary partial disability or permanent partial benefits will immediately terminate, and there will be no opportunity to shorten the period of disability. *See* N.C. Gen. Stat. § 97-30 to -31 (2004). Nor is there anything in the record to suggest that plaintiff will or will not ultimately receive a permanent partial disability award. We believe this result would contravene the intent of the legislature.

Accordingly, we conclude the Commission did not err in permitting defendant to take an immediate credit for payments made during

plaintiff's incarceration and permitting defendant to deduct $100.00 per week from its ongoing payments.

AFFIRMED.

Judges McGEE and JACKSON concur.

STATE OF NORTH CAROLINA v. DELAUNO MONTREZ COREY

No. COA04-736

(Filed 20 September 2005)

Sentencing— aggravating factors—*Blakely* error

The trial court erred in an armed robbery case by sentencing defendant in the aggravated range based on its finding of aggravating factors that were not submitted to the jury, and the case is remanded for resentencing even though the State contends defendant stipulated to the factual basis for the plea and thus stipulated to the aggravating factors, because: (1) a stipulation to the factual basis for a guilty plea is not a stipulation to an aggravating factor; and (2) there is no admission by a defendant of an aggravating factor unless the defendant stipulates to the aggravating factor itself.

Appeal by defendant from judgment entered 11 December 2001 by Judge Carl L. Tilghman in Martin County Superior Court. Heard in the Court of Appeals 27 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn J. Thomas, for the State.

Geoffrey W. Hosford for defendant-appellant.

ELMORE, Judge.

Delauno Montrez Corey (defendant) was indicted for the armed robbery of the Handy Mart convenience store which occurred on 7 February 2001. Pursuant to a plea agreement with the State, defendant pled guilty to one count of armed robbery in the instant case and one count of common law robbery in an unrelated case. The State agreed to dismiss a separate charge of escape, and defendant agreed

to testify against his co-defendants in the case. On 10 December 2001 Judge Carl Tilghman presided over defendant's sentencing hearing. Defendant stipulated to the factual basis for the offenses charged. The court entered findings of four aggravating factors: (1) defendant induced others to participate in the offense; (2) defendant joined with more than one person in committing the offense and was not charged with conspiracy; (3) defendant involved a person under the age of 16 in the commission of the offense; and (4) the offense was committed while defendant was on escape of custody for an armed robbery. The court found that the aggravating factors outweighed any mitigating factors and sentenced defendant in the aggravated range to a minimum term of 120 months and maximum term of 153 months imprisonment.

On 26 February 2003 defendant filed a "Petition for Writ of Certiorari" seeking review of the judgment entered 11 December 2001. This Court allowed the petition in an order entered 26 March 2003. Defendant's sole argument on appeal concerns the trial court's findings of the aggravating factors and consequent imposition of an aggravated range sentence.

In *State v. Allen*, 359 N.C. 425, 438-39, 615 S.E.2d 256, 265 (2005), our Supreme Court applied *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), to the North Carolina Structured Sentencing Act and held that the provisions of N.C. Gen. Stat. § 15A-1340.16 which require a trial judge to make findings of aggravating factors neither stipulated to by the defendant nor found by a jury are unconstitutional. The Court explained that, consistent with a defendant's Sixth Amendment right to jury trial, "[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. The Court held that where aggravating factors are not submitted for jury consideration, such error is structural and therefore reversible *per se*. *Id.* at 449, 615 S.E.2d at 272.

The State attempts to uphold the sentence by arguing that defendant stipulated to the factual basis for the plea and thus stipulated to the aggravating factors. But a stipulation to the factual basis for a guilty plea is not a stipulation to an aggravating factor. Our Supreme Court in *Allen* stated that "under *Blakely* the judge may still sentence a defendant in the aggravated range based upon the defendant's admission to an *aggravating factor* enumerated in

N.C.G.S. § 15A-1340.16(d)." *Id.* at 439, 615 S.E.2d at 265 (emphasis added). Thus, there is no admission by a defendant of an aggravating factor unless the defendant stipulates to the aggravating factor itself. As defendant was sentenced beyond the prescribed presumptive range based upon factors neither stipulated to by defendant nor found by a jury beyond a reasonable doubt, defendant is entitled to a new sentencing hearing.

Remanded for resentencing.

Judges HUNTER and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 SEPTEMBER 2005

BERKOW v. WEST No. 04-1393	Jackson (03CVD115)	Affirmed
CAROLINA PRIDE CARWASH, INC. v. KENDRICK No. 04-451	Person (02CVS12)	Reversed and remanded
CLINE v. BLACK No. 04-1527	Guilford (02CVS10788)	Affirmed
GODWIN v. BARNES No. 04-257-2	Wilson (02CVS1224)	New trial
HASHEMI v. TOWN OF CARY No. 04-128	Wake (02CVS17043)	Reversed and remanded
HOPPER v. FLYNN No. 04-1068	Pasquotank (02CVS649)	Reversed
IN RE B.R.C. No. 04-481	Burke (03J37)	Dismissed
IN RE C.H.-D. No. 04-1462	Mecklenburg (04J288)	Appeal dismissed
INTERNATIONAL FIN. CONSULTANTS, INC. v. U.S.A. RENTALS, INC. No. 04-1509	Mecklenburg (02CVS17707)	Appeal dismissed
MCALLISTER v. WAL-MART STORES, INC. No. 04-1249	Ind. Comm. (I.C. #280211)	Vacated and remanded
RABON v. CAULDER No. 04-1586	Robeson (97CVD1691)	Affirmed
STATE v. BOZEMAN No. 04-1063	Guilford (02CRS94476) (02CRS94477) (02CRS94495) (02CRS94496) (03CRS24529)	No error
STATE v. CASTOSA No. 04-1477	Wake (03CRS43599) (03CRS43601) (03CRS43602) (03CRS46344)	No error

STATE v. CUPID No. 04-137	Guilford (02CRS102982) (02CRS102985) (03CRS24126)	Motion for appropriate relief is allowed in part and denied in part. Case remanded for resentencing
STATE v. FABIO No. 04-1346	Buncombe (03CRS9403) (03CRS56899)	New trial
STATE v. HAMLIN No. 04-1271	Guilford (03CRS79883)	No error
STATE v. HERNANDEZ No. 04-1156	Wake (00CRS21056) (00CRS21057) (00CRS21058) (00CRS21059) (00CRS22726)	Remanded for new suppression hearing; motion for appropriate relief denied
STATE v. KITTRELL No. 05-38	Wake (04CRS12408)	Vacated
STATE v. McKINNEY No. 04-14	Wayne (01CRS57630) (01CRS57631)	Remand for resentencing
STATE v. McRAE No. 04-1290	Durham (03CRS50926)	No error in trial; affirmed with respect to prior record level determination; remanded for resentencing
STATE v. MORRISON No. 04-1000	Wake (03CRS86370) (03CRS86371)	Remanded for resentencing
STATE v. MORTON No. 04-1484	Forsyth (02CRS55018)	Reversed and remanded in part; no error in part
STATE v. PAINTER No. 04-896	McDowell (01CRS52387) (01CRS52389) (02CRS2020) (03CRS1091) (03CRS1092)	No error at trial; remanded for resentencing
STATE v. SINCLAIR No. 04-813	Wake (03CRS86373) (03CRS86374)	Remanded for resentencing

STATE v. SPRINKLE No. 04-1291	Robeson (02CRS11158) (02CRS11159) (02CRS11161)	No error in defendant's trial. Remanded for resentencing
STATE v. THOMPSON No. 04-1268	Alamance (03CRS53451)	No error
STATE v. WILLIAMSON No. 04-1704	Durham (03CRS50549)	Vacate judgment, remanded for new sentencing hearing

IN RE J.W., K.W.

[173 N.C. App. 450 (2005)]

IN RE: J.W. A MINOR JUVENILE DOB: 05-09-00
IN RE: K.W. A MINOR JUVENILE DOB: 06-13-97

No. COA04-1280

(Filed 4 October 2005)

1. Evidence— cross-examination—lack of relevancy

The trial court did not abuse its discretion in a termination of parental rights case by sustaining an objection to respondent mother's cross-examination of a DSS investigator regarding the condition of respondent's home on the day after the initial visit by DSS prior to the first adjudication of neglect, because: (1) the relevant issue was not the prior adjudication of neglect, but the possibility of future neglect at the time of the termination hearing; and (2) even assuming arguendo that the trial court improperly sustained the objection, respondent failed to show that such error was prejudicial when respondent was permitted to present to the court evidence related to respondent's housekeeping habits as observed by DSS.

2. Evidence— documents from prior hearings—independent determination

The trial court did not err in a termination of parental rights case by admitting documents from prior hearings into evidence for a limited purpose, because: (1) a court may take judicial notice of earlier proceedings in the same cause; (2) prior adjudications of neglect are admissible, although not determinative in a parental rights proceeding; (3) nothing in the record indicated that the trial court failed to conduct the independent determination required when prior disposition orders have been entered in the matter; and (4) the trial court specifically found that it had considered the testimony offered by both petitioner and respondent's witnesses at the hearing in making its determination of neglect.

3. Termination of Parental Rights— findings of fact—clear, cogent, and convincing evidence

The trial court did not err in a termination of parental rights case by its findings of fact, because: (1) findings related to cross-examination of a DSS investigator and the admission of past orders have already been deemed to be proper; (2) clear, cogent, and convincing evidence, including respondent's own testimony,

supported a finding that respondent failed to complete required classes and that respondent failed to obtain mental health counseling and treatment as recommended; (3) although respondent initially complied with part of the order to have a phone installed, there was evidence that respondent's phone had been disconnected and that the assigned DSS case worker was unable to reach respondent at any of the contact numbers; (4) the record supported a finding that respondent failed to keep a clean and safe home environment for the children as required; (5) a finding regarding respondent's demeanor was properly left to the determination of the trial judge and evidence in the record supported the trial court's finding; (6) clear, cogent, and convincing evidence supported a finding that respondent failed to articulate a specific plan of care for the children; (7) clear, cogent, and convincing evidence supported a finding that respondent has maintained a residence for the past year and a half in a neighborhood she considered unsuitable for children, and that she had recently begun living with her boyfriend while continuing to maintain her own residence which was an indication of instability; and (8) clear, cogent, and convincing evidence supported a finding as to respondent's demeanor and attitude.

4. Termination of Parental Rights— conclusions of law— neglect—failure to make reasonable progress

The trial court did not err by concluding its findings of fact support the conclusion of law that grounds existed for termination of respondent mother's parental rights based on neglect and failure to make reasonable progress, because: (1) the findings of fact supported the conclusion of a probability of repetition of neglect if the juveniles were returned to respondent; and (2) although respondent has shown sporadic efforts, respondent has failed to make reasonable child support payments, failed to perceive the need for instruction in areas which led to the children's removal, and failed to demonstrate initiative to comply with the trial court's directives to correct the conditions which led to removal.

Judge LEVINSON dissenting.

Appeal by respondent mother from an order entered 12 March 2004 by Judge Addie H. Rawls in Harnett County District Court. Heard in the Court of Appeals 24 March 2005.

E. Marshall Woodall, for petitioner-appellee Harnett County Department of Social Services.

Elizabeth Myrick Boone for Guardian ad litem.

Jesse Jones for respondent-appellee Robert Winder.

Carlene Edwards for respondent-appellee Jason Wiggins.

Peter Wood for respondent-appellant.

HUNTER, Judge.

Respondent-mother appeals from an order terminating her parental rights over her minor children, J.W. and K.W. For the reasons stated herein, we affirm the trial court's order of termination.

Respondent is the mother of K.W. and J.W., two boys born to different fathers. K.W.'s father currently lives in Nevada and has had little contact with K.W. J.W.'s father married respondent and moved the family to North Carolina. Neither father challenges the termination of their respective parental rights.

Evidence presented at the termination of parental rights hearing established that in December 2000, when J.W. was approximately seven months old and K.W. was three years old, respondent took J.W. to the hospital because of his spitting up. The hospital diagnosed J.W. with acid reflux and failure to thrive. The Harnett County Department of Social Services ("DSS") was contacted. After meeting respondent and the children at the hospital, DSS conducted a home visit which revealed unsafe and unsanitary conditions.

A nonsecure custody petition was filed alleging neglect, and both children were subsequently removed from the home. The children were adjudicated neglected in February 2001 due to J.W.'s "failure to thrive" and the unsafe and unsanitary conditions of the home. Full custody was awarded to DSS. The trial court further ordered that J.W. remain in foster care, and that K.W. be returned to the home after proper child care arrangements had been confirmed.

A review was held on 10 August 2001 and placement of J.W. in respondent's home was approved. A permanency planning meeting was held on 9 November 2001 and the children were permitted to remain in respondent's home, but with weekly DSS visits to monitor placement. On 16 January 2001, the Guardian ad Litem and Attorney Advocate filed a motion to review placement after a home visit by

DSS revealed unsanitary conditions. The children were removed pending review. On 8 February 2002, the trial court continued custody of both children with DSS and ordered them placed into foster care after finding that respondent had digressed from the original compliance with the service plan, had failed to keep a clean home, and showed an apparent lack of concern for the children. The trial court ordered a dual plan for reunification and placement with other family. Additionally, the trial court ordered respondent to comply with a list of items, "in the event the parents desire to have their children returned." Twelve of the items applied to respondent:

1. Attend Parenting classes[.]
2. Participate—DSS Homemaker services[.]

. . .

4. Participate in household budgeting classes with Extension Services[.]
5. Obtain counselling [sic] and treatment as recommended by Dr. Aiello.
6. Pay child support[.]

. . .

8. Mother obtain and maintain employment with a schedule compatible with the needs of the children[.]
9. Obtain a telephone[.]
10. Attend all medical and dental appointments with children or conference with care providers to maintain familiarity with children's condition.
11. Keep and maintain a clean and appropriate home environment.
12. Provide evidence of compliance to DSS or GAL on a weekly basis[.]
13. Maintain stable residence and not have boarders or house guests for extended periods of time.
14. Sign releases for DSS and GAL to allow communication by DSS and GAL with all service providers, above.

Another permanency planning hearing was held 12 July 2002. The trial court found that while "[respondent] initially complied with the

service plan, [she has] not complied fully as ordered." The trial court ordered that reunification efforts and visitation with the parents cease, and that DSS pursue guardianship with a relative. At the permanency planning hearing held 8 August 2003, the trial court found that the home study of the maternal grandmother had been completed and not approved, and ordered that the plan be changed from guardianship to adoption. A motion to terminate parental rights was filed 30 September 2003. After hearings held in February 2004, the trial court found grounds existed for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2), and that it was in the best interests of both children to terminate the rights of respondent. Respondent appeals.

I.

[1] In her first assignment of error, respondent contends the trial court committed prejudicial error in sustaining an objection to cross-examination of Sara Messer ("Messer"), a DSS investigator. We disagree.

"The scope of cross-examination lies largely within the discretion of the trial court[.]" *State v. Atkins*, 304 N.C. 582, 585, 284 S.E.2d 296, 298 (1981). "Since the limit of legitimate cross-examination is a matter largely within the trial judge's discretion, his rulings thereon will not be held to be prejudicial error in absence of a showing that the verdict was improperly influenced by the ruling." *State v. Edwards*, 305 N.C. 378, 381-82, 289 S.E.2d 360, 363 (1982).

Here, the trial court sustained an objection to the relevancy of respondent's questioning regarding the condition of the home on the day after the initial visit by DSS, prior to the first adjudication of neglect. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). Here, the issue before the court was a petition for termination of parental rights on two grounds, parental neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), and willfully leaving the juveniles in foster care for more than twelve months without reasonable progress pursuant to section 7B-1111(a)(2).

Respondent contends that cross-examination of Messer was relevant to the determination of whether respondent's parental rights should be terminated for neglect. In *In re Ballard*, 311 N.C. 708, 715,

319 S.E.2d 227, 232 (1984), our Supreme Court stated that a prior adjudication of neglect was admissible in a subsequent termination hearing, but that the "determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.* As a prior adjudication of neglect is not determinative for a termination proceeding, the issue before the trial court was the independent determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing. *In re Byrd*, 72 N.C. App. 277, 280, 324 S.E.2d 273, 276 (1985). Therefore, the trial court properly sustained the objection to respondent's cross-examination questions related to the validity of the first adjudication of neglect, as the relevant issue was not the prior adjudication of neglect, but the possibility of future neglect at the time of the termination hearing.

Further, even assuming *arguendo* that the trial court improperly sustained the objection to respondent's cross-examination of Messer as to the condition of the home on the day following the initial DSS visit, respondent fails to show that such error was prejudicial. Respondent cross-examined Heather Floyd ("Floyd"), the DSS worker in charge of respondent's case following the adjudication of neglect, as to respondent's housekeeping habits over the months Floyd monitored the household following the children's return to the home subsequent to the initial adjudication of neglect. Respondent also questioned Floyd as to the correction of the problems with dangerous implements which were a partial basis for the initial adjudication of neglect. Respondent, therefore, was permitted to present to the court evidence related to respondent's housekeeping habits as observed by DSS.

As the trial court properly sustained the objection to respondent's question for lack of relevancy, and as, assuming *arguendo* that the trial court erred, the error was not prejudicial, we find this assignment of error to be without merit.

II.

[2] Respondent next contends that the trial court erred in admitting documents from prior hearings into evidence for a limited purpose. We disagree.

"[A] court may take judicial notice of earlier proceedings in the same cause." *In re Byrd*, 72 N.C. App. at 279, 324 S.E.2d at 276. Our statutes state 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." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2003). As discussed *supra*, our Courts have held that prior adjudications of neglect are admissible, although not determinative in a parental rights proceeding. *See Ballard*, 311 N.C. at 715, 319 S.E.2d at 232; *In re Huff*, 140 N.C. App. 288, 300, 536 S.E.2d 838, 846 (2000).

Here, the trial court permitted admission of the previous order of adjudication, review orders, and permanency planning orders. Respondent objected on the grounds that review and permanency planning orders are subject to a lower standard of evidentiary proof, and therefore would admit evidence that was not clear, cogent, and convincing as required for a termination hearing. This Court recently addressed the same objection in *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005), noting that there is a "well-established supposition that the trial court in a bench trial 'is presumed to have disregarded any incompetent evidence.' " *Id.* at 16, 616 S.E.2d at 273 (quoting *Huff*, 140 N.C. App. at 298, 536 S.E.2d at 845). As in *J.B.*, nothing in the record before us indicates that the trial court failed to conduct the independent determination required when prior disposition orders have been entered in the matter. *Ballard*, 311 N.C. at 715-16, 319 S.E.2d at 232-33. The trial court specifically found that it had considered the testimony offered by both petitioner and respondent's witnesses at the hearing in making its determination of neglect. We, therefore, find no error in the trial court's admission of orders of prior adjudication, review, and permanency planing.

III.

Respondent next contends in related assignments of error that the trial court erred in its findings of fact and conclusions of law. We disagree.

A. *Findings of Facts*

[3] In its order terminating respondent's parental rights, the trial court made fifty-seven findings of fact. Respondent alleges that portions of multiple findings of fact are not supported by clear, cogent, and convincing evidence.

We first address the applicable law and standard of review by which we are bound. "Termination of parental rights is a two-stage proceeding. At the adjudication stage the petitioner must show by clear, cogent and convincing evidence that grounds exist to termi-

nate parental rights." *In re Brim*, 139 N.C. App. 733, 741, 535 S.E.2d 367, 371 (2000). "In the adjudicatory stage, the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted).

A trial court may terminate parental rights for any of the reasons set out in N.C. Gen. Stat. § 7B-1111 (2003). N.C. Gen. Stat. § 7B-1111(a)(1) states that a court may terminate parental rights where: "The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101." *Id.* "Neglect," in turn, is defined as follows:

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

N.C. Gen. Stat. § 7B-101(15) (2003).

Section 7B-1111(a)(2) states that a trial court may terminate parental rights where the court finds that: "The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. . . ." *Id.* " 'A finding of any one of the grounds enumerated [in section 7B-1111], if supported by competent evidence, is sufficient to support a termination.' " *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citation omitted).

In termination proceedings, "the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996). As explained in *In re Whisnant*, 71 N.C. App. 439, 322 S.E.2d 434 (1984):

> This is because when a trial judge sits as "both judge and juror," as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the

> credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.

Id. at 441, 322 S.E.2d at 435 (citation omitted). "If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365-66 (2000).

> On appeal, this Court reviews whether the district court's findings of fact are supported by clear, cogent and convincing evidence, and whether those findings support the district court's conclusions of law. If the decision is supported by such evidence, the district court's findings are binding on appeal, even if there is evidence to the contrary.

In re T.C.B., 166 N.C. App. 482, 485, 602 S.E.2d 17, 19 (2004) (citation omitted). Our Supreme Court has recognized the role of the trial court as finder of fact and the weight that must be accorded these findings. In *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984), the Supreme Court stated, "[i]n cases involving a higher evidentiary standard, such as in the case *sub judice*, we must review the evidence in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *Id.* "Although the question of the *sufficiency* of the evidence to support the findings may be raised on appeal, our appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *Id.* at 110-11, 316 S.E.2d at 252-53 (citations omitted).

We now turn to the specific findings to which respondent assigns error. Respondent first contends that the trial court erred in Findings 26, 30, 34, 35, and 36, findings related to Messer's cross-examination and the admission of past orders, for the same reasons stated in the first and second assignments of error. As discussed *supra*, we find no error in these findings.

Respondent next contends that Finding of Fact 43 is not supported by clear, cogent, and convincing evidence as respondent offered evidence of compliance with the case plan. We disagree.

Finding of Fact 43 states:

> On February 8, 2002, the Court ordered the parents . . . to participate in a list of 14 services and obligations outlined by the Court

and attached to the Court's order which was made available to them. The mother failed to comply with most of the items on the list. She told the social worker that she attended parenting classes but failed to document the same with a certification of completion. The mother did not offer any evidence of such completion to this Court. In fact, enough time has passed that she could have again enrolled in parenting classes in an effort to meet this obligation. She failed to follow through with homemaker services. The mother told the social worker she has participated in household budgeting classes but failed to document the same. She has failed to offer any evidence of completion of such classes to this Court. The mother failed to obtain mental health counseling and treatment recommended by Dr. Aiello in a psychological evaluation of the mother. She failed to get a telephone. She failed to keep a clean and safe home environment for the children. The mother failed to pay child support as court established by the efforts of the child support agency. The mother has failed to find employment compatible with the needs of her children. She still works at the same position that she did when the children were taken from her custody in December 2000. The mother testified that she had some educational constraints with respect to pursuing other employment; however, the court is concerned with respect to just how much effort has been taken with seeking compatible employment.

In *In re B.S.D.S.*, 163 N.C. App. 540, 594 S.E.2d 89 (2004), after an adjudication of neglect of the child who had been sexually abused by the respondent-mother's boyfriend, the respondent-mother was ordered to comply with certain terms to demonstrate she was able to appropriately care for the child. *Id.* at 541, 594 S.E.2d at 91. These terms included attendance at a SAIS non-offending spouse group and participation in treatment recommended by DSS, in addition to three other requirements. *Id.* at 541-42, 594 S.E.2d at 91. The evidence at the termination hearing demonstrated that although the respondent-mother claimed to have completed the group session, she was unable to produce documentary support for her contention, and DSS was unaware of her completion. *Id.* at 545, 594 S.E.2d at 93. Further, although ordered to undergo therapy after evaluation by a psychologist, the respondent-mother failed to do so until three weeks prior to the termination hearing. *Id.* at 546, 594 S.E.2d at 93. The Court in *B.S.D.S.* found that this evidence was sufficient to support a finding of insufficient progress. *Id.* at 546, 594 S.E.2d at 93.

Here, similarly, the trial court ordered respondent to complete classes in parenting, budgeting, and homemaking. A social worker testified that she thought respondent might have attended five of the parenting classes, but that she had not completed the full program of six classes. Respondent herself also testified to attending only five parenting classes, but was unable to produce documentation to verify completion. DSS also offered evidence that respondent did not complete the required homemaker services or the budgeting classes. Respondent herself confirmed that she had not completed the homemaker classes. Thus, there is clear, cogent, and convincing evidence that respondent failed to complete the required classes.

The trial court also ordered respondent to obtain mental health counseling and treatment as recommended. Respondent was recommended to attend counseling after her initial psychological evaluation done after the first removal and adjudication of neglect of the children in early 2001. Respondent testified that although she starting counseling, she stopped when the children were returned to her physical custody in late 2001. DSS case workers testified that respondent failed to comply with the required counseling after the second removal of the children. Therefore, there is clear, cogent, and convincing evidence that respondent failed to comply with this portion of the court order.

The trial court also ordered respondent to have a phone. Although there is some evidence that respondent initially complied and had a phone installed, the assigned DSS case worker from June 2002 until April 2003 testified that respondent's phone had been disconnected, and that she was unable to reach defendant at any of the contact numbers. Clear, cogent, and convincing evidence therefore supports the trial court's finding.

Finally, the trial court ordered respondent to keep and maintain a clean and appropriate home environment. Prior to the second removal of the children in January 2002, the case worker at that time testified that respondent's maintenance of the home was better than upon DSS's initial visit, but remained inconsistent and required continual monitoring. Both children were placed in the parents' home as of August 2001, although legal custody remained with DSS, but were again removed in January 2002 after a visit by social workers revealed that the home was again in a state of great disorder. Following the second removal of the children, while DSS was continuing to attempt reunification, two unannounced home visits at different times of the day were made by another social worker to assess the condition of

the home. Although she was unable to assess the interior condition of the home because respondent was not home on either occasion, the social worker reported the exterior of the home had lots of trash and debris, the screen door was busted, there was trash on the stoop and alongside the house and drive, and debris in the yard, including furniture and broken toys. The record therefore supports a finding that respondent failed to keep a clean and safe home environment for the children.

The trial court did not err in finding that respondent failed to comply with most of the requirements of the list. Further, respondent does not challenge the evidence supporting the remainder of the finding of fact regarding respondent's failure to pay child support and provide evidence of compliance to DSS on a weekly basis. Therefore, clear, cogent, and convincing evidence supports Finding of Fact 43.

Respondent also contends the trial court erred in Finding of Fact 46, that respondent lacked initiative to comply with the directives and failed to perceive or determine that the services ordered by the court were needed by her. We disagree.

> All of the findings of fact regarding respondent's in-court demeanor, attitude, and credibility, including her willingness to reunite herself with her child, are left to the trial judge's discretion. Therefore, any of the findings of fact regarding the demeanor of any of the witnesses are properly left to the determination of the trial judge, since she had the opportunity to observe the witnesses.

Oghenekevebe, 123 N.C. App. at 440-41, 473 S.E.2d at 398-99.

Here, the trial court, as stated in the findings of fact, had the opportunity to view respondent, hear her testimony, and judge her credibility in determining her attitude and initiative. Therefore, Finding of Fact 46 regarding respondent's demeanor is properly left to the determination of the trial judge and evidence in the record supports the trial court's finding.

Respondent next contends that clear, cogent, and convincing evidence does not support Finding of Fact 47, that the respondent was unable to articulate any plan by which the children would be provided for after she went to work. We disagree.

Here, respondent testified that she planned to work Wednesday through Saturday weekly from 7:00 p.m. to 2:00 or 3:00 a.m., that she

could care for the children during the day after they came home from school, and stated generally that "then there would be a qualified good babysitter that I know would take care of my kids and they would be sleeping while I'm at work." Respondent offered no names of sitters or evidence that she had investigated options for nighttime care for the children. Although respondent's boyfriend was questioned as to whether he was familiar with children in his own family, and if he was able to watch the children, feed them, and put them to bed, respondent's boyfriend did not testify that he would provide child care for respondent's children while she worked. Respondent offered no further testimony as to specifics of how child care would be provided if the children were placed back into her care. As respondent failed to articulate a specific plan of care for the children, clear, cogent, and convincing evidence supports this finding.

Respondent further asserts that Finding of Fact No. 48 is not supported by clear, cogent, and convincing evidence. We disagree.

The pertinent portions of Finding of Fact 48 state that:

> She has lived for the past year and [a] half in a duplex apartment in Cumberland County, North Carolina which she admits is inadequate and not in a community conducive for the children. Specifically, it would not be an environment in which she would be comfortable with the children being outside of the home. *Her response to this circumstance is to move in with her boyfriend while at the same time maintaining her own apartment all of which, in and of itself, shows instability on her part.*

(Emphasis added.) Respondent's own testimony supports the trial court's finding that respondent has maintained a residence for the past year and a half in a neighborhood she considered unsuitable for children, and that she had recently begun living with her boyfriend while continuing to maintain her own residence. Further, respondent's testimony when questioned as to her plans if her relationship with her boyfriend did not work out provides evidence to support such a finding. Respondent stated:

> I have an apartment currently right now that I continue renting. I do plan to keep on looking for apartments that are in a better—in a better neighborhood. So if something does happen to Mike and I, I do have a place where my kids and I go to [sic]. . . .
>
> I do plan on continuing to work, so if something does happen to us, I don't have to try to find a job.

Although different inferences could be drawn from respondent's testimony that she continued to maintain and search for alternative housing after living with her boyfriend for only a month, the trial court is charged with determining what inference should be drawn, and the evidence supports a conclusion that such behavior is an indication of instability. *See Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365-66 ("[i]f different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected"). Therefore clear, cogent, and convincing evidence supports this finding and conclusion.

Respondent next contends there is a lack of clear, cogent, and convincing evidence to support Finding of Fact 49, that respondent had demonstrated a continued failure to make a proper plan for her children, had done little other than visit with her children, and had failed to perceive the danger in past conditions which led to the children's removal and continued to fail to perceive that reasoning. We disagree.

As discussed *supra*, "findings of fact regarding respondent's in-court demeanor, attitude, and credibility, including her willingness to reunite herself with her child, are left to the trial judge's discretion." *Oghenekevebe*, 123 N.C. App. at 440-41, 473 S.E.2d at 398-99.

Here, evidence in the record indicates that in the more than three year period from the first DSS assessment, respondent was able to comply only sporadically with the case plan for initial return of the children, and was unable to properly maintain her home and care for the children after her first reunification with the children in November 2001, resulting in removal of the children in January 2002. Further, respondent was unable to make sufficient progress under the court-ordered plan following the second removal of the children, so that reunification efforts were ceased in July 2002. Since the cessation of reunification efforts, although respondent maintained some contact with DSS, she failed to pay child support throughout 2002 and made only small payments totaling less than $260.00 and some gifts of clothing and a phonics game in 2003. Further, although respondent initially maintained contact with social workers, from November 2003 to late January 2004 respondent ceased contacting DSS with no explanation. Finally, respondent failed to consistently attend permanency planning meetings. Therefore, there is clear, cogent, and convincing evidence to support the trial court's findings and conclusion as to respondent's demeanor and attitude.

B. *Conclusion of Law*

[4] Respondent also contends that the trial court's findings of fact are insufficient to support the conclusion of law that grounds exist for termination of respondent's parental rights. We disagree.

Respondent first contends that the findings of fact are insufficient to support grounds for termination based on neglect. As noted *supra*, N.C. Gen. Stat. § 7B-1111(a)(1) states that the trial court may terminate parental rights upon a finding that "[t]he parent has . . . neglected the juvenile." *Id.*

In *In re Ballard*, our Supreme Court recognized that in most termination cases the children have been removed from the parents' custody before the termination hearing, and therefore, "to require that termination of parental rights be based only upon evidence of events occurring after a prior adjudication of neglect which resulted in removal of the child from the custody of the parents would make it almost impossible to terminate parental rights on the ground of neglect." *Ballard*, 311 N.C. at 714, 319 S.E.2d at 232. *Ballard* held that

> evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights. The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.

Id. at 715, 319 S.E.2d at 232. In *In re Beasley*, 147 N.C. App. 399, 555 S.E.2d 643 (2001), this Court further addressed the petitioner's burden when a prior adjudication of neglect had been established.

> "[I]f there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents.["] "Thus, the petitioner need not present evidence of neglect subsequent to the prior adjudication of neglect."

Beasley, 147 N.C. App. at 404-05, 555 S.E.2d at 647 (citation omitted).

Here, as discussed *supra*, both children were adjudicated neglected by the trial court in 2001 on the basis of the youngest child's "failure to thrive" and the unsafe and unsanitary conditions of the

home. Continued efforts were made to reunite the children with their parents, but subsequent to both children's return in August 2001, the children were again removed for unsanitary conditions in January 2002. Placement remained in foster case thereafter due to the parents' "actions[] and inactions" in properly complying with the service plan. Respondent was given a further plan which included training and education in parenting, homemaking, and budgeting, as well as counseling, directives as to involvement in medical care, maintenance of a telephone for emergency situations, and child support. Clear and competent evidence supports the trial court's findings that respondent failed to substantially comply with much of the list. Further, the trial court, after hearing testimony from respondent, found the mother lacked initiative to comply with the trial court's directives, failed to perceive the need for such services, and had failed to recognize the development issues which were the partial basis for the original adjudication of neglect, and thus concluded it was likely the children would not be safe and properly cared for and supervised if returned to the home. The findings of fact therefore support the trial court's conclusion of a probability of repetition of neglect if the juveniles were returned to respondent.

Respondent also contends that the findings of fact are insufficient to support grounds for termination based on failure to make reasonable progress. We again disagree.

As noted *supra*, N.C. Gen. Stat. § 7B-1111(a)(2) provides for termination of parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." *Id.* "Willfulness may be found where a parent has made some attempt to regain custody of the child but has failed to exhibit 'reasonable progress or a positive response toward the diligent efforts of DSS.' " *In re B.S.D.S.*, 163 N.C. App. at 545, 594 S.E.2d at 93 (citations omitted). " '[E]xtremely limited progress is not reasonable progress.' This standard operates as a safeguard for children. If parents were not required to show both positive efforts and positive results, 'a parent could forestall termination proceedings indefinitely by making sporadic efforts for that purpose.' " *Id.* (citations omitted). Thus, our Courts have held that "a respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness 'regardless of her good intentions,' "

and will support a finding of lack of progress during the year preceding the DSS petition sufficient to warrant termination of parental rights under section 7B-1111(a)(2). *Id.* at 546, 594 S.E.2d at 93 (citation omitted).

Here, as discussed *supra*, respondent failed to make adequate progress in response to the court-ordered plan, and reunification efforts were ceased in July 2002. Although respondent has shown sporadic efforts since that time, respondent has failed to make reasonable child support payments, has failed to perceive the need for instruction in areas which led to the children's removal, and has failed to demonstrate initiative to comply with the trial court's directives to correct the conditions which led to removal. Therefore the findings of fact support the trial court's conclusion that respondent failed to make reasonable progress.

In conclusion, the record reveals clear, cogent, and convincing evidence to support the trial court's findings. Although there is evidence to the contrary, "the district court's findings are binding on appeal[.]" *In re T.C.B.*, 166 N.C. App. at 485, 602 S.E.2d at 19. Such findings are sufficient to support the conclusion that grounds existed to terminate respondent's parental rights. Therefore, the trial court's order of termination is affirmed.

Affirmed.

Judge McCULLOUGH concurs.

Judge LEVINSON dissents in a separate opinion.

LEVINSON, Judge dissenting.

I respectfully dissent. Because the record fails to reveal clear, cogent and convincing evidence necessary to support the findings of fact and conclusions of law supporting grounds for termination of respondent-mother's parental rights, the order of the trial court as it pertains to her must be reversed. I make no comment regarding sections I and II of the majority opinion.

As a preliminary matter, I note that I have set forth, in some detail, the evidence presented during the termination hearing. While this may repeat, in some instances, that which the majority opinion outlines, it is necessary to fully explain and discuss my reasoning.

Respondent is the mother of K.W. and J.W., two boys born to different fathers. K.W.'s father currently lives in Nevada and has had little contact with K.W. J.W.'s father, Mr. W., married respondent and moved the family to North Carolina.

In December 2000 respondent took J.W., then an infant, to the hospital because of his "spitting up." The hospital diagnosed J.W. with acid reflux and failure to thrive. DSS was contacted and made two home visits in December 2000. During the first home visit, the DSS worker observed an unsafe environment (because an ax, knife and loaded gun were unsecured), and an unsanitary environment (because of clothes and dirty dishes piled throughout the house). On a follow-up visit the next day, the gun, ax, and knife were secured and the home was clean. Nonetheless, DSS assumed custody of J.W. and K.W. by means of a petition alleging neglect because of unsafe and unsanitary living conditions. In addition, J.W. was alleged to be a neglected juvenile for lack of medical care. By order entered 16 February 2001, the children were adjudicated neglected and their custody continued with DSS.

During 2001, respondent and Mr. W. were allowed increasingly unsupervised and extended visitation. K.W. was returned to the care of respondent and Mr. W. in May 2001; J.W. was returned to their custody in August 2001. DSS continued to maintain placement authority for both boys. On 9 November 2001 a permanency planning hearing was held. In maintaining reunification as the permanent plan, the trial court included the following findings of fact in its order:

> (6) (b) The [respondent and Mr. W.] have complied with the service plan and the psychological assessments have been favorable.
>
> (c) Both children have been home since August, 2001. While the placement has gone well, the Department and GAL do have some concerns over the cleanliness of the home and the odor therein. However, the [respondent and Mr. W.] have progressed a great deal and the situation as it exists today would not justify a removal of the children from that home. The Department and GAL wish to continue to monitor the placement.

During the fall of 2001, the DSS worker visited the home several times each month. She described respondent's housekeeping as "sporadic" and noted that clothes and dirty dishes were often visible. DSS

made two more home visits in January 2002. On 7 January 2002 the home was worse than usual, with dishes and food left out, dirty clothes piled in the laundry room, cans of beans on the floor, no sheets on the beds, and toys strewn about the home. However, when the worker returned two days later, "the house was very clean, laundry room, kitchen, dining room floors, boy[s'] room, and den. It looked like a totally different house[.]" Despite the improvement, on 16 January 2002, the GAL and Attorney Advocate filed a motion for review to address placement and, on 25 January 2002, DSS obtained an order again removing the children from the home.

A subsequent permanency planning hearing was held 8 February 2002. At that time, the permanency goal was changed to a dual plan of reunification and relative placement. The trial court granted custody of the children to DSS, allowed supervised visitation for respondent and Mr. W., and ordered respondent and Mr. W. to comply with a case plan listing fourteen requirements, twelve of which applied to mother:

1. Attend Parenting classes
2. Participate—DSS Homemaker services

. . . .

4. Participate in household budgeting classes with Extension Services
5. Obtain counselling [sic] and treatment as recommended by Dr. Aiello.
6. Pay child support

. . . .

8. Mother obtain and maintain employment with a schedule compatible with the needs of the children
9. Obtain a telephone
10. Attend all medical and dental appointments with children or conference with care providers to maintain familiarity with children's condition
11. Keep and maintain a clean and appropriate home environment
12. Provide evidence of compliance to DSS or GAL on a weekly basis

13. Maintain stable residence and not have boarders or house guests for extended periods of time

14. Sign releases for DSS and GAL to allow communication by DSS and GAL with all service providers above

At the termination hearing, a social worker testified the children were removed from the home the second time due to respondent's inconsistent housekeeping; inconsistent attendance of the children at daycare (notwithstanding the fact respondent was home during the daytime); and inconsistent medical care for the children. With respect to the concern about medical care, the record shows only that (1) J.W. had a cough and a fever of between 102 and 103 degrees for a couple of days in December 2001, and (2) in the fall of 2001, respondent had failed to return phone calls to the doctor concerning test results of J.W.'s scalp fungus. There was no evidence from this period of time concerning a failure to thrive on the part of J.W., or of respondent's failure to provide the children with adequate nutrition.

Following the 8 February 2002 permanency planning hearing, respondent attended every scheduled visitation with the children except one when she had car trouble. On that occasion, respondent called and rescheduled the visit. The DSS social worker testified that respondent's behavior during visits was appropriate. In the spring of 2002, respondent attended the only doctor's appointment scheduled for the children.

In the early summer of 2002, prior to 12 July 2002, the social worker made two unannounced visits to the home. Because respondent was not home either time, the worker was unable to see inside the house. Around the exterior of the house, she observed "a lot of trash and debris," a "busted screen," and pieces of furniture and broken toys in the yard.

Another permanency planning hearing was held 12 July 2002. The goal was changed to "relative placement." All visits between respondent and the children were ceased, and respondent has not been allowed visitation since that time. DSS was relieved of all efforts to work with respondent on her case plan. Respondent nevertheless continued to call the social worker regularly, sometimes as often as once a week, for the following one and one half years, to ask how the children were doing. Respondent telephoned the DSS worker regularly until 4 November 2003. She stopped calling for two months and resumed calling DSS again in January 2004. Respondent continued to

bring items of clothing and money to DSS for the children. Beginning 12 July 2002, respondent was neither informed of the doctors' appointments for the children, nor given the names of their health care providers.

In June 2002 Mr. W. moved to Mississippi and had no further contact with DSS, the children, or respondent.

Following another permanency planning hearing held 8 August 2003, an order was entered which changed the goal to adoption. A DSS worker testified that the change was due to "a number of inconsistencies and a lack of compliance to that list [in the case plan]."

Respondent's mother, Ms. Gibson, and respondent's live-in boyfriend, Mr. Slonecker, testified at the termination hearing. They each attested to the fact that respondent was a good housekeeper and that she kept a clean home. Ms. Gibson stated that, since the children were taken away from her, respondent had matured a great deal and become more responsible. Mr. Slonecker stated that he worked full-time as a carpenter and has a three bedroom home with a yard in a quiet neighborhood. He stated respondent's home was clean and appropriate when they began dating in 2003 and that respondent continued to be a good housekeeper. Mr. Slonecker testified that if the children were returned to respondent, he could watch them at night while respondent worked.

The court terminated respondent's parental rights in both children based on neglect, pursuant to N.C.G.S. § 7B-1111(a)(1), and her failure to correct the conditions leading to the removal of the children from the home, pursuant to N.C.G.S. § 7B-1111(a)(2).

In its order terminating respondent's parental rights, the trial court made 57 findings of fact. On appeal, respondent challenges many of these findings as unsupported by evidence in the record. Specifically, as they relate to the grounds set forth in N.C.G.S. §§ 7B-1111(a)(1) and (a)(2), respondent challenges portions of findings numbers 43, 46, 47, 48, 49, and 55, and contends that the remaining findings of fact do not support these grounds.

I first turn to a review of the applicable law.

"A termination of parental rights proceeding consists of two phases. In the adjudicatory stage, the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists." *In re*

Anderson, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted). "Upon determining that one or more of the grounds for terminating parental rights exist, the court moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 615 (1997). "We review whether the trial court's findings of fact are supported by clear and convincing evidence and whether the findings of fact support the conclusions of law." *Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 (citation omitted).

According to N.C.G.S. § 7B-1111(a)(1) (2003), the ground concerning neglect, a court may terminate one's parental rights where:

> The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.
>
> "Neglect", in turn, is defined as follows:
>
> Neglected juvenile.—A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. . . .

N.C.G.S. § 7B-101(15) (2003).

For a termination of parental rights based on neglect, the trial court must determine whether neglect is present at the time of the termination proceeding. *See In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984). "[E]vidence of neglect by a parent prior to losing custody . . . is admissible in subsequent proceedings to terminate parental rights. The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect[.]" *Id.* at 715, 319 S.E.2d at 232 (citation omitted). The probability of a repetition of neglect must be shown by clear, cogent and convincing evidence. *See Young*, 346 N.C. at 250, 485 S.E.2d at 616.

According to N.C.G.S. § 7B-1111(a)(2), the ground concerning reasonable progress, a court may terminate one's parental rights where:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. . . .

In explaining the application of this ground, this Court recently stated:

> Thus, to find grounds to terminate a parent's rights under G.S. § 7B-1111(a)(2), the trial court must perform a two part analysis. The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. Evidence and findings which support a determination of "reasonable progress" may parallel or differ from that which supports the determination of "willfulness" in leaving the child in placement outside the home.
>
> A finding of willfulness does not require a showing of fault by the parent. Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children.
>
> With respect to the requirement that the petitioner demonstrate that the parent has not shown reasonable progress . . . evidence supporting this determination is not limited to that which falls during the twelve month period next preceding the filing of the motion or petition to terminate parental rights [as it was under the former statute].

In re O.C. and O.B., ––– N.C. App. –––, –––, 615 S.E.2d 391, 396 (2005) (quotations and citations omitted).

In the instant case, the trial court made the following findings of fact. First, findings 1 through 24 deal generally with the procedural history of the motions to terminate parental rights; jurisdiction; and the parties and persons who appeared in court. Findings 25 through 37 concern the circumstances surrounding the 16 February 2001 adjudication of neglect when the children were initially removed from the

home, and the history of actions taken by the trial court as a result of permanency planning hearings. In addition, the court made the following findings which have relevance to the termination of mother's parental rights:

> 38. Since the Court's order on January 25, 2002, the children have been in the full custody and care of DSS and have continuously remained out of the parents' home as of the date of this hearing. At the time of the filing of the motion for termination of parental rights, the children had been out of the parents' home for a total of over 20 months.
>
> 39. These children were neglected by the mother . . . in December 2000 as described by the Court in its order on February 9, 2001. . . .
>
> . . . .
>
> 41. When the children were both placed or returned (after the August 10, 2001 hearing) to the physical care of [mother and Mr. W.] with weekly home visits from the DSS social worker, the parents . . . failed to consistently maintain a safe and sanitary home for them.
>
> . . . .
>
> 45. Up to a point, the mother has kept in contact with the social worker; however, for a period of two and one-half (2½) months she failed to contact the social worker and at other times, she has been somewhat sporadic.

I next turn to specific portions of additional findings of fact which have been challenged on appeal and are essential to my evaluation of this matter.

I first consider finding of fact number 43:

> On February 8, 2002, the Court ordered the parents . . . to participate in a list of 14 services and obligations outlined by the Court and attached to the Court's order which was made available to them. The mother failed to comply with most of the items on the list. She told the social worker that she attended parenting classes but failed to document the same with a certification of completion. The mother did not offer any evidence of such completion to this Court. In fact, enough time has passed that she could have again enrolled in parenting classes in an effort to meet

> this obligation. She failed to follow through with homemaker services. The mother told the social worker she has participated in household budgeting classes but failed to document the same. She has failed to offer any evidence of completion of such classes to this Court. The mother failed to obtain mental health counseling and treatment recommended by Dr. Aiello in a psychological evaluation of the mother. She failed to get a telephone. She failed to keep a clean and safe home environment for the children. . . . The mother has failed to find employment compatible with the needs of her children. She still works at the same position that she did when the children were taken from her custody in December 2000. The mother testified that she had some educational constraints with respect to pursuing other employment; however, the court is concerned with respect to just how much effort has been taken with seeking compatible employment.

There is not clear and convincing evidence in the record that mother "failed to keep a clean and safe home environment for the children." While there was evidence that mother failed to keep a clean and safe home during certain times leading up to the removal of the children, the petitioner produced no evidence of the same conditions for the eighteen month period preceding the termination hearing. Petitioner did not produce any photographs illustrating the workers' testimony concerning the conditions of respondent's home. In fact, the only photographs in the record were those introduced by respondent illustrating that her current home was clean. As late as the permanency planning hearing of November 2001, the trial court itself found that, while the GAL had some concerns about the cleanliness of respondent's home, she "[had] progressed a great deal and the situation as it exists today would not justify a removal of the children from [her] home." The last home visit by DSS occurred in late June or early July 2002. The termination hearing was held in mid-February 2004. The record evidence is uniform in that, for a substantial period of time next preceding the termination hearing, mother kept a clean and safe home, and there is an absence of clear and convincing evidence in the record to suggest she does not, or would not, keep an adequately safe and sanitary home.

There is not clear and convincing evidence in the record that mother "failed to get a telephone", or "failed to comply with most of the items on the list [outlined by the trial court]." The uncontradicted evidence showed respondent attended parenting classes; obtained a telephone and provided the phone number to DSS by the summer of

2002;[1] attended the children's medical appointments; maintained a clean and appropriate home environment for eighteen months preceding the termination hearing; provided evidence of ongoing compliance to DSS approximately once each week; maintained a stable residence with no boarders or guests for extended periods of time following the entry of the case plan; maintained employment; and signed releases for DSS and the GAL.

There was not clear and convincing evidence to support the court's finding that mother "did not offer any evidence of . . . completion of parenting classes to this Court." On the contrary, respondent testified she completed the parenting course, and a DSS worker testified that the parenting classes requirement was satisfied.

Nor is there clear and convincing evidence in the record that mother "failed to obtain mental health counseling and treatment recommended by Dr. Aiello in a psychological evaluation . . . ." The record shows respondent obtained a psychological evaluation. Furthermore, there was significant evidence that she followed the recommendations of that evaluation. One DSS worker, who was assigned to the case in the spring of 2001, testified that respondent complied with all the psychological recommendations. A different worker, assigned to the case one year later, contradicted this testimony, stating there had been no compliance with the recommendations of the psychological evaluation during the previous worker's tenure. Respondent testified that she had attended counseling but stopped once the children were returned to her care. When respondent returned to the counseling agency to apply for further counseling, she was told she did not require their services. And in three separate court orders, representing hearings held 11 May 2001, 10

1. The majority relies on the testimony of social worker Paige Black to establish mother failed to obtain a telephone and that Ms. Black was unable to contact mother from June 2002 until April 2003. However, Ms. Black's testimony does not establish that she even attempted to call mother after 12 July 2002. For the period of time preceding 12 July 2002, Ms. Black testified she was not able to reach mother at the numbers provided "at that residence." Ms. Black was referring to the residence where mother lived with her husband before she moved into her duplex apartment in August 2002. All of Ms. Black's testimony indicates her efforts to contact mother occurred prior to the 12 July 2002 hearing terminating reunification. Ms. Black testified, "When we were released of reunification efforts on July 12th, that's when my actual efforts with [mother] ceased[.]" While she was the worker, Ms. Black testified that mother called her "regularly." The worker assigned to the case from April 2003 to February 2004, Ann Verdin, testified that mother called her regularly as well. Respondent mother testified she gave Ms. Black her telephone number when she moved into her duplex apartment in August 2002. Mother testified she gave her number to Ms. Verdin as well and, that as of the date of the hearing, she had had a working telephone since August 2002.

August 2001, and 9 November 2001, the trial court found that "[Respondent has] complied with the [case] plan and the psychological assessments have been favorable." No psychological evaluation was offered into evidence. While I recognize that one social worker stated that the psychological requirements were not met, my review of the record demonstrates that the evidence is not clear and convincing on this point.

I next address portions of finding of fact number 46:

> The Court had the opportunity to view the witnesses, hear their testimony, and judge their credibility. The Court had the opportunity to judge the attitude of the mother as a witness and to determine whether the neglect would likely reoccur if the children were returned to her care. The mother has disclosed a lack of initiative on her part to comply with the Court's directives; she has failed to perceive or determine that these services mentioned by the Court were needed by her to provide or to assure the Court that she could provide a safe and sanitary environment for her minor children and for her own overall well being.

Notwithstanding the trial court's correct observation that one of its functions is to determine the weight and credibility of witness testimony, this does not divest this Court of its responsibility to evaluate whether the evidence presented meets the threshold of clear and convincing evidence. As it concerns the court's findings that mother "lacked initiative" and "failed to perceive or determine that the[] services mentioned by the Court were needed by her," there is simply insufficient evidence in the record to support these generalized findings. The evidence was uncontradicted that respondent had complied with many of the directives in her case plan—something the trial court itself observed in its previous orders. More importantly, all the evidence showed that, for at least one year prior to the termination hearing, respondent had maintained a safe and sanitary home.

I next address finding of fact number 47:

> The mother has testified that she would be able to meet the needs of the children if placed with her immediately. However, she is unable to articulate any plan by which the children would be provided for after she goes to work.

Respondent did articulate a plan for her children's care while she is at work. She and Mr. Slonecker both testified that Mr. Slonecker would be responsible for the children while she worked.

I next address finding of fact number 48:

> The mother has lived with Mr. W. in at least two residences since these cases began; at times others have resided with them. One of the Court's directives was to maintain stable housing and not have guest[s] or boarders for extended periods. She has lived for the past year and [a] half in a duplex apartment in Cumberland County, North Carolina which she admits is inadequate and not in a community conducive for the children. Specifically, it would not be an environment in which she would be comfortable with the children being outside of the home. Her response to this circumstance is to move in with her boyfriend while at the same time maintaining her own apartment all of which, in and of itself, shows instability on her part. She has offered no evidence of any attempt to locate any other residence.

At the time of the termination proceedings, respondent had maintained her duplex apartment for one and one half years. There was no evidence she had others residing with her during that time or had "boarders for extended periods." While continuing to maintain her apartment, respondent moved in with Mr. Slonecker, whom she had been dating for one year. While respondent acknowledged that her duplex apartment was in an undesirable neighborhood, this is more akin to evidence of poverty than to "unstable" housing. The inference that respondent has failed to maintain stable housing is not reasonably supported by the evidence.

I next review the following underlined portions of finding of fact number 49:

> The . . . actions of the mother demonstrate a continuation of her failure to make a proper plan for her children. She has failed to do these things necessary to show she will be able to appropriately parent her children. They were placed back in her home in 2001 and she was unable to properly care for them and they were again removed by the Court. After being specifically told what was expected of her to do to demonstrate an improvement of her parenting skill and ability, she failed to do very little except visits with her children. She stated on the stand that she was wrong or at fault about her children; she does not perceive the need to comply with the court's directives (service plan) to demonstrate to the Court that she is able to provide a safe and sanitary environment for her children. She failed to perceive the meaning of [J.W.'s] condition (failure to thrive) in December 2000; she failed

> to perceive the danger, unsafe and unsanitary conditions of her home in December 2000 and in January 2002 (period the children were back in her home). At the time of her testimony in this hearing, she still discloses her failure to perceive the reasoning for the removal of her children. For example, she does not recognize development issues of minor children which is partially evidenced in [J.W.'s] case of quick recovery upon his receiving proper care. It is likely that these children would not be safe and properly cared for and supervised if placed in her home.

The uncontradicted evidence showed respondent had a plan for the children. She and the children would live with Mr. Slonecker. There were two unoccupied bedrooms in the home and Mr. Slonecker would babysit in the evenings while she worked. Some of the evidence showed respondent had imperfect compliance with certain requirements of her case plan. Overall, however, the evidence demonstrated that she made significant improvements to her housekeeping practices; was consistently attentive to the medical needs and concerns of the children; and was generally compliant with the children's attendance at daycare when they were last in her care. The record shows only that respondent had maintained a clean home for at least one year and had maintained extensive contact with DSS for over eighteen months following the end of her visits. Respondent's circumstances have changed markedly since the children were removed: she has demonstrated consistency in her housekeeping, housing, employment, and concern for the children; she has separated from her husband; re-established contact with her mother; and developed a stable relationship with Mr. Slonecker.

With respect to the court's finding that respondent "failed to perceive the meaning of [J.W.'s] condition (failure to thrive) in December 2000," I observe, first, that it was respondent who took J.W. to the hospital due to concerns about symptoms associated with acid reflux and failure to thrive. Secondly, there are few, if any, facts set forth in the 16 February 2001 order adjudicating J.W. neglected that suggests mother's omissions concerning medical care for the children were significant: the court found that "the respondent parents have attended some medical care appointments for . . . [J.W.] . . . in an attempt to provide better care for [him]." In addition, the neglect adjudication order stated only that J.W. was diagnosed with failure to thrive and, further, that J.W. "requires some special medical care. . . ." While these findings, and the conclusion of neglect, have some relevance to the current motion to terminate parental rights, these estab-

lished findings related to mother's failure to attend to the medical needs of J.W. are, frankly, negligible and mostly unhelpful to petitioner in this termination matter.

With respect to the finding that mother "failed to perceive the danger, unsafe and unsanitary conditions of her home in December 2000 and in January 2002," I note, first, that the uncontradicted evidence was that respondent cleaned her home by the second DSS home visit in December 2000. The weapons had been secured and have not been noted as a problem since. In 2002, the evidence was that respondent's housekeeping was inconsistent. By the second home visit, in January 2002, respondent had cleaned the home. The evidence does not support the inference, by clear and convincing evidence, that respondent "failed to perceive" the dangers of an unsafe and unsanitary home.

I next address the following portion of finding number 49:

> At the time of her testimony in this hearing, she still discloses her failure to perceive the reasoning for the removal of her children. For example, she does not recognize development issues of minor children which is partially evidenced in [J.W.'s] . . . quick recovery upon his receiving proper care.

Respondent's testimony corroborated the two diagnoses given to J.W. at the time of his hospitalization in December 2000: failure to thrive and acid reflux. Respondent stated the children were initially taken away from her due to the house being unkempt and J.W. having been diagnosed with acid reflux and failure to thrive. Respondent had demonstrated to the satisfaction of the court, by August 2001, that she could care for J.W. Respondent described the types of pureed food she had been instructed to feed J.W. during the time he was returned to her care. There was no evidence J.W. again exhibited failure to thrive while in respondent's care. From the foregoing evidence, it does not follow that respondent did not "perceive" the reason for the removal of the children or recognize developmental issues.

I next address the underlined portion of finding number 55:

> The children are living in the same foster home. They have adjusted well to the foster family. Both children are healthy. . . . [J.W.] is no longer suffering from failure to thrive. The boys are in need of a stable, safe and secure environment. They have now been in the same home for over two (2) years and this home has been a [good] environment. The mother has not seen the children

> for more than one year. . . . The priorities of the mother and Mr. W are inconsistent with the welfare of their children.

For the reasons already discussed, the record does not support a finding that respondent's priorities are "inconsistent with the welfare of [the] children." Respondent maintained a clean home and displayed consistent concern for the welfare of the children. And, frankly, on this record, it is unclear what the trial court meant by "[t]he priorities of the mother . . . are inconsistent with the welfare of [the] children."

I now consider whether the findings of fact, which are supported by clear, cogent and convincing evidence, are sufficient to support the court's conclusion that grounds exist to terminate respondent's rights based on neglect, G.S. § 7B-1111(a)(1), and failure to correct the conditions leading to the removal of the children, G.S. § 7B-1111(a)(2).

First, I easily conclude that the findings of fact which are supported by sufficient evidence in the record do not support grounds for termination pursuant to G.S. § 7B-1111(a)(1) (neglect). Here, the findings do not show a probability of a repetition of neglect based upon any one or more of the central arguments made by DSS: keeping a clean home; attentiveness to medical care; and stable residence and employment. And, as already explained, mother's imperfect compliance with the case plan does very little on these facts to establish, by clear and convincing evidence, neglect under G.S. § 7B-1111(a)(1).

I similarly conclude that the findings of fact which are supported by sufficient evidence in the record do not support grounds for termination pursuant to G.S. § 7B-1111(a)(2) (reasonable progress). The circumstances leading to the children's removal from the home were an unsafe and unsanitary home environment, and inconsistent medical care for J.W. For all the reasons discussed above, the record evidence does not demonstrate, and the supported findings of fact do not support, a conclusion that mother failed to make reasonable progress in correcting those conditions which led to the removal of the children. And, again, mother's imperfect compliance with the case plan does very little on these facts to establish, by clear and convincing evidence, failure to make reasonable progress under G.S. § 7B-1111(a)(2).

As to both grounds found by the trial court (neglect and failure to make reasonable progress), it is clear that the trial court relied, in very large measure, on mother's alleged failures to abide by the case

plan. However, compliance with action items requested by DSS, or ordered by the court, does not necessarily establish or defeat the grounds for termination set forth in G.S. § 7B-1111. By way of illustration, there is little or nothing in this record to explain how psychological treatment related to the need for mother to keep a clean and sanitary home, a central part of this termination matter. The psychological report wasn't even admitted into evidence. Even if a clinical regimen were recommended as a result of the "favorable" assessment, and mother failed to abide by the same, DSS has not demonstrated a connection between such a failure and the statutory termination grounds alleged. Nor is it clear why, on these facts, mother's failure to gain differing employment with daytime hours—something referenced in finding of fact 43—necessarily supports either ground for termination. Or why her evening work schedule is necessarily "incompatible" with the needs of the children. Not all parents work "bankers' hours." While it is clear that the court urged—and respondent resisted—efforts to secure employment doing something other than serving cocktails at a nighttime establishment, it is unclear how this arguable failure to comply with the case plan necessarily helps establish the termination grounds alleged. Furthermore, it is unclear what mother failed to "perceive"—or what "initiative" she failed to demonstrate.

In conclusion, the findings and record evidence fall short of that required to terminate the relationship between mother and these two children. Accordingly, I would reverse those portions of the order terminating mother's rights over J.W. and K.W.

DIANA L. COLEY, GERALD L. BASS JOHN WALTER BRYANT, RONALD C. DILTHEY, AND ALL OTHER TAXPAYERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS v. THE STATE OF NORTH CAROLINA AND NORRIS TOLSON, SECRETARY OF REVENUE, DEFENDANTS-APPELLEES

No. COA04-1141

(Filed 4 October 2005)

1. Appeal and Error— minor violations of appellate rules—no dismissal

Appellate review of a trial court dismissal was granted under Appellate Rule 2 despite several violations of the Appellate Rules. The violations were not substantive enough or egregious enough

for dismissal; moreover, not dismissing this case does not create an appeal or lead to examining issues not raised by appellant.

2. Constitutional Law— income tax increase—not a retroactive tax under North Carolina Constitution

A Session Law raising an income tax rate was not a retrospective tax on an "act previously done" in violation of N.C. Const. art. I, § 16. The action was properly dismissed under Rule 12(b)(6).

Judge CALABRIA dissenting.

Appeal by plaintiffs from order and judgment entered 6 August 2004, *nunc pro tunc* 1 July 2004, by Judge Henry V. Barnette, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 20 April 2005.

Boyce & Isley, PLLC, by G. Eugene Boyce, R. Daniel Boyce, Philip R. Isley and Laura B. Isley, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart and Special Deputy Attorney General Norma S. Harrell.

McGEE, Judge.

This case challenges the constitutionality of Session Law 2001-424, under which the highest income tax rate was temporarily raised from 7.75 to 8.25 percent. 2001 N.C. Sess. Laws, ch. 424, § 34.18(a). The bill was signed into law on 26 September 2001, and the new tax rate became "effective for taxable years beginning on or after January 1, 2001[.]" *Id.* at § 34.18(b). Plaintiffs filed a class action suit against the State of North Carolina and Norris Tolson, North Carolina's Secretary of Revenue, (collectively, defendants) on 25 April 2003, seeking a declaration that Session Law 2001-424 violated Article 1, Section 16 of the North Carolina Constitution (Section 16). Plaintiffs also sought refunds of individual income taxes paid on wages, earnings, and all other taxable income for 2001.

Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on 24 June 2003. Plaintiffs filed a motion for judgment on the pleadings on 25 August 2003, and a motion for summary judgment on 5 January 2004. The trial court heard the matter on 16 January 2004. In an order filed 6 August 2004, *nunc pro tunc* 1 July

2004, the trial court denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss. Plaintiffs appeal.

I.

[1] We note several violations of the North Carolina Rules of Appellate Procedure by plaintiffs: (1) plaintiffs' brief lacks a Statement of the Facts in violation of N.C.R. App. P. 28(b)(5); (2) plaintiffs' brief lacks a Statement of the Grounds for Appellate Review in violation of N.C.R. App. P. 28(b)(4); (3) the footnotes in plaintiffs' brief and reply brief do not comply with the font requirements set out in N.C.R. App. P. 28(j)(1); and (4) plaintiffs failed to timely file an Appeal Information Statement in violation of N.C.R. App. P. 41(b)(2).

Plaintiffs' noncompliance with the rules listed above is not substantive nor egregious enough to warrant dismissal of plaintiffs' appeal. *See, e.g., N.C. Farm Bureau Mut. Ins. Co. v. Allen*, 146 N.C. App. 539, 542, 553 S.E.2d 420, 422 (2001). This Court may consider an appeal that violates the Rules of Appellate Procedure to "prevent manifest injustice." N.C.R. App. P. 2. Plaintiffs have properly assigned error and have properly argued those assignments of error. Therefore, we invoke Rule 2 and address the merits of plaintiffs' appeal. The decision by this Court not to dismiss the present case for minor rules violations does not lead us to "create an appeal for an appellant" or to examine any issues not raised by the appellant. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam).

II.

[2] Plaintiffs contend that the trial court erred in granting defendants' motion to dismiss. Under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003), a motion to dismiss is proper when a complaint fails to state a claim upon which relief can be granted. Our Supreme Court has stated that a motion to dismiss should be granted when: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002); *see also Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 65, 614 S.E.2d 328, 334 (2005). Plaintiffs' complaint alleges that Session Law 2001-424, by increasing the income tax rate for the highest tax bracket, is unconstitutional under Section 16, which prohibits the retrospective taxation of

"sales, purchases, or other acts." Because we determine that Section 16 does not apply to Session Law 2001-424, we find that the trial court properly granted defendants' motion to dismiss.

A.

The history of Section 16 begins with our Supreme Court's holding in *State v. Bell*, 61 N.C. 76 (1867) (per curiam). In *Bell*, a law had been ratified on 18 October 1865 authorizing a tax "on the amount of all purchases made in or out of the State, whether for cash or on a credit, by any merchant, etc., buying or selling goods, wares or merchandise[.]" *Id.* at 80. The tax was effective "during the twelve months next preceding the first of January, 1866." *Id.* The defendant merchant refused to pay the tax on any purchases he made prior to 18 October 1865. *Id.* at 80-81. The defendant was tried and convicted for a violation of the law. *Id.* at 81. On appeal, the defendant argued that the tax was an *ex post facto* law. *Id.* In the alternative, defendant argued that the tax was a retrospective law and therefore was against "the spirit, if not the letter, of the Constitution." *Id.* at 82.

Our Supreme Court held that the tax was not an *ex post facto* law, since *ex post facto* laws only involve "matters of a criminal nature." *Id.* at 81-82. The law at issue did not make the defendant's actions criminal until he refused to abide by the tax, and therefore "in respect to such criminality [the law was] altogether prospective." *Id.* at 82. The Court also held that the law was not unconstitutionally retrospective. *Id.* at 85-86. The Court noted that the State has a broad and "essential" power to tax, and stated that the Court could "see nothing to prevent the people from taxing themselves, either through a convention or a legislature, in respect to property owned or a business followed anterior to the passage of the [law imposing the tax]." *Id.* at 86.

In response to *Bell*, the following provision to the North Carolina Constitution was adopted at the 1868 North Carolina Constitutional Convention: "No law taxing retrospectively sales, purchases, or other acts previously done, ought to be passed." N.C. Const. of 1868, art. I, § 32. The provision today reads: "No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted." N.C. Const. art. I, § 16.

Our Supreme Court has only twice had the opportunity to interpret this provision of our State's Constitution. In 1877, the Court struck down a tax that was enacted on 26 May 1876 and that levied a

twenty-five cent tax on each one hundred dollars of merchandise purchased during the twelve months previous to 1 May 1876. *Young v. Town of Henderson*, 76 N.C. 420, 423-24 (1877). The Court recognized that the tax, as a retrospective tax on purchases, expressly violated the North Carolina Constitution. *Id.* at 424.

The Court later examined a tax levied by this State's Unemployment Compensation Law, ch. 1, Public Laws 1936 (Extra Session), which was ratified on 16 December 1936. *Unemployment Compensation Com. v. Trust Co.*, 215 N.C. 491, 499, 2 S.E.2d 592, 598 (1939). The Unemployment Compensation Law had as its purpose, in part, "to provide 'for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.' " *Id.* at 500, 2 S.E.2d at 598 (quoting Unemployment Compensation Law § 2). The law taxed employers who "had in [their] employ on or subsequent to 1 January, 1936, one or more individuals performing services for [them] within this State." *Id.* at 500, 2 S.E.2d at 598; *see also* Unemployment Compensation Law § 19(e). If one of these employers had eight or more employees " 'in each of twenty different weeks within either the current or the preceding calendar year[,]' " the employer was subject to the tax. *Unemployment Compensation Com.*, 215 N.C. at 500, 2 S.E.2d at 598 (quoting Unemployment Compensation Law § 19(f)). The Court noted that to be an employer subject to the tax,

> it [was] not necessary that such employing unit should have had in its employ eight or more individuals in each of twenty different weeks of 1936. It [was] sufficient if it employed eight individuals in each of twenty different weeks *within the preceding calendar year*, if it continue[d] to be the employer of one or more persons during 1936. To determine the status of an [employer], in ascertaining whether it is liable for the tax, the [North Carolina Unemployment Commission][wa]s empowered to examine [the employer's] status . . . not only during 1936 but during 1935 as well.

Id. at 500, 2 S.E.2d at 598.

Our Supreme Court found that the tax violated the North Carolina Constitution. *Id.* at 501, 2 S.E.2d at 599. The Court found that a tax on employment or "upon the maintenance of the status of an employer" was a tax upon an act or acts. *Id.* at 501, 2 S.E.2d at 599. The Court also noted the irrelevancy of the employer's status in 1935 and 1936 to the purpose of the tax:

> [S]uch unemployment as occurred during the year 1936, for which the contributions were to be made, had already occurred. The unemployed could not, under the requirements of the statute, qualify to receive compensation for their involuntary unemployment during that year. In so far as 1936 is concerned, the contributions are required for a purpose impossible to be accomplished. The "burden which now so often falls with crushing force upon the unemployed worker and his family" had already been met by those involuntarily unemployed, and there was no possibility of relief under the act, even though contributions for that year [were] required.

Id. at 501, 2 S.E.2d at 598-99 (quoting Unemployment Compensation Law § 2).

It is under this framework that we examine the case before us.

B.

Plaintiffs argue that Session Law 2001-424 enacted a tax on wages and other income already earned, and thus is a retroactive tax in violation of Section 16. Defendants argue in their cross assignment of error that the trial court erred in finding that Section 16 applies to Session Law 2001-424. We find that the subject of defendants' cross assignment of error is dispositive of this case.

The text of Section 16 reads, in relevant part: "No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted." N.C. Const. art. I, § 16. We must determine whether the increase of an income tax rate is included within the scope of Section 16. " 'Issues concerning the proper construction of the Constitution of North Carolina "are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments." ' " *Stephenson v. Bartlett*, 355 N.C. 354, 370, 562 S.E.2d 377, 389 (2002) (citations omitted). In addition,

> Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished. Inquiry should be directed to the old law, the mischief, and the remedy. The court should place itself as nearly as possible in the position of the men who framed the instrument.

> A court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided.

Perry v. Stancil, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) (citations omitted); *see also State v. Webb*, 358 N.C. 92, 94, 591 S.E.2d 505, 509 (2004).

We begin by looking at the plain language of Section 16. *Martin v. State of North Carolina*, 330 N.C. 412, 416, 410 S.E.2d 474, 476 (1991). The plain language does not indicate in any way that the prohibition on retrospective taxes included a prohibition on a retrospective increase on an income tax rate. Therefore, the intent of the General Assembly, as evidenced by its choice of language, does not indicate that Section 16 applies to Session Law 2001-424.

Furthermore, the history surrounding the ratification of Section 16 does not demonstrate that the drafters intended to include income taxes within the scope of Section 16. Section 16 was enacted in response to *State v. Bell*, wherein the Court upheld a criminal conviction for the defendant-merchant's failure to pay retrospective taxes on purchases. *Bell*, 61 N.C. at 89. The historical situation behind the drafting of Section 16 involved sales and purchases, as specifically mentioned in Section 16, and did not surround the situation of an increased income tax rate, or even income taxes at all.

We also find that the doctrine of *ejusdem generis* suggests that the application of Section 16 to Session Law 2001-424 is inappropriate.

> " 'In the construction of statutes, the *ejusdem generis* rule is that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.' "

Smith v. Smith, 314 N.C. 80, 87, 331 S.E.2d 682, 686-87 (1985) (citations omitted). Under *ejusdem generis*, only terms similar to "sales" and "purchases" can be included in the definition of the term "other acts." As distinguished from a singular, distinct "sale" or "purchase," taxation on income is a complicated procedure by which net income earned over the course of a fiscal year is taxed. Furthermore, at the time Session Law 2001-424 was enacted, individuals' net income for

the year 2001 had not yet been, and could not yet be, determined. As a result, we cannot find that an increase in an income tax rate is properly included within the term "act."

Finally, we find this case to be distinguishable from *Unemployment Compensation Com.*, where our Supreme Court found that the tax at issue was a tax upon an act or acts. 215 N.C. at 501, 2 S.E.2d at 599. In *Unemployment Compensation Com.*, an entirely new tax was created. *Id.* at 499, 2 S.E.2d at 598. In addition, an employer could be taxed based on the employer's status in the year prior to that during which the statute authorizing the tax was enacted. *Id.* at 500, 2 S.E.2d at 598. The futility of such legislation was noted by the Court: "In so far as 1936 is concerned, the contributions are required for a purpose impossible to be accomplished. . . . [T]here was no possibility of relief under the act, even though contributions for that year [were] required." *Id.* at 501, 2 S.E.2d at 599.

In contrast, this case involves a new tax rate, not an entirely new tax. Moreover, the new tax rate began to apply only in the year in which the statute was enacted. At this point, neither an individual's annual income nor tax liability under the statute had yet been determined. Furthermore, the increased tax rate was not ineffectual in light of any purpose of Session Law 2001-424. We find that although an employer's status at a previous time may be correctly interpreted under *Unemployment Compensation Com.* to be within the definition of an "act," the total amount of an individual's income for a year which had not yet concluded cannot be similarly defined.

Because the increase in the income tax rate under Session Law 2001-424 is not a tax upon an act, we find that the statute is constitutional. The trial court properly granted the motion to dismiss. We therefore need not consider plaintiffs' argument that the trial court erred by denying plaintiffs' motion for summary judgment.

Affirmed.

Judge ELMORE concurs.

Judge CALABRIA dissents with a separate opinion.

CALABRIA, Judge, dissenting.

Because I believe that Session Law 2001-424 is a retrospective tax in violation of Article I, Section 16 of the North Carolina Constitution, I respectfully dissent.

Article I, Section 16 provides that, "[n]o law taxing retrospectively sales, purchases, or other acts previously done shall be enacted." The majority attempts to dismiss plaintiffs' appeal by holding that "an increase in an income tax rate is [not] properly included within the term 'act.' " While I agree that "constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption," *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) (citations omitted), I do not concur with the interpretation of Article I, Section 16 reached by the majority in the instant case.

While it is axiomatic that "[t]he Legislature has an unlimited right to tax all persons domiciled within the State, and all property within the State," such right only exists to the extent it "has not been limited either by express words of the State Constitution or by plain implications." *Pullen v. Commissioners*, 66 N.C. 361, 362 (1872). Prior to the adoption of Article I, Section 16, our Supreme Court, in *State v. Bell*, 61 N.C. 76 (1867), considered to what extent the North Carolina Constitution limited the legislature's enactment of not only retrospective tax laws but also any other law retrospective in nature. In *Bell*, our Supreme Court stated that with regard to retrospective statutes not applying to crimes and penalties, "[t]he omission of any such prohibition in the Constitution of the United States, and also of the State [of North Carolina], is a strong argument to show that retrospective laws, merely as such, were not intended to be forbidden." *Id.*, 61 N.C. at 83. The Court went on to hold that,

> [w]ith th[e] large and essential power of taxation unrestrained, except where it may come in conflict with the Constitution of the United States, with a well established right to pass a retrospective law which is not in its nature criminal, we can see nothing to prevent the people from taxing themselves, either through a convention or a legislature, in respect to property owned or a business followed anterior to the passage of the ordinance or the statute.

Id., 61 N.C. at 86.

It is certainly true, as the majority points out, that the controversy decided in *Bell* involved a criminal conviction for the defendant's failure to pay a retrospective tax on purchases. However, the ramifications of the *Bell* decision, which prompted the enactment of Article I, Section 16, were clearly broader than enabling the legislature to enact retrospective laws taxing purchases. Indeed, *Bell* expressly gave the legislature the freedom to tax the citizens of North Carolina retro-

spectively without fear of constitutional infirmity. By reviewing the legislative history that preceded the submission of Article I, Section 16 to the delegation, it is clear that the Bill of Rights Committee ("the Committee") considered the broad sweep of our Supreme Court's ruling. While the initial proposed amendments contained the phrase "nor ought any law to be made taxing sales or purchases *or transactions of any sort* made before the passage of such law," the Committee subsequently replaced "transactions of any sort" with the phrase "acts previously done." This revision recognizes an intent on the part of the Committee to expand the protections of Article I, Section 16 beyond taxes on purchases, sales, and transactions, and to prevent retrospective taxes by our legislature on all acts. This proposition is further bolstered by the placement of this provision in our State Constitution, not within Article V, containing clauses dealing with finance, but within Article I, denominated as the "Declaration of Rights." It is clear that this provision was not something to be construed narrowly but to be read in context as a part of the fundamental rights of all citizens to be free from retrospective taxation.

In any event, the cases interpreting the language of this provision support the conclusion that the term "other acts" should be read expansively and not limited in the manner proposed by the majority. In *Unemployment Compensation Com. v. Trust Co.*, 215 N.C. 491, 2 S.E.2d 592 (1939), our Supreme Court addressed the meaning of "other acts" as contained in Article I, Section 16. The tax considered by the Court in *Unemployment Compensation Com.* was essentially a tax "upon the maintenance of the status of an employer" measured by the number of persons the taxpayer employed. *Id.* In the State's brief to the Court, the Attorney General argued for the same statutory construction adopted by the majority in this case, urging that the canon of statutory construction, *ejusdem generis*, be adopted to limit the meaning of the term "other acts" to acts similar to sales or purchases. The Court rejected such a construction and stated that: "the requirement that employers make contributions 'in respect to employment' is in effect a tax upon an act or acts. If it be considered a tax upon the maintenance of the status of an employer, even then it is essentially a tax upon an act. To maintain the status of an employer one must employ and pay wages." *Id.*, 215 N.C. at 501, 2 S.E.2d at 599. In *Unemployment Compensation Com.* our Supreme Court had the opportunity to limit the phrase "other acts" and declined to do so. As such, it seems illogical to conclude that a tax based on the number of persons a taxpayer employs is any closer to a "purchase" or "sale" than is the act of earning income.

Although the majority tries to distinguish the Supreme Court's holding in *Unemployment Compensation Com.* from the facts of the instant case, its reasoning is unavailing. The majority first points out that, unlike *Unemployment Compensation Com.*, this case does not involve an entirely new tax. While this may be true, this distinction is not material to the issue in the case at bar. The issue of whether the tax is new or merely an increase in a tax rate is not in any way determinative of whether the term "other acts" encompasses a tax on income. There is no law cited by the majority that stands for the proposition, and it seems illogical to conclude that this provision would be inapplicable to a retrospective raise in the sales tax rate, requiring citizens to pay additional taxes on purchases previously made.

The majority also tries unsuccessfully to distinguish the instant case by arguing that unlike the tax at issue in *Unemployment Compensation Com.*, the tax of Session Law 2001-424 "began to apply only in the year in which the statute was enacted." However, this premise, if valid, is not determinative as to the issue of whether a tax on income can be considered a tax on an "act" under the meaning of Article I, Section 16. If taken as true, this conclusion only supports the proposition that the income tax law in the instant case is not "retrospective" within the meaning of Article I, Section 16. It does not serve to distinguish the holding of *Unemployment Compensation Com.* that the term "other acts" should be broadly defined.

Regardless of the majority's belief that the tax in the instant case is not retrospective in nature, by holding that Article I, Section 16 does not protect against *any* retrospective tax on income, the majority has opened the door for the legislature to raise the tax rate for years in which assessments and payments have clearly been made, whenever they feel a budget crisis calls for such a measure. Such a broad holding will subject the citizens of this State to arbitrary and unfair taxation that is inapposite with our nation's long history of disfavoring the retrospective application of laws and will allow our legislature unlimited authority to tax in a manner that is inconsistent with both the letter and spirit of our Constitution.

Because I believe that income taxes may be subject to the restrictions set forth in Article I, Section 16, I next address the issue of whether Session Law 2001-424 is "retrospective." Appellants contend that under the provisions of the Individual Income Tax Act they were required to "pay" taxes throughout the year pursuant to mandatory withholding and reporting statutes. As a result, appellants

argue the increased tax rate resulting from the enactment of Session Law 2001-424 represented a retrospective tax on acts previously done to the extent that it required additional taxes to be paid on income earned between 1 January 2001 and the enactment of Session Law 2001-424 on 26 September 2001.

Appellants first contend that the trial court erred in concluding that taxes can only be "paid" annually upon the filing of the 15 April tax return. North Carolina General Statutes § 105-134 (2003) provides that: "[t]he general purpose of [the Individual Income Tax Act] is to impose a tax for the use of the State government upon [] taxable income collectible annually[.]" Such tax "from the time it is due and payable, [becomes] a debt from the person . . . to the State of North Carolina." N.C. Gen. Stat. § 105-238 (2003). Under N.C. Gen. Stat. § 105-134.3 (2003), "[t]he tax imposed by [the Individual Income Tax Act] shall be assessed, collected, and paid in the taxable year following the taxable year for which the assessment is made, *except as provided to the contrary in Article 4A of this Chapter.*" Emphasis added. However, Article 4A of the Individual Tax Act creates certain mandatory requirements for employees and self-employed individuals whereby portions of income received must be withheld and remitted to the Secretary of State. Specifically, N.C. Gen. Stat. § 105-163.2 (a) requires employers to "deduct and withhold from the wages of each employee the State income taxes *payable* by the employee on the wages . . . allow[ing] for the exemptions, deductions, and credits to which the employee is entitled under Article 4[.]" Emphasis added. Employers, including those who are self-employed, are required to file returns based on these withholdings quarterly, monthly, or semiweekly as directed by N.C. Gen. Stat. § 105-163.6, and the failure to make such returns and withholdings can result in criminal as well as civil interest penalties.

From a reading of the relevant statutes under the Individual Income Tax Act, it is clear and appellees do not dispute, that North Carolina has adopted the "pay-as-you-go" method of taxation, whereby certain residents are required to remit a portion of their income received to the State of North Carolina on a statutorily designated basis, well in advance of the actual date on which their taxes are assessed. Furthermore, although the State contends otherwise, I agree with appellants that the required withholdings under Article 4A are "payments" toward tax liability and not merely deposits. The collection statutes under Article 4A are replete with the terms "payable" and "paid" in reference to the required advance remittances. Also, the

North Carolina Department of Revenue Administrative Code expressly provides that North Carolina does not use a deposit system for income taxes withheld. 17 N.C.A.C. 6C.0201. Instead, our legislature has provided that taxes are a debt when they become due. For taxpayers who are either employees or self-employed, this debt becomes due not annually, but quarterly, monthly, or semi-weekly as provided by statute. As the employee withholding is not a deposit but rather the satisfaction of a debt, it is logical to conclude that the required remittances represent the payment of an income tax obligation or debt under the Individual Income Tax Act.

Appellants next contend that if the State of North Carolina requires them to pay their taxes in advance, and such payment was made, that any action by the legislature raising the income tax rate for taxes already paid is retrospective within the meaning of Article I, Section 16. As applied to statutes, the words "retroactive" and "retrospective" may be regarded as synonymous and may broadly be defined as having reference to a state of things existing before the act in question. *Black on Interpretation of Laws*, 247. In other words, "the application of a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment." *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980). However, a statute is not unconstitutional simply because it is applied to facts which were in existence before its enactment. *Wood v. Stevens & Co.*, 297 N.C. 636, 650, 256 S.E.2d 692, 701 (1979). "Instead, a statute is impermissibly retrospective only when it interferes with rights which had vested or liabilities which had accrued prior to its passage." *Id.*

In the instant case, the tax created by our legislature immediately placed appellants in arrears on taxes already paid by increasing the rate of taxation on income earned prior to the enactment of Session Law 2001-424. By the nature of our taxation system, taxes are required to be paid in advance of April 15 and are spent by our legislature upon such payment in advance of April 15. By creating the obligation for taxpayers to make these payments in advance, taxpayers governed by the collection statutes in Article 4A, are subject to a debt or liability that must be dispensed. Although it is true that the Individual Income Tax Act taxes individuals based on net income for a one year period, the adoption of "pay-as-you-go" taxation has effectively required taxpayers to pay taxes incrementally on income earned over smaller periods of time. By paying their remittance, the tax liability for that income earned should be deemed satisfied to the

degree a taxpayer has not underpaid based on tax statutes in effect prior to that earning period. That is to say that although the General Assembly is not prevented from levying a tax payable in the future, based upon the income of periods ending after the enactment of the levy, it may not levy a tax that alters the liabilities of taxpayers that have already accrued prior to the enactment of the statute. Such a tax in my opinion is retrospective as a matter of law and repugnant to the Constitution of this State.

As I believe that Session Law 2001-424 violates Article I, Section 16 of the North Carolina Constitution, I would reverse the trial court's order dismissing the appellants' claim and order the trial court to grant summary judgment in favor of the appellants. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA v. JACK PHILLIP MOORE

No. COA04-642

(Filed 4 October 2005)

1. Constitutional Law— right to confrontation—prior sexual assault—testimonial evidence—photo lineup—harmless error

Although the trial court violated defendant's right to confrontation in a double second-degree rape, first-degree kidnapping, possession of cocaine, possession of drug paraphernalia, and habitual misdemeanor assault case by allowing the admission of evidence regarding an alleged prior sexual assault obtained from a detective's testimony that a prior victim identified defendant as her assailant when the prior victim was unavailable at trial, it was harmless error beyond a reasonable doubt because: (1) the victim in this case provided sufficient detail of her rape and identified defendant as her attacker; and (2) the sexual assaults upon two prior victims were properly admitted to show defendant's modus operandi, common plan or scheme, intent, and knowledge.

2. Evidence— prior crimes or bad acts—sexual assaults—modus operandi—common plan or scheme—intent—knowledge

The trial court in a prosecution for second-degree rape, kidnapping and other offenses properly admitted evidence of two alleged prior sexual assaults by defendant under N.C.G.S. § 8C-1,

Rules 403 and 404 for the purpose of showing defendant's modus operandi, common plan or scheme, intent and knowledge because: (1) in regard to the similarity of this case to one of the prior victims, in both cases defendant initiated contact with a woman whom he had known for several years; both women had substance abuse problems and defendant told both of them that he had drugs they could use; in both cases defendant struggled with the women once they arrived at their destinations, he removed their clothes, he placed at least one of his hands on their neck, and he engaged in sexual intercourse; both women indicated they did not believe defendant would harm them prior to their attacks since they had known defendant for several years, they were friends, and he had treated them nicely; and a time disparity of seventeen months is not too remote for Rule 404(b) purposes; and (2) in regard to the similarity of this case with another prior victim, although a rape had not occurred at the time the police arrived, the evidence parallels what happened to the victim in this case earlier in the same evening.

3. Evidence— pornographic magazines—criminal citation—harmless error

The trial cout committed harmless error in a double second-degree rape, first-degree kidnapping, possession of cocaine, possession of drug paraphernalia, and habitual misdemeanor assault case by admitting an officer's testimony regarding pornographic magazines and a criminal citation found in defendant's motel room, because: (1) although the pornographic magazines could be considered prejudicial, a different outcome would not have resulted if these magazines had not been presented to the jury; and (2) although the citation indicated defendant illegally possessed a crack pipe and a half ounce of marijuana which was irrelevant to the issues in this case, the State could prove beyond a reasonable doubt that defendant raped the victim based upon her testimony alone which was also supported by the N.C.G.S. § 8C-1, Rule 404(b) evidence demonstrating defendant's modus operandi, common plan or scheme, intent, and knowledge.

4. Sentencing— remand—erroneous use of rape conviction to elevate kidnapping charge

Although defendant neither objected to the sentence he received nor raised his two constitutional arguments in the trial court in a double second-degree rape, first-degree kidnapping, possession of cocaine, possession of drug paraphernalia, and

habitual misdemeanor assault case, the Court of Appeals used its inherent authority under N.C. R. App. P. 2 and remanded the case to the trial court for resentencing, because: (1) the State conceded that one of defendant's rape convictions was erroneously utilized to elevate second-degree kidnapping to first-degree kidnapping; and (2) the State acknowledged that this dual use of one of defendant's rapes of the victim is restricted by *State v. Stinson*, 127 N.C. App. 252 (1997).

Appeal by defendant from judgments entered 8 August 2003 by Judge Zoro J. Guice in Buncombe County Superior Court. Heard in the Court of Appeals 2 March 2005.

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

Eric A. Bach for defendant-appellant.

HUNTER, Judge.

Jack P. Moore ("defendant") presents the following issues for our consideration: Did the trial court erroneously allow the State to offer (I) statements from a previous rape accuser through the hearsay testimony of a police officer and emergency room physician in violation of the Sixth Amendment of the United States Constitution as interpreted by *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004); (II) evidence of three additional sexual encounters between defendant and other women pursuant to Rules 401, 403, and 404 of the North Carolina Rules of Evidence; and (III) testimony regarding pornographic magazines and a criminal citation as it was inadmissible under Rule 401 and 403. Defendant also presents two constitutional issues for consideration: Did the trial court violate his constitutional rights by (I) sentencing defendant to consecutive sentences on two counts of second degree rape and one charge of habitual misdemeanor assault when the assault indictment charged the same conduct alleged in the rape indictments; and (II) sentencing defendant to consecutive sentences for second degree rape and first degree kidnapping when the kidnapping offense was elevated to the first degree with the same sexual assault allegation contained in the rape indictment. After careful review, we find no prejudicial error occurred in the trial below, but remand for resentencing as to first degree kidnapping.

The evidence tends to indicate that on 23 October 2002, L.S. was in Asheville, North Carolina, in an area near the Interstate Motel looking for marijuana. She saw defendant, with whom she had been acquainted for over twenty years, on the street. During her conversation with defendant, she told him she was looking for marijuana. Defendant told her he had some marijuana in his motel room and that he would sell it to her for $10.00. L.S. walked with defendant to his motel room at the Interstate Motel.

Upon entering the motel room, defendant went into the bathroom. After defendant exited the bathroom, defendant grabbed L.S., threw her down on a bed, and began removing her clothes. L.S. asked defendant to stop, but he continued. Defendant raped L.S. He then allowed L.S. to wash and dress, but before L.S. could leave the room, he forced her onto a bed and raped her again. After the second rape, L.S. left the room and subsequently called the police.

Meanwhile, defendant saw M.O., a woman with whom he had been acquainted for several years, in the Interstate Motel. During his conversation with M.O., M.O. informed him she was looking for some alcohol to drink. Defendant invited M.O. to his room for a drink. Upon entering the room, he grabbed M.O., threw her onto a bed, and began removing her clothes. He held M.O. by her neck while he removed his pants. Before he could penetrate M.O., the police knocked on his door and defendant jumped up. M.O. answered the door, put her clothes on, and left the motel room.

Defendant was subsequently indicted on two counts of second degree rape, and one count of first degree kidnapping, possession of cocaine, possession of drug paraphernalia, habitual misdemeanor assault, and for being an habitual felon. Defendant was convicted of all charges and was sentenced to two consecutive sentences of 133-169 months for each rape conviction, 133-169 months for kidnapping to run concurrently to the rape convictions, 133-169 months for possession of cocaine to run consecutively after the kidnapping sentence, and 133-169 months for habitual misdemeanor assault to run consecutively after the possession of cocaine sentence. Defendant appeals.

[1] We first address defendant's contention that the trial court erroneously allowed the admission of evidence regarding an alleged prior sexual assault in violation of the Confrontation Clause to the United States Constitution. Specifically, defendant challenges the admission of statements made by T.M., an alleged prior victim, to a police detec-

tive and a medical doctor regarding her rape. Prior to defendant's trial in this case, T.M. died and was therefore unavailable to testify at defendant's trial.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. "Our review of whether defendant's Sixth Amendment right of confrontation was violated is three-fold: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004). In this case, it is undisputed that T.M. was unavailable at defendant's trial because she was deceased. It is also undisputed that defendant did not have a prior opportunity to cross-examine T.M. Thus, our analysis is limited to whether T.M.'s statements were testimonial in nature.

According to testimony, on 18 October 2000, T.M. reported to the police that she had been sexually assaulted. Detective Paula Barnes ("Detective Barnes") contacted T.M. at the hospital and interviewed her regarding the sexual assault. T.M. provided Detective Barnes with a description of the sexual assault and indicated a man by the name of Jimmy Jackson committed the assault. Dr. Stace Horine ("Dr. Horine") testified that he was an emergency room physician and that he treated T.M. on 18 October 2000 for an alleged rape. During the treatment, T.M. gave an account of the alleged rape. However, she did not name her assailant. Detective Barnes testified that there were several officers looking for the assailant that evening and that later in the evening, the police showed T.M. a photographic line-up of six individuals. After viewing the pictures, T.M. identified defendant as the person who assaulted her.

Defendant argues the admission of Detective Barnes's and Dr. Horine's testimony regarding statements made by T.M. violated his Sixth Amendment right to confrontation because T.M.'s statements were testimonial in nature. In their appellate briefs, the parties discuss at length whether statements made to a medical doctor are testimonial in nature, and they also present argument regarding the statements made to Detective Barnes. It is unnecessary for this Court to resolve these issues because T.M. did not name her assailant in those statements. Rather, the police utilized T.M.'s statements in their investigation and eventually presented T.M. with a photographic line-

up from which she identified defendant. This Court has held that "the information obtained from [a] photo line-up and offered at trial through [a police officer is] testimonial evidence." *State v. Lewis*, 166 N.C. App. 596, 602, 603 S.E.2d 559, 563 (2004). Thus, Detective Barnes's testimony that T.M. identified defendant as her assailant was inadmissible under the Sixth Amendment to the United States Constitution because T.M. was unavailable at trial and defendant did not have a prior opportunity to cross-examine.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2003). In light of the other evidence in this case, we conclude the constitutional error was harmless beyond a reasonable doubt. Indeed, L.S. provided sufficient detail of her rape and identified defendant as her attacker. Also, as explained below, the sexual assaults upon M.O. and S.J., prior victims of defendant, were properly admitted to show defendant's *modus operandi*, common plan or scheme, intent, and knowledge. The jury could conclude beyond a reasonable doubt from this evidence that defendant committed the charged offenses.

[2] Next, we address defendant's contentions that the trial court erroneously admitted evidence under Rules 403 and 404 of two alleged prior sexual assaults of S.J. and M.O. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003), 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.

Id. Rule 404(b) is one of inclusion. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

> "Where [prior bad act] evidence reasonably tends to prove a material fact in issue in the crime charged, it will not be rejected merely because it incidentally proves the defendant guilty of another crime," but [it will be rejected] if the sole logical relevancy of that evidence is to suggest defendant's predisposition to commit the type of offense with which he is presently charged.

State v. Jeter, 326 N.C. 457, 458, 389 S.E.2d 805, 806 (1990) (quoting *State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1986)). Whether evidence is admissible 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).

> "When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor."

State v. Bidgood, 144 N.C. App. 267, 271-72, 550 S.E.2d 198, 201 (2001) (citation omitted).

Although evidence may be admissible under Rule 404(b), the probative value of the evidence must still outweigh the danger of undue prejudice to the defendant to be admissible under Rule 403. *State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987). This issue is a "matter within the sound discretion of the trial judge." *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). "That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *Bidgood*, 144 N.C. App. at 272, 550 S.E.2d at 202. We note, however, that our Supreme Court has stated that " '[t]he dangerous tendency of this class of evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts.' " *Jeter*, 326 N.C. at 458, 389 S.E.2d at 806 (quoting *Johnson*, 317 N.C. at 430, 347 S.E.2d at 15).

Our Courts have been very liberal in permitting the State to present evidence to prove any relevant fact not prohibited by Rule 404(b) with respect to prior sexual offenses. *See State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561 (1992). "This is particularly true where the fact sought to be proved is the defendant's intent to commit a similar sexual offense for which the defendant has been charged." *Id.* at 612, 419 S.E.2d at 561-62.

Assault Upon S.J.

S.J. testified that on 6 June 2001, defendant approached her outside of the ABCCM Shelter in Asheville, North Carolina. Defendant asked to borrow her lighter so he could smoke some crack cocaine.

She agreed to let defendant borrow her lighter and they proceeded to go into the woods. S.J. testified that she had been a drug addict for several years and that crack addicts would normally go into the woods to smoke crack. However, this time defendant wanted to go deeper into the woods, and this was out of the ordinary. They walked deeper into the woods and arrived at an area where a mattress and dresser were located. Upon arriving at this area, defendant and S.J. began to fight and defendant was able to force S.J. onto the ground. Defendant grabbed her throat, threatened to kill her, removed her underwear and had sexual intercourse with S.J., even though S.J. had asked defendant repeatedly to stop. Afterwards, S.J. was able to leave the woods, and she reported the incident to the police.

The trial court admitted this testimony under Rule 404(b) on the basis that it tended to show identity, the necessary intent, defendant's knowledge, absence of mistake or accident, and a common plan or scheme. The State argues this evidence was admissible because it demonstrates defendant's common plan or scheme and intent to rape drug addicts by luring them to a secluded area. Defendant argues, however, that the alleged rape of S.J. is dissimilar from the present offense for the following reason: S.J. was allegedly lured away from others in order to commit the rape, but in the present case, L.S. voluntarily entered defendant's hotel room.

We conclude the circumstances of S.J.'s rape and the present offense are sufficiently similar for Rule 404(b) purposes. In both cases, defendant initiated contact with a woman whom he had known for several years. Both of these women had substance abuse problems. During defendant's conversations with these women, he told them he had drugs they could use. In S.J.'s case, defendant asked the victim to go deep into the woods with him in order to smoke crack cocaine. In the present case, defendant asked the victim to come to his motel room so she could purchase marijuana. In both cases, once defendant and the women arrived at their destinations, defendant struggled with the women, removed their clothes, placed at least one of his hands on their neck, and engaged in sexual intercourse. Both women also indicated that prior to their attacks, they did not believe defendant would harm them because they had known defendant for several years, were friends, and he had treated them nicely.

We conclude these two incidents were sufficiently similar for Rule 404(b) purposes. The fact that one of the incidents occurred in a motel room and the other in the woods does not change our analysis. Indeed, in both cases, defendant lured an acquaintance to

a location where they would be alone in order to either use or purchase drugs. Once they were alone, defendant engaged in sexual intercourse with the women, against their will, and placed his hand on their necks during the encounter. This evidence was admissible to show *modus operandi*, common plan or scheme, intent, and knowledge.

Defendant also argues the sexual assault upon S.J. should not have been admitted because of the time disparity between S.J.'s incident and the present offense.

> Evidence of other crimes must be connected by point of time and circumstance. Through this commonality, proof of one act may reasonably prove a second. However, the passage of time between the commission of the two acts slowly erodes the commonality between them. The probability of an ongoing plan or scheme then becomes tenuous. Admission of other crimes at that point allows the jury to convict defendant because of the kind of person he is, rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged.

State v. Jones, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988). In this case, L.S.'s rape occurred on 23 October 2002 and S.J.'s rape occurred on 6 June 2001, approximately a seventeen-month difference. We conclude that seventeen months is not too remote for Rule 404(b) purposes. *See State v. Frazier*, 344 N.C. 611, 615-16, 476 S.E.2d 297, 300 (1996) (describing instances in which the court has admitted under Rule 404(b) prior instances of similar sexual misbehavior that had a time lapse of more than two years, including a ten year disparity).

Assault upon M.O.

On 23 October 2002, after L.S. reported an alleged sexual assault upon her, the police went to defendant's motel room. M.O. answered the door and was wearing only a t-shirt. Defendant was standing between the two beds in the room and did not have on any clothes.

M.O. testified that she was a drug addict and an alcoholic. She also testified that she had known defendant for five or six years and that they would smoke crack together in the woods. On 23 October 2002, M.O. testified she went to the Interstate Motel in Asheville in order to drink alcohol after a fight with her boyfriend. After she could not locate her friend, she saw defendant. Defendant asked her why she was at the motel and she told him she was looking for something

to drink. Defendant told her he had something to drink and invited her to his room. She indicated that she felt comfortable going to his room because she had known defendant for years and did not believe he would hurt her. Upon entering the room, M.O. testified defendant threw her down on a bed and began ripping her clothes off. Defendant was choking her as he removed her clothes, and then defendant held her down as he was removing his pants. During this time, M.O. was trying to fight back and was asking defendant to stop. Then, there was a knock at the door and someone said, "[p]olice." The defendant jumped up and M.O. answered the door.

Defendant challenges the admission of M.O.'s testimony regarding what occurred in his motel room because defendant had not committed a crime at the time the police knocked on the door. Specifically, defendant argues this Court must distinguish between criminal and non-criminal conduct. Defendant argues that the encounter between M.O. and defendant may offend common decency in that it involved a man luring a woman into his room under false pretenses and being sexually aggressive towards her, but it was not a bad act for Rule 404(b) purposes.

Although a rape had not occurred at the time the police arrived, M.O. testified that defendant invited her to his room to consume alcohol. Once in the room, defendant threw her down on the bed, began ripping her clothes off, was choking her, and he was removing his pants with his free hand. During this encounter, M.O. was fighting back at defendant. This evidence not only describes an assault and battery, but it also parallels what happened to L.S. earlier that evening. Thus, it shows defendant's *modus operandi*, common plan or scheme, intent, and knowledge.

[3] Next, defendant challenges the admission of Officer Darryl Fisher's testimony regarding pornographic magazines and a criminal citation found in defendant's motel room. "Evidence of [a] defendant's mere possession of pornographic materials does not tend 'to make the existence of any fact that is of consequence to the determination of the action more [probable] or less probable than it would be without the evidence.' " *State v. Smith*, 152 N.C. App. 514, 522, 568 S.E.2d 289, 294 (2002) (quoting N.C. Gen. Stat. § 8C-1, Rule 401). "[W]ithout any evidence that [a] defendant had viewed the pornographic materials with the victim, or any evidence that defendant had asked the victim to look at pornographic materials," the pornographic material is "not relevant to proving [a] defendant committed the alleged [sexual] offenses" and should not be admitted by the trial

court. *Id.* at 523, 568 S.E.2d at 295. In this case, the State argues the pornographic material was admissible to show defendant's control and dominion over the motel room. However, there was no testimony that defendant's name, address, or fingerprints were on the magazines. Furthermore, defendant's control and dominion over the motel room was not at issue in this case. Even if defendant's control of the room was at issue, the fact that defendant was discovered completely naked in the room by the police, possessed the room key, and signed a consent to search form which allowed the police to search the motel room demonstrates his dominion and control over the room. Accordingly, the pornographic magazines were erroneously admitted by the trial court into evidence.

However, the erroneous admission of these magazines into evidence was harmless error. Although the pornographic magazines could be considered prejudicial, we conclude a different outcome would not have resulted if these magazines had not been presented to the jury. Indeed, L.S. described her attack and identified defendant as the rapist. The State also presented evidence of similar sexual assaults committed by defendant.

Defendant also argues the admission of a criminal citation was erroneous because it was irrelevant under Rule 401 and highly prejudicial under Rule 403. The criminal citation issued on 21 October 2002 indicated defendant illegally possessed a crack pipe and a half ounce of marijuana. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *State v. Coen*, 78 N.C. App. 778, 780, 338 S.E.2d 784, 786 (1986) (quoting N.C. Gen. Stat. § 8C-1, Rule 401). In this case, the fact that defendant possessed a crack pipe and a half ounce of marijuana two days earlier does not have any tendency to prove any of the relevant issues in this case. Indeed, the State had to prove beyond a reasonable doubt that defendant raped L.S. The relevant evidence indicated defendant and L.S. had known each other for approximately twenty years. Defendant used this relationship to lure L.S. to his motel room under the false pretense of selling her some marijuana. Defendant raped L.S. after she entered his motel room. Whether defendant actually possessed marijuana or a crack pipe is irrelevant.

However, "[t]he admission of irrelevant evidence is generally considered harmless error." *State v. Melvin*, 86 N.C. App. 291, 297, 357 S.E.2d 379, 383 (1987). "The defendant has the burden of showing he

was prejudiced by the admission of the evidence." *Id.*; *see also* N.C. Gen. Stat. § 15A-1443. We conclude the admission of the criminal citation was harmless error. As previously discussed, the State could prove beyond a reasonable doubt that defendant raped L.S. based upon her testimony alone, which was supported by the Rule 404(b) evidence that demonstrated defendant's *modus operandi*, common plan or scheme, intent, and knowledge.

[4] Finally, defendant raises several constitutional arguments regarding his sentences for second degree rape, habitual misdemeanor assault, and first degree kidnapping. Specifically, defendant argues the trial court violated his constitutional rights by (I) sentencing him to consecutive sentences on two counts of second degree rape and one charge of habitual misdemeanor assault when the assault indictment charged the same conduct alleged in the rape indictments; and (II) sentencing defendant to consecutive sentences for second degree rape and first degree kidnapping when the kidnapping offense was elevated to the first degree with the same sexual assault allegation contained in the rape indictment.

Defendant neither objected to the sentence he received nor raised these arguments below. Pursuant to our Supreme Court's decision in *State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997), we conclude these issues are not properly preserved for appellate review. *See id.* (stating a similar argument was not properly preserved for appellate review because the defendant did not raise the issue in the trial court).

However, we note that the State has conceded that one of defendant's rape convictions was erroneously utilized to elevate second degree kidnapping to first degree kidnapping. The State acknowledges that "this dual use of one of defendant's rapes of [L.S.] is restricted by *State v. Stinson*, 127 N.C. App. 252, 489 S.E.2d 182 (1997)[.]" Therefore, pursuant to this Court's inherent authority under N.C.R. App. P. 2, we remand this case to the trial court for resentencing. Under Rule 2:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

Id. We conclude an exercise of this Court's inherent authority under Rule 2 is necessary to prevent a manifest injustice.[1] *See State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 364 (1987) (indicating that although a defendant had not preserved constitutional issues for appellate review, our Supreme Court invoked Rule 2 and addressed the issues to foreclose manifest injustice).

In sum, we conclude defendant received a trial free of prejudicial error. Although the trial court erroneously admitted evidence of a prior rape of T.M., evidence of pornographic magazines and a criminal citation, a different result would not have resulted absent this evidence. Indeed, L.S. described her rape in sufficient detail and identified defendant as the rapist. The State also provided evidence of defendant's *modus operandi*, common scheme or plan, intent, and knowledge by admitting evidence of two other sexual assaults allegedly committed by defendant.

No prejudicial error. Remanded for resentencing.

Judges CALABRIA and JACKSON concur.

RAY ALLEN OAKES AND WENDY WARD OAKES, PLAINTIFFS V. MARGARET TALLEY WOOTEN AND STEVEN EDWARD WOOTEN, DEFENDANTS

No. COA04-1174

(Filed 4 October 2005)

1. Motor Vehicles— intersection accident—contributory negligence—no evidence

There was no evidence in an automobile accident case that plaintiff failed to keep a proper lookout and exercise reasonable care in entering an intersection pursuant to a green light, and the trial court did not err by not instructing the jury on contributory negligence or by granting a directed verdict of no contributory negligence.

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1. We note that defendant may raise the remaining sentencing issue in a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415(b)(8) (2003).

2. Motor Vehicles— intersection accident—failing to stop at red light—peremptory instruction

There was no error in giving a peremptory instruction on defendant's negligence in failing to stop at a red light where the evidence that defendant entered the intersection while the light was red was uncontested and the court also instructed the jury that it must find this negligence to be the proximate cause of plaintiff's injury.

3. Damages and Remedies— auto accident—failure to mitigate damages—insufficient evidence

The trial court did not err by not instructing the jury on mitigation of damages in an automobile accident case where defendants did not meet their burden of establishing that plaintiff failed to act reasonably in not seeking employment and by continuing chiropractic care.

4. Damages and Remedies— failure to instruction on nominal—not prejudicial

There was no prejudicial error in not instructing on nominal damages in an automobile accident case where the jury was properly instructed on actual damages and awarded plaintiff $119,000.

5. Trials— lack of particular instruction—failure to request—no argument on prejudice

There was no error in the trial court's failure to instruct the jury on circumstantial evidence where defendants did not request a special instruction and made no argument as to how they were prejudiced by the court's failure to offer the instruction.

6. Appeal and Error— preservation of issues—no objection to instruction at trial

Defendant's failure to object at trial did not preserve for appeal the question of whether the court correctly instructed on peculiar susceptibility.

7. Discovery— denied admissions proven at trial—reasonable grounds to deny

The trial court abused its discretion by ordering defendants to pay costs and attorney fees as a sanction pursuant to N.C.G.S. § 1A-1, Rule 37 for denying requests for admissions that were proven at trial. Defendants met their burden of proving that rea-

sonable grounds existed at the time to believe they might prevail on some matters and for not admitting other issues.

8. Costs— authorized and unauthorized

The trial court erred by taxing against defendants costs not authorized by N.C.G.S. § 7A-305 for medical reports, deposition costs, filing fees, travel costs, trial exhibits, color copies, and photocopies. However, there was statutory authority for awards for mediation fees, expert witness fees, and service of process fees.

9. Costs— expert witness fees—no abuse of discretion

The trial court did not abuse its discretion in an automobile accident case by taxing against defendants expert medical witness fees where both witnesses were subpoenaed to testify and provided testimony on plaintiff's condition.

Appeal by defendants from judgment entered 15 September 2003 and an order entered 23 January 2004 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 13 April 2005.

Wyatt Early Harris Wheeler, L.L.P., by Stanley F. Hammer, for plaintiff-appellees.

Gregory A. Wendling for defendant-appellants.

HUNTER, Judge.

Margaret Talley Wooten ("Wooten") and Steven Edward Wooten ("Steven") (collectively "defendants") appeal from a judgment entered 15 September 2003 consistent with a jury verdict finding defendants negligent, and from an order entered 23 January 2004 awarding costs and attorneys' fees. For the reasons stated within, we reverse the trial court's award of attorneys' fees and costs to plaintiffs pursuant to Rule 37 and award of certain costs pursuant to N.C. Gen. Stat. § 6-20, and affirm as to all other issues.

The evidence presented tended to show that on 6 November 1999, Ray Allen Oakes ("Oakes") was descending the exit ramp from Interstate 85 ("I-85") to South Main Street in Graham, North Carolina. Oakes entered the intersection on a green light, attempting to turn north. Wooten, traveling south on South Main Street, failed to stop for the red light at the I-85/Main Street intersection and collided

with Oakes's vehicle. Wooten stated that she had looked down and did not realize the light was red until shortly before she reached the intersection.

Oakes was injured in the collision and was taken to Alamance Regional Medical Center for treatment. He underwent various treatments for back injuries over the next year, culminating in surgery.

Oakes brought a negligence action against Wooten and her husband, the owner of the car, in January 2002. Oakes's wife, Wendy Oakes ("Wendy") (collectively "plaintiffs"), also joined as a plaintiff in an action for loss of consortium. The jury found defendants negligent and awarded Oakes $119,000.00 in damages, but did not award consortium damages to Wendy. Defendants' motion for a new trial was denied, and plaintiffs were awarded costs and attorneys' fees pursuant to N.C. Gen. Stat. §§ 7A-314, 6-20, and 1A-1, Rules 36 and 37(c). Defendants appeal.

I.

Defendants contend the trial court erred in failing to instruct the jury as to Oakes's contributory negligence, and in a related assignment of error, contend the trial court erred in granting a motion for directed verdict as to Oakes's contributory negligence and denying defendants' motion for judgment notwithstanding the verdict on the trial court's prior directed verdict. We disagree.

[1] We first address defendants' contentions as to the trial court's failure to instruct the jury as to contributory negligence. "In determining the sufficiency of the evidence to justify the submission of an issue of contributory negligence to the jury, the court 'must consider the evidence in the light most favorable to the defendant and disregard that which is favorable to the plaintiff.' " *Kummer v. Lowry*, 165 N.C. App. 261, 263, 598 S.E.2d 223, 225 (2004) (citation omitted). " ' "If different inferences may be drawn from the evidence on the issue of contributory negligence, some favorable to the plaintiff and others to the defendant, it is a case for the jury to determine." ' " *Id.* at 263-64, 598 S.E.2d at 225 (citations omitted).

Our Supreme Court has addressed the issue of a driver's duty when approaching a traffic signal.

> "The duty of a driver at a street intersection to maintain a lookout and to exercise reasonable care under the circumstances is not relieved by the presence of electrically controlled traffic signals,

> which are intended to facilitate traffic and to render crossing less dangerous. He cannot go forward blindly even in reliance on traffic signals.["]

Bass v. Lee, 255 N.C. 73, 78-79, 120 S.E.2d 570, 573 (1961) (quoting *Hyder v. Battery Co., Inc.*, 242 N.C. 553, 557, 89 S.E.2d 124, 128 (1955)). "A green or 'go' signal is not a command to go, but a qualified permission to proceed lawfully and carefully in the direction indicated." *Bass*, 255 N.C. at 79, 120 S.E.2d at 573. In *Cicogna v. Holder*, 345 N.C. 488, 489, 480 S.E.2d 636, 637 (1997), the Supreme Court considered "the quantum of evidence necessary to submit contributory negligence to the jury when the plaintiff's vehicle is struck by another vehicle while the plaintiff is proceeding through an intersection pursuant to a green light." *Id. Cicogna* held that as no evidence was presented of anything that would have put the plaintiff on notice that the defendant would not obey the traffic light, contributory negligence should not have been submitted to the jury, as the plaintiff was not required to anticipate the defendant's negligence. *Id.* at 489-90, 480 S.E.2d at 637.

Here, Oakes's testimony showed that he had the green light when entering the intersection, that he surveyed the intersection before entering, and that he did not see defendant's car. Oakes's brother, Lynn Oakes ("Lynn"), a passenger in the vehicle, also testified that the light was green when Oakes entered the intersection. Lynn stated that he saw Wooten's vehicle on his blind side after they had entered the intersection, and began to call out a warning to "[w]atch out[,]" but was unable to complete the warning because Wooten had already struck Oakes. Wooten testified that she was driving at approximately twenty-five miles per hour, that her attention was drawn away from the road and that when she looked again at the light, it was red. Wooten further testified that prior to the collision, no part of her vehicle crossed the stop line, and that only the front end of her car crossed the stop line into the intersection when she came into contact with Oakes's vehicle.

When taken in the light most favorable to defendants, the evidence fails to show that anything would have put Oakes on notice that Wooten would not obey the traffic light in time to avoid the collision. As in *Cignoga*, Oakes testified that he surveyed the intersection and did not see Wooten. Wooten testified that she was not traveling at a high rate of speed and did not cross the stop line until Oakes had already turned in front of her. Lynn testified that he attempted to shout a warning but was unable to complete it before

the impact. Even when viewed in the light most favorable to defendants, there is no evidence that Oakes failed to keep a proper lookout and exercise reasonable care in entering the intersection. Therefore, the trial court did not err in refusing the jury instructions.

We next address defendants' related contention that the trial court erred in granting a directed verdict as to contributory negligence. "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Di Frega v. Pugliese*, 164 N.C. App. 499, 505, 596 S.E.2d 456, 461 (2004). "The test for determining whether a motion for a directed verdict is supported by the evidence is the same as that for ruling on a motion for judgment notwithstanding the verdict." *Stilwell v. General Ry. Servs., Inc.*, 167 N.C. App. 291, 294, 605 S.E.2d 500, 502 (2004). "Thus, where a defendant pleads an affirmative defense such as contributory negligence, 'a motion for directed verdict is properly granted against the defendant where the defendant fails to present more than a scintilla of evidence in support of each element of his defense.' " *Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004) (citation omitted).

"Our Supreme Court has previously stated that 'two elements, at least, are necessary to constitute contributory negligence[.]' " *Whisnant*, 166 N.C. App. at 722, 603 S.E.2d at 850 (quoting *Construction Co. v. R.R.*, 184 N.C. 179, 180, 113 S.E. 672, 673 (1922)). "The defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Id.* at 722, 603 S.E.2d at 850.

As discussed *supra*, even when viewed in the light most favorable to defendant, the evidence fails to show a want of due care on the part of plaintiff. *See Cicogna*, 345 N.C. at 489-90, 480 S.E.2d at 637. Therefore, the trial court did not err in granting the directed verdict finding no contributory negligence, or in denying defendants' motion for judgment notwithstanding the verdict.

II.

[2] Defendants next contend the trial court erred in giving a peremptory instruction to the jury as to Wooten's negligence in failing to stop for the red light. We disagree.

In *Williams v. Davis*, 157 N.C. App. 696, 580 S.E.2d 85 (2003), the defendants contended the plaintiff had violated N.C. Gen. Stat.

§ 20-158(b)(1), as the statute required the plaintiff to stop and yield to oncoming traffic, and therefore, was contributorily negligent. The trial court granted defendants' motion based on contributory negligence as argued by defendants. "A violation of N.C.G.S. § 20-158(b)(1) is not negligence or contributory negligence *per se*; however, it 'may be considered with the other facts in the case in determining whether a party was guilty of negligence or contributory negligence.' " *Williams v. Davis*, 157 N.C. App. at 701, 580 S.E.2d at 88-89 (quoting N.C. Gen. Stat. § 20-158(d) (2001)). "Thus, a violation of N.C.G.S. § 20-158(b)(1) is 'evidence of negligence; and when the proximate cause of injury, is sufficient to support a verdict[.]' " *Williams*, 157 N.C. App. at 701, 580 S.E.2d at 89 (citations omitted). "When all the evidence offered suffices, if true, to establish the controverted fact, the Court may give a peremptory instruction—that is, if the jury finds the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner." *Dobson v. Honeycutt*, 78 N.C. App. 709, 712, 338 S.E.2d 605, 607 (1986).

Here, the evidence was uncontested that Wooten entered the intersection while the light was red. The trial court instructed the jury that:

> The Motor Vehicle Law provides that when a stoplight at an intersection is emitting a steady red light, that is, it's red, the operator of the vehicle facing the red light shall not enter the intersection. All the evidence is that Ms. Wooten did enter the intersection when the light was red, and if you find that she did enter the intersection when the light was red, as all the evidence shows, then it would be your duty to find that she was negligent.

The trial court then further instructed the jury that they must find that such negligence was the proximate cause of Oakes's injuries in order to find defendants liable. *See Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 341, 88 S.E.2d 333, 339 (1955) (stating that to make out a case of actionable negligence, both a showing of statutory violation and the additional essential element of proximate cause are required). As the evidence here was undisputed as to Wooten's violation of the statute, the trial court did not err in giving a peremptory instruction to the jury as to Wooten's negligence in failing to stop for the red light when the trial court further instructed the jury that they must find such negligence was the proximate cause of plaintiff's injury.

III.

[3] Defendants next contend the trial court erred in denying a jury instruction on the issue of mitigation of damages. We disagree.

" ' "The rule in North Carolina is that an injured plaintiff, whether his case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If he fails to do so, for any part of the loss incident to such failure, no recovery can be had." ' " *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 489, 403 S.E.2d 104, 108 (1991) (citations omitted). " 'This rule is known as the doctrine of avoidable consequences or the duty to minimize damages. Failure to minimize damages does not bar the remedy; it goes only to the amount of damages recoverable.' " *Radford v. Norris*, 63 N.C. App. 501, 502, 305 S.E.2d 64, 65 (1983) (citations omitted). "When a defendant submits a request for specific instructions which are correct and are supported by the evidence, the trial court commits reversible error in failing to submit the substance of those instructions to the jury." *Alston v. Monk*, 92 N.C. App. 59, 66, 373 S.E.2d 463, 468 (1988).

Here, the evidence does not support the requested instruction of mitigation of damages. Defendants contend that Oakes failed to mitigate damages in not seeking any type of employment while out recovering from his back injury and subsequent surgery. However, Oakes's physician testified that he did not want Oakes working while rehabilitating after the surgery. Therefore, defendants present no evidence that Oakes failed to mitigate damages by not seeking employment due to his doctor's instruction during his rehabilitation. Defendants further contend Oakes failed to mitigate damages by continuing chiropractic care, although it resulted in increased pain and potentially resulted in a need for surgery. However, evidence presented at trial showed only that Oakes continued in chiropractic care at his treating physician's instruction, and that the chiropractic care resulted in no physical change to Oakes's herniation. As defendants failed to meet their burden of proof that Oakes did not act reasonably in minimizing his loss, the trial court properly did not instruct the jury as to mitigation of damages.

IV.

[4] Defendants next contend the trial court erred in denying a request for jury instructions on the issue of nominal damages. We disagree.

North Carolina Pattern Jury Instruction 106.00 states that if an issue has been decided in favor of plaintiff,

> the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of a technical injury to the plaintiff.
>
> The plaintiff may also be entitled to recover actual damages. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual damages proximately caused by the negligence of the defendant.

N.C.P.I.—Civ. 106.00 (motor veh. vol. 2004) (footnote omitted).

" 'The burden is on the appellant not only to show error but to show that if the error had not occurred there is a reasonable probability that the result of the trial would have been favorable to him.' " *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967) (citation omitted). Here, although the trial court did not instruct the jury as to nominal damages, it properly instructed the jury as to the burden of proof in awarding actual damages. The jury awarded damages to Oakes in the amount of $119,000.00. As the jury found by the greater weight of the evidence that Oakes suffered actual damages, defendants show no harm in the trial court's failure to instruct on nominal damages. Therefore, there was no prejudicial error in the trial court's failure to instruct.

V.

[5] Defendants next contend the trial court erred in denying a jury instruction on circumstantial evidence. We disagree.

"It is the duty of the trial court to charge the law applicable to the substantive features of the case arising on the evidence, without special requests[.]" *Faeber v. E. C. T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972). Here, the trial court noted that all the evidence in the case was from three eyewitnesses and that there was no circumstantial evidence. Defendants correctly cite authority that, "[w]hen a party appropriately tenders a written request for a special instruction which is correct in itself and supported by the evidence, the failure of the trial judge to give the instruction, at least in substance, constitutes reversible error." *Millis Construction Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 509-10, 358 S.E.2d 566, 568 (1987). Here,

however, defendants did not make a written request for a special instruction and further make no argument as to how the trial court's failure to offer an instruction as to circumstantial evidence prejudiced defendants. The assignment of error is without merit.

VI.

[6] Defendants next contend the trial court erred in improperly charging the jury on peculiar susceptibility. As defendants failed to object to this instruction, this issue is not properly before the Court for review.

"A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection[.]" N.C.R. App. P. 10(b)(2).

Defendants here failed to object to the trial court's instruction, which was substantially the same as the North Carolina Pattern Jury Instruction for Peculiar Susceptibility. This issue is therefore not properly preserved for appellate review.

VII.

[7] In related assignments of error, defendants next contend the trial court erred in concluding that defendants have no reasonable grounds for denial of admissions, and abused its discretion in ordering defendants to pay plaintiffs' costs and attorneys' fees pursuant to N.C. Gen. Stat. § 1A-1, Rule 37 (2003). We agree.

The trial court sanctioned defendants because of their failure to admit under Rule 37(c), which provides:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (i) the request was held objectionable pursuant to Rule 36(a), or (ii) the admissions sought was of no substantial importance, or (iii) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (iv) there was other good reason for the failure to admit.

N.C. Gen. Stat. § 1A-1, Rule 37(c). The Official Commentary to this rule explains that this provision "emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail." N.C. Gen. Stat. § 1A-1, Rule 37 official commentary. Rule 36 requires that an admission

> shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder.

N.C. Gen. Stat. § 1A-1, Rule 36(a) (2003).

"The choice of sanctions under Rule 37 is within the trial court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion." *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992). "Rule 37 allowing the trial court to impose sanctions is flexible, and a 'broad discretion must be given to the trial judge with regard to sanctions.' " *Telegraph Co. v. Griffin*, 39 N.C. App. 721, 727, 251 S.E.2d 885, 888 (1979) (citations omitted). "The party wishing to avoid court-imposed sanctions for non-compliance with discovery requests bears the burden of showing the non-compliance was justified." *Williams v. N.C. Dep't of Env't & Natural Res.*, 166 N.C. App. 86, 92, 601 S.E.2d 231, 235 (2004).

In *Williams*, this Court held that the trial court had abused its discretion in awarding attorney's fees and cost pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(c), because the agency had reasonable grounds to believe they might prevail on the matters they were requested to admit. *Williams*, 166 N.C. App. at 93, 601 S.E.2d at 235-36. *Williams* held that in determining whether reasonable grounds existed, "[u]nder Rule 37(c), the court's inquiry must focus on what the [defendant] knew at the time they answered the request for admissions." *Id.* at 93, 601 S.E.2d at 235.

Here, in the Rule 37 Order, the trial judge listed a number of requests for admissions that defendants had denied and that plaintiffs had proven during the trial. These included Wooten's failure to admit her violation of N.C. Gen. Stat. § 20-158(b)(2), failure to keep a proper lookout, failure to use due care, and failure to maintain

proper control. The Order also listed Wooten's failure to admit full fault for the collision, lack of contributory negligence, that Wooten was acting as an agent for her husband, and that serious injury occurred to Oakes as a result of the accident. The Order finally listed Wooten's denial that she was the sole proximate cause of Oakes's herniated disc at L4-5 and neurological symptoms, the exact amount of Oakes's medical bills, and that Oakes had suffered a permanent diminution of wage-earning capacity. Following the list of denied admissions, the Order contained a detailed list of the expenses incurred in establishing the matters denied. The trial judge found no reasonable grounds for defendants to deny the matters set forth in the Request for Admissions and granted plaintiffs' motion for attorneys' fees and costs.

A review of the record shows that defendants made a number of qualified responses to plaintiffs' Requests for Admissions on 14 May 2002, prior to any discovery or depositions by either party, and before medical care providers and treating physicians were identified by plaintiffs in this matter. A review of the qualified responses in Wooten's Answer to Request for Admissions shows that Wooten admitted that she was the wife of Steven, and that she was driving a car registered to him with his permission. Wooten also stated in response to the request regarding the seriousness of Oakes's injury that Oakes had told her at the scene of the accident that he was not seriously hurt. Wooten denied the question regarding the specifics as to Oakes's medical conditions on the grounds that she had no medical training. Finally, Wooten stated:

> [A]s I approached the intersection and went under the bridge and last checked the light it was green and then I believe I looked down to my radio although I am not certain for a few seconds and when I looked back up near the intersection, the light had turned red. I applied my brakes as hard as possible and attempted to stop prior to reaching the crossing of the intersection although I was unable to stop completely and I slid somewhat out into the intersection and contact was made with Mr. Oakes' vehicle.

At the time the responses were made, when discovery had not yet begun, Wooten lacked knowledge to admit matters regarding Oakes's medical condition and contributory negligence. Wooten's qualified denial as to her actions in failing to stop for the light was consistent with the evidence presented at trial and the trial court's findings of proof as to defendant's negligence. As discussed *supra*, our statutes state that:

> No failure to stop as required by the provisions of [§ 20-158(d)] shall be considered negligence or contributory negligence per se in any action at law for injury to person or property, but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether a party was guilty of negligence or contributory negligence.

N.C. Gen. Stat. § 20-158(d) (2003). As a violation of the statute is not negligence *per se*, defendant had reasonable grounds to believe she might prevail in the negligence actions, based on her qualified denials. Defendants, therefore, met their burden of proof in showing that at the time for request of admission, reasonable grounds existed to believe that they might prevail on some matters denied, and good reasons, i.e. defendants' lack of knowledge, existed for the failure to admit other issues at that time. Accordingly, we find the trial judge abused her discretion in awarding plaintiffs' attorneys' fees and costs pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(c). We, therefore, do not address defendants' related assignment of error that the trial court erred in its findings as to expert witness testimony concerning causation in awarding Rule 37 damages.

VIII.

[8] In their next assignment of error, defendants contend that the trial court committed reversible error in taxing certain costs against defendants pursuant to N.C. Gen. Stat. § 6-20 and 7A-305. We agree.

" ' "Where an appeal presents [a] question[] of statutory interpretation, full review is appropriate, and [we review] a trial court's conclusions of law . . . *de novo*." ' " *Department of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C. App. 461, 464, 586 S.E.2d 780, 782 (2003) (citations omitted). "[C]osts may be allowed or not, in the discretion of the court, unless otherwise provided by law." N.C. Gen. Stat. § 6-20 (2003). In *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E.2d 179 (1972), the North Carolina Supreme Court indicated that costs are " 'creatures of legislation, and without this they do not exist.' " *Id.* at 691, 190 S.E.2d at 185 (citations omitted). Additionally, enumerated costs and expenses unnecessarily incurred by the prevailing party will not be taxed against the losing party. *Id.*

In *Charlotte Area Mfd. Housing*, 160 N.C. App. at 469-70, 586 S.E.2d at 785, this Court held that costs, as used by the legislature in N.C. Gen. Stat. § 6-20, are limited to those items expressly enumerated in N.C. Gen. Stat. § 7A-305(d). *Id.* Additionally, this Court

held that " 'reasonable and necessary' " expenses previously permitted under the common law were no longer recognized. *Id.* at 470, 586 S.E.2d at 785. In *Handex of Carolinas v. County of Haywood*, 168 N.C. App. 1, 13, 607 S.E.2d 25, 32 (2005), this Court held that the trial court lacked discretion to award costs not otherwise enumerated in the list set out in N.C. Gen. Stat. § 7A-305(d). *Id.* N.C. Gen. Stat. § 7A-305 states:

> (d) The following expenses, when incurred, are also assessable or recoverable, as the case may be:
>
> (1) Witness fees, as provided by law.
>
> (2) Jail fees, as provided by law.
>
> (3) Counsel fees, as provided by law.
>
> (4) Expense of service of process by certified mail and by publication.
>
> (5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
>
> (6) Fees for personal service and civil process and other sheriff's fees, as provided by law. . . .
>
> (7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. . . .
>
> (8) Fees of interpreters, when authorized and approved by the court.
>
> (9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

N.C. Gen. Stat. § 7A-305(d) (2003).

This Court has upheld the awarding of witness fees for expert witnesses under subpoena, mediation fees, and service of process fees. *Handex*, 168 N.C. App. at 13, 607 S.E.2d at 32-33. However, this Court has found that the trial court erred in granting a request for deposition fees, because there was no statutory authority for the award of deposition costs. *Id.* at 13, 607 S.E.2d at 33. Additionally, this Court has found error in an award of costs for photocopies, telephone calls, photographs, trial diagrams and exhibits, and medical reports

and records, as those expenses are not authorized as costs pursuant to N.C. Gen. Stat. § 7A-305. *Overton v. Purvis*, 162 N.C. App. 241, 249-50, 591 S.E.2d 18, 24-25 (2004).

Here, the trial court erred in awarding numerous costs not authorized by N.C. Gen. Stat. § 7A-305 for medical reports, deposition costs, filing fees, travel costs, trial exhibits, color copies, and photocopies. We find statutory authority, however, for the following awards: mediation fees pursuant to N.C. Gen. Stat. § 7A-305(d)(7); expert witness fees pursuant to N.C. Gen. Stat. § 7A-305(d)(1); and service of process fees pursuant to N.C. Gen. Stat. § 7A-305(d)(6).

[9] In their related assignment of error, defendants also contend that the trial court abused its discretion in taxing against defendants certain expert fees pursuant to N.C. Gen. Stat. § 6-20 and 7A-305. We disagree.

N.C. Gen. Stat. § 7A-305(d)(1) states that witness fees are assessable as costs "as provided by law." *Id.* "This refers to the provisions of N.C. Gen. Stat. § 7A-314 which provides for witness fees where the witness is under subpoena." *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 735, 596 S.E.2d 891, 895 (2004). N.C. Gen. Stat. § 7A-314(d) (2003) provides that an expert witness "shall receive such compensation and allowances as the court . . . , in its discretion, may authorize." *Id.*

Here, the trial court awarded $4,502.00 in expert witness fees to Dr. Elsner for medical testimony with travel time, and $700.00 in expert witness fees to Dr. Meylor for preparation and testimony. Both expert witnesses were subpoenaed to testify and provided testimony on Oakes's condition. The trial court went on to find that the testimony of both expert witnesses was "clear, strong, and convincing" and "reasonably necessary in this case[.]" In light of these facts, we find no abuse of discretion by the trial court in awarding expert witness fees.

We conclude that the trial court did not err in instructing the jury and that there was no prejudicial error in the trial court's failure to give certain requested instructions. We also find the trial court did not err in granting a motion for directed verdict as to plaintiff's contributory negligence. We further conclude the trial court did not err in awarding certain expert witness fees pursuant to N.C. Gen. Stat. § 6-20 and 7A-305. However, as we find an abuse of discretion in the trial court's award of attorneys' fees and costs under Rule 37, and

a lack of statutory authority for the award of certain costs pursuant to N.C. Gen. Stat. § 6-20, we reverse those awards of attorneys' fees and costs to plaintiffs, and remand for entry of a new order as to costs consistent with this opinion.

Affirmed in part, reversed and remanded in part.

Judges McCULLOUGH and LEVINSON concur.

JOHN R. SUTTON AND JAMES M. EDMONDS, PLAINTIFFS V. JARVIS WAYNE MESSER, STAR STONE ENTERPRISES, INC., SAMUEL E. GRIFFIN, REESE LASHER, JOE EBLEN, DANNY BULLMAN, CHARLIE BULLMAN, SANDRA DUCKET, LESTER WRIGHT, ENOC PRATHER, CHARLIE HENSLEY, STEVE METCALF, BOB POSEY, JOE PENLAND, SR., GUS COLAGERAKIS, AND MIKE MONTAPERTO, DEFENDANTS

No. COA04-757

(Filed 4 October 2005)

1. Contracts— interpretation of provisions—surrounding language and purpose of agreement

Language in an agreement for the sale of rubies, considered with surrounding language and the purpose of the agreement, provided for institution of a receivership at the unilateral request of any party. This language could not be the basis for a judgment on the pleadings for defendants.

2. Contracts— agreement to sale by receiver—undesignated partial quantity—not void for vagueness

The plain language of an agreement to sell two large rubies authorized the receiver to sell either but not both, and was not unenforceable for vagueness. Judgment on the pleadings for defendants should not have been granted.

3. Contracts— essential term—left to court's discretion

An essential term of an agreement for the disposal of rubies was present where the parties agreed to leave the terms of the receiver's sale to the discretion of the court. Judgment on the pleadings for defendants should not have been granted.

4. Parties— specific performance of contract—investors not party to contract

An agreement for the sale of rubies was enforceable in this action even though some of the defendants were not parties to the agreement, and judgment on the pleadings should not have been granted.

5. Appeal and Error— failure to join necessary parties—not raised at trial—not considered on appeal

The defense of failure to join necessary parties was not considered because it was not raised at trial.

Judge BRYANT dissenting.

Appeal by plaintiffs from a judgment signed 25 February 2004 by Judge E. Penn Dameron, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 13 January 2005.

Root & Root, P.L.L.C., by Allan P. Root for plaintiffs-appellants.

James M. Kimzey and Katherine E. Jean for Jarvis Wayne Messer, Star Stone Enterprises, Inc., Danny Bullman, Charlie Bullman, Sandra Ducket, Bob Posey and Gus Colagerakis, defendants-appellees.

JACKSON, Judge.

John R. Sutton and James M. Edmonds (plaintiffs) appeal from a 25 February 2004 judgment granting defendants'[1] Motion for Judgment on the Pleadings and dismissing plaintiffs' complaint with prejudice.

The present action arises out of an agreement dated 30 September 1998 entitled "Settlement and Mutual Release Agreement" (Agreement). The Agreement was executed in settlement of a 1996 lawsuit in Buncombe County brought by Jarvis Wayne Messer and Star Stone Enterprises, Inc.—defendants in the present action—against attorneys John R. Sutton and James M. Edmonds. Sutton and

1. Defendants Messer, Star Stone Enterprises, Inc., D. Bullman, C. Bullman, Ducket, Prather, Hensley, Posey, and Colagerakis filed a Motion to Dismiss and Motion for Judgment on the Pleadings in the present action. Plaintiff's complaint named defendants Griffin, Lasher, Eblen, Metcalf, and Penland, placing them within the jurisdiction of Buncombe County Superior Court. Defendant Wright filed an Answer to plaintiffs' complaint, submitting himself to the jurisdiction of Buncombe County Superior Court. At the time the trial court granted the Motion for Judgment on the Pleadings, service had not yet been obtained on defendant Montaperto.

Edmonds claimed an interest in the sales proceeds of two rubies pursuant to investment contracts between them and Messer. A dispute arose between Sutton, Edmonds and Messer that led to the 1996 lawsuit, settled by the Agreement dated 30 September 1998.

Plaintiffs allege the Agreement entitles either party to petition the trial court for appointment of a receiver to sell the two rubies and distribute the proceeds of the sales "to the parties as their interests shall be found by the Court." The two rubies are the "Appalachian Star Ruby," a 139.43 carat oval Star Ruby cabochon, and the "Smoky Mountain Two Star Ruby," an 86.56 carat round double Star Ruby cabochon. Both rubies are owned by Messer.

Pursuant to paragraph 2 of the Agreement, a three person Sales Committee is formed to "sell either or both of the Rubies with all due haste, taking into account their intrinsic and fair market value, and taking into account that they should be marketed with due care and circumspection, in order to avoid selling them for less than a fair value." Paragraph 3 of the Agreement provides that "[t]he Sales Committee shall have authority to sell either or both of the Rubies with all acts and actions to be taken and approved by the Sales Committee to be by majority vote." Paragraph 4 of the Agreement addresses how the parties may proceed if the Sales Committee fails in its efforts:

> The Sales Committee shall make every reasonable effort to sell one or both Rubies within a period of three (3) years from the date of this Agreement. If neither of the Rubies has been sold by the aforementioned deadline, then, at the request and instigation of either party, and without opposition of the other party, a state court receiver shall be appointed, in Buncombe Superior Court, to sell either of the Rubies on such terms and conditions as a Court shall deem fit or advisable, after a hearing at which all facts shall be presented by each party. If neither party desires to institute a receivership action, then the Sales Committee shall continue to have the authority and direction to continue to attempt to sell the Rubies for a period of two (2) additional years from the aforementioned deadline, and the right of either party to institute a receivership proceeding shall continue throughout such two-year (2) period.

Plaintiffs alleged in their complaint that the initial three-year period had elapsed without the Rubies being sold by the Sales Committee, and requested the court appoint a receiver to sell the

rubies on such terms as determined by the court, and distribute the net proceeds among the parties as their interests are determined by the court. In addition to Messer and Star Stone Enterprises, Inc., plaintiffs named as defendants certain other investors who were alleged to be entitled to a percentage of the proceeds of the sales of the rubies pursuant to separate contracts with Messer.

In response, Messer and other investor-defendants filed a Motion to Dismiss and a Motion for Judgment on the Pleadings. A judgment granting the defendants' Motion for Judgment on the Pleadings and dismissing plaintiffs' complaint with prejudice was signed on 25 February 2004. On 24 March 2004, plaintiffs appealed.

" 'Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party.' " *Gore v. Nationsbanc Ins. Co.*, 153 N.C. App. 520, 521, 570 S.E.2d 115, 116 (2002) (quoting *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001)). A motion for judgment on the pleadings is intended 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); *George Shinn Sports, Inc. v Bahakel Sports, Inc.*, 99 N.C. App. 481, 486, 393 S.E.2d 580, 583 (1990), *review denied, motion granted*, 328 N.C. 571, 403 S.E.2d 511 (1991). Judgment on the pleadings is proper where the pleadings reveal no genuine issue of material fact and present only questions of law. *Ragsdale* at 137, 209 S.E.2d at 499. " 'When ruling on a motion for judgment on the pleadings, the trial court 'is to consider only the pleadings and any attached exhibits, which become part of the pleadings.' " *Gore*, 153 N.C. App. at 521, 570 S.E.2d at 116 (quoting *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001)) (internal quotations omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 10(c) (2003). "If the pleadings present any issues of fact, then judgment on the pleadings is not appropriate." *Thompson v. Town of Warsaw*, 120 N.C. App. 471, 473, 462 S.E.2d 691, 692 (1995); *see also Benson v. Barefoot*, 148 N.C. App. 394, 396, 559 S.E.2d 244, 246 (2002).

[1] Plaintiffs assign as error the trial court's entry of judgment on the pleadings in favor of defendants on the grounds that the pleadings established material issues of fact regarding the validity of the Agreement and failed to establish that defendants were entitled to judgment as a matter of law.

Plaintiffs contend the Agreement specifically provides for the institution of a court-appointed receiver at the request of either party after the expiration of a three-year period in the event neither ruby has been sold. Plaintiffs further contend that this right to request the appointment of a receiver continues throughout the additional two-year period provided by the Agreement in the event a receivership has not been instituted upon the expiration of the initial term. Accordingly, plaintiffs assert that the Agreement itself does not preclude the appointment of a receiver as requested and cannot be the basis for entry of judgment on the pleadings in favor of defendants.

Defendants contend that the plain language of the Agreement precludes the unilateral institution of a receivership by either party and, because of their opposition to such receivership, judgment on the pleadings in their favor was proper. This contention first was raised by defendants on appeal and was not contained in the answer to their complaint nor in their motion to dismiss.

Both parties base these positions on their interpretations of the language of paragraph 4 set forth in its entirety *supra* and which states, in relevant part, "without opposition of the other party, a state court receiver shall be appointed, in Buncombe Superior Court, to sell either of the Rubies . . . ."

"A settlement agreement is interpreted according to general principles of contract law, and since contract interpretation is a question of law, the standard of review on appeal is *de novo*." *Cabarrus County v. Systel Bus. Equip. Co.*, 171 N.C. App. 423, 425, 614 S.E.2d 596, 597 (2005) (citing *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001); *Harris v. Ray Johnson Constr. Co., Inc.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000)). " 'The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made . . . .' " *Hilliard v. Hilliard*, 146 N.C. App. 709, 714, 554 S.E.2d 374, 377-78 (2001) (quoting *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962)). " '[A] contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.' " *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, 147 N.C. 274, 284, 61 S.E. 185, 190 (1908) (quoting Paige on Contracts, § 1112). " 'If the words employed are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have.' " *Jones v. Casstevens*, 222 N.C. 411, 413, 23 S.E.2d 303, 305 (1942) (quoting *King v. Davis*, 190 N.C. 737, 741, 130 S.E. 707, 709-10 (1925)).

In the case *sub judice*, plaintiffs contend that the words "without opposition of the other party" mean that neither party can prevent the other from instituting a receivership as provided by the terms of the Agreement. Defendants contend that the same language requires agreement of both parties for the appointment of a receiver. Although Defendants' interpretation may be reasonable when the language is considered standing alone, it is not reasonable in light of the surrounding language of the Agreement or the apparent purpose of the receivership provision. Paragraph 4 goes on to provide as a contingency:

> If *neither* party desires to institute a receivership action, then the Sales Committee shall continue to have the authority and direction to continue to attempt to sell the Rubies for a period of two (2) additional years from the aforementioned deadline, and the right of *either* party to institute a receivership proceeding shall continue throughout such two-year (2) period.

(Emphasis supplied). This additional language does not indicate that agreement among the parties was required for the institution of a receivership. To the contrary, this language clearly indicates that a receivership could be initiated at the request of only one party to the Agreement as argued by plaintiffs.

Further, it reasonably appears, and is so conceded in defendants' brief, that the receivership provision was intended to serve as a compromise of the parties' claims if the sales committee failed to sell the Rubies. As such, interpreting the language "without opposition from the other party" as proposed by defendants clearly would defeat the purpose of the provision.

Accordingly, we hold that the Agreement specifically provides for the institution of a receivership at the unilateral request of any one party. Consequently, this argument cannot be the basis for an entry of judgment on the pleadings in defendants' favor.

[2] Defendants next assert that the Agreement is unenforceable for vagueness and ambiguity and, consequently, entry of judgment on the pleadings in their favor also was proper on those grounds. Specifically, defendants contend that because the Agreement provides for the sale of one or both of the Rubies by the sales committee, but specifies that a receiver could be appointed to sell either of the Rubies upon terms and conditions that the court deemed fit, there was no meeting of the minds.

While we agree with defendants that there is nothing in the Agreement which can be read to authorize a receiver's sale of both Rubies, we see nothing that prevents the Agreement from being enforceable. The use of the phrase "to sell either of the Rubies" with regard to the authority of the receiver clearly establishes that the parties intended the receiver's authority to be limited to the sale of only one Ruby. This is particularly true in light of the parties' use of phrases, "to sell either or both of the Rubies" and "to sell one or both of the Rubies" with regard to the authority of the sales committee which clearly indicate that the sales committee's authority was not limited to the sale of only one ruby. Accordingly, we hold that, pursuant to the plain language of the Agreement, the court appointed receiver is authorized to sell either one, but not both, of the Rubies.

[3] In further support of the position that the Agreement is unenforceable defendants contend that, because the Agreement fails to specify which of the Rubies was to be sold by the receiver, an essential term of the agreement was lacking. " 'If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.' " *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001) (quoting *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (internal quotations and citations omitted). In the case *sub judice*, the parties agreed that the court would determine what terms and conditions of a receiver's sale would be "fit and advisable," which necessarily would include the determination of which Ruby was to be sold. Because the parties had agreed to leave the terms of the receiver's sale to the discretion of the court, a mode for deciding which Ruby would be sold by the receiver was agreed upon and, therefore, the agreement is not void for indefiniteness.

[4] Defendants next argue that the Agreement is unenforceable because many of the named defendants are not parties to the Agreement and, consequently, cannot be bound by it. Parties to a contract only may bind themselves and third parties may not be bound without their consent. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 438, 238 S.E.2d 597, 602-03 (1977) (citing 17A C.J.S., Contracts § 520 at 999). Here, however, plaintiffs are not attempting to enforce the Agreement against the investor defendants who were not parties to the Agreement. Rather, the investor defendants are proper parties to the action because the resolution of this action could affect their interests even though their presence was not necessary to proceed with the action. *N.C. Monroe Constr. Co. v. Guilford County Board*

of Education, 278 N.C. 633, 638-39, 180 S.E.2d 818, 821 (1971) (quoting *Gaither Corp. v. Skinner*, 238 N.C. 254, 256, 77 S.E.2d 659, 661 (1953)). Conversely, a party who claims a material interest in the subject matter of the case, whose interests will be directly affected by its outcome, and whose rights "must be ascertained and settled before the rights of the parties to the suit can be determined" is a necessary party. *Id.* (quoting *Equitable Life Assurance Soc. v. Basnight*, 234 N.C. 347, 352, 67 S.E.2d 390, 394 (1951)).

The presence of the investor defendants in this action who were not parties to the Agreement, was not required for this action to proceed as none of them have any interest in the actual Rubies themselves. The relief sought by plaintiffs is the specific performance of the Agreement which provides for the sale of one or both Rubies in settlement of a prior suit between the parties to the Agreement. Only defendant Messer has an ownership interest in the actual Rubies while plaintiffs and all other defendants have only an interest in the proceeds from the sale of the Rubies. Accordingly, because defendant Messer, the sole owner of the Rubies, is a party to the Agreement, which calls for the sale of one or both Rubies, it can be specifically performed.

Plaintiffs included the investor defendants known to them as the nature, method, and terms of a sale resulting from enforcement of the Agreement will affect the price received for the Rubies and, consequently, the investor defendants' interests. However, as none of the investor defendants have an ownership interest in the Rubies themselves, their presence was not required for the resolution of the action. Consequently, we hold that the investor defendants who were not parties to the Agreement were proper, and not necessary, parties to this action.

[5] Finally, defendants assert that the pleadings established that they were entitled to judgment as a matter of law because not all necessary parties were joined. Defendants contend that there existed additional investor defendants with interests in the proceeds of the sale of the Rubies and therefore not all necessary parties were present. The defense of failure to join a necessary party must be raised before the trial court and may not be raised for the first time on appeal. *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 574, 344 S.E.2d 789, 793, *disc. review denied*, 318 N.C. 418, 349 S.E.2d 601 (1986), *appeal dismissed after remand*, 94 N.C. App. 760, 381 S.E.2d 720 (1989). Defendants failed to raise this defense before the trial court and, accordingly, we do not consider this defense.

Assuming *arguendo* we were to consider this argument, however, it still would not be persuasive for the same reasons discussed *supra* regarding the investor defendants as proper parties.

Judgment of the trial court on the pleadings is reversed. The case is ordered remanded to the trial court for determination in light of defendants' remaining defenses, with instructions to the trial court to enter findings that: (1) appointment of a receiver may be instituted by either party to the Agreement unilaterally; (2) said receiver is authorized to sell only one Ruby—the identity of which is to be determined by the trial court, in its discretion, after hearing arguments of both parties in accordance with the Agreement; (3) the Agreement is not void for indefiniteness; (4) the investor defendants are proper parties whose presence does not preclude specific performance of the Agreement; and (5) no investor defendants are necessary parties.

Reversed and remanded with instructions.

Judge HUNTER concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge dissenting.

The majority interprets the language in the Agreement "without opposition from either party" to mean that such Agreement "provides for the institution of a receivership at the unilateral request of either party." This interpretation goes beyond the pleadings and the Agreement which were before the trial court in an effort to determine the intent of the parties. Therefore, I respectfully dissent.

A motion for judgment on the pleadings is properly allowed when all material allegations of fact are admitted in the pleadings and only questions of law remain. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). When language of a contract is plain and unambiguous its construction is a matter of law for the court. *Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 453, 325 S.E.2d 493, 496 (1985); *See Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 120, 516 S.E.2d 879, 882 (where the language of a contract is clear, the contract must be interpreted as written), *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).

The challenged phrase in paragraph 4, "without opposition of the other party," plainly states that absent the consent of both parties to a court-appointed receivership sale, the Sales Committee had two additional years in which to attempt to sell either ruby. Accordingly, plaintiffs filed a receivership action one day prior to the expiration of the two-year additional time period. Per the terms of the Agreement, defendants exercised their right to oppose initiating the receivership sale of either ruby. Under the plain meaning of the Agreement, plaintiffs had no right to compel defendants to sell the rubies within the five-year time period.

The trial court properly reviewed the Agreement to see if the terms were plain and unambiguous. *See De Torre v. Shell Oil Co.*, 84 N.C. App. 501, 353 S.E.2d 269 (1987) (judgment on the pleadings proper where agreement unambiguous). The time period under the Agreement as to the sale of either ruby expired effective 30 September 2001, the date on which the trial court granted defendants' motion for judgment on the pleadings. There exists no ambiguity regarding the terms of the Agreement. The Agreement further detailed the parties' anticipated process of selling either ruby over a five-year period from the date it was executed. As no genuine issue of material fact exists, I would affirm judgment in favor of defendants.

IN THE MATTER OF THE ESTATE OF JERRY L. NEWTON, JR. DECEASED

PAUL JEFFREY NEWTON, ANNE NEWTON GRAHAM, AND JOSEPH WESLEY NEWTON, PETITIONERS v. JERRY LEWIS NEWTON, III, TRUSTEE IN RE: THE MATTER OF REBA BURTON NEWTON REVOCABLE TRUST AGREEMENT DATED THE 29TH DAY OF SEPTEMBER, 1992, RESPONDENT

PAUL JEFFREY NEWTON, ANNE NEWTON GRAHAM, AND JOSEPH WESLEY NEWTON, PETITIONERS v. JERRY LEWIS NEWTON, III, TRUSTEE IN RE: THE MATTER OF JERRY LEWIS NEWTON, JR. REVOCABLE TRUST AGREEMENT DATED THE 29TH DAY OF SEPTEMBER, 1992, RESPONDENT

No. COA04-1508

(Filed 4 October 2005)

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

The assignments of error that respondent omitted in his brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

2. Trusts— jurisdiction—removal of trustee—recusal of Clerk of Court

The trial court did not err by exercising jurisdiction over the proceedings seeking to remove respondent as trustee of various trusts, because: (1) the Clerk of Court in the instant case had recused himself; and (2) the instant matter was limited only to those estate proceedings aimed at removing respondent as trustee. N.C.G.S. § 36A-23.1(a).

3. Trusts— removal of trustee—designation as special proceedings—reclassification as estate matters—effectiveness of summonses

Summonses served in proceedings seeking to remove respondent as trustee of inter vivos and testamentary trusts were not ineffectual because the proceedings were originally designated as special proceedings rather than estate matters and either the clerk or the trial court entered orders allowing reclassification of the files as estate matters, and petitioners were not required to re-serve respondent with "E"-captioned summonses, where one proceeding was properly filed and served as an estate matter prior to the effective date of N.C.G.S. § 36A-26.1, and respondent was not prejudiced in the other two proceedings by petitioners' initial failure to file the cases under an "E" caption or by the orders allowing reclassification of the files.

4. Trusts— motion to continue—removal of trustee—applicability of Rules of Civil Procedure

The trial court did not err in an action seeking the removal of respondent as trustee of various trusts by denying respondent's motion to continue the proceedings based on respondent's assertion that he was entitled to discovery as well as twenty days to prepare a responsive pleading following the denial of his motions to dismiss, because: (1) although our general statutes provide procedures allowing the removal of trustees, they do not expressly provide that the resulting hearings are governed by the Rules of Civil Procedure; (2) the trial court conducted the proceedings in a consistent and fair manner providing the parties with that amount of process due to them under general principles of law; and (3) there was no indication that respondent suffered any prejudice by the trial court's refusal to allow written discovery or a continuance to file a responsive pleading.

5. Trusts— removal of trustee—abuse of discretion standard

The trial court did not abuse its discretion by removing respondent as trustee of several trusts, because: (1) although respondent introduced several properly filed accountings and offered explanations for his decisions while serving as trustee, much of respondent's actions and inactions were beyond the bounds of reasonable judgment and uncharacteristic of a trustee demonstrating complete loyalty to the trust beneficiaries; and (2) respondent failed to exercise that type of unbridled loyalty due to the beneficiaries of the trusts based on his contempt for petitioners, and he has thereby prevented the distribution of the trusts' assets more than six years after their mother's death.

Appeal by respondent from orders entered 7 June 2004 and 10 June 2004 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 6 June 2005.

Bailey & Thomas, P.A., by Wesley Bailey, for petitioner-appellee Paul Jeffrey Newton.

Bennett & Guthrie, P.L.L.C., by Richard V. Bennett, for petitioner-appellee Anne Newton Graham.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Maria C. Papoulias, for petitioner-appellee Joseph Wesley Newton.

Stephen E. Lawing for respondent-appellant Jerry Lewis Newton, III.

TIMMONS-GOODSON, Judge.

Jerry Lewis Newton, III ("respondent") appeals the trial court orders removing him as trustee of certain trusts, denying his motions to continue and dismiss the proceedings, and allowing the reclassification and consolidation of the actions. For the reasons discussed herein, we affirm the trial court's orders.

The facts and procedural history pertinent to the instant appeal are as follows: On 29 September 1992, respondent's father, Jerry Lewis Newton, Jr. ("Jerry"), executed a revocable trust ("Jerry's *inter vivos* trust") naming respondent co-trustee upon Jerry's death. On the same date, respondent's mother, Reba Burton Newton ("Reba"), executed a revocable trust ("Reba's *inter vivos* trust") naming respondent co-trustee upon Reba's death. On 18 August 1993, Jerry died, leaving a will creating a third trust ("Jerry's testamentary trust") which named respondent co-trustee. Reba subsequently died on 5

September 1998. Upon Reba's death, respondent served as the sole trustee of the three trusts. The four beneficiaries of the trusts were respondent and his three siblings: Anne Newton Graham ("Anne"), Joseph Wesley Newton ("Joseph"), and Paul Jeffrey Newton ("Paul") (collectively, "petitioners").

On 31 March 2004, petitioners filed a motion in Forsyth County file number 04 SP 620, seeking to remove respondent as trustee of Reba's *inter vivos* trust. On that same date, petitioners filed a motion in Forsyth County file number 04 SP 621, seeking to remove respondent as trustee of Jerry's *inter vivos* trust. Anne and Paul had previously filed a motion in Forsyth County file number 97 SP 576, seeking to remove respondent, Reba, and Joseph as co-trustees of Jerry's testamentary trust.

On 16 April 2004, respondent filed motions to dismiss the petitions in file numbers 04 SP 620 and 04 SP 621. On 21 April 2004 and 22 April 2004, the Forsyth County Clerk of Superior Court ("the Clerk") filed separate orders in each file number, disqualifying himself from ruling on the motions to remove respondent as trustee. In support of his disqualification, the Clerk cited respondent's prior request that the Public Administrator of Jerry and Reba's estates prosecute the Clerk for various statutory violations. On 6 May 2004, petitioners filed a motion to consolidate the three file numbers for hearing and a motion for a protective order to prohibit respondent from pursuing discovery in the matters. On 14 May 2004, petitioners filed a motion to reclassify file numbers 04 SP 620 and 04 SP 621 as file numbers 04 E 620 and 04 E 621, respectively.

In May and June 2004, the trial court held a hearing to determine all issues before it. After receiving testimony and argument from both parties, the trial court denied respondent's motions to dismiss the petitions and granted petitioners' motions to reclassify the file numbers and consolidate the cases. The trial court also ruled upon the petition to remove respondent as trustee of the trusts, concluding in pertinent part as follows:

> 2. That the stated contempt and deep hostility which [respondent] holds for [petitioners] who are also his sister and brothers, makes it impossible for [respondent] to exercise that degree of unbridled loyalty to the beneficiaries of [the] trusts which is required of [respondent] by the laws of the State of North Carolina, including North Carolina General Statutes Section 36A-165.

3. That [respondent], the sole and acting Trustee under the Trusts, did violate his fiduciary duty through default and misconduct in the execution of his office as Trustee of said Trusts in violation of the laws of the State of North Carolina, in failing to carry out the terms of the Trusts by refusing to distribute the assets of [Jerry's testamentary trust] and [Jerry's *inter vivos* trust], and by failing to distribute the assets on deposit in [Reba's *inter vivos* trust], by reason of self-interest and his animosity towards the remainder beneficiaries.

Based upon these conclusions of law, the trial court thereafter ordered that respondent be removed from serving as trustee of the three trusts. Respondent appeals.

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[1] We note initially that respondent's brief does not contain arguments supporting each of his original assignments of error on appeal. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those issues properly preserved by respondent for appeal.

The issues on appeal are whether the trial court erred by: (I) exercising jurisdiction over the proceedings; (II) denying respondent's motions to dismiss; (III) denying respondent's motions to continue the proceedings; and (IV) entering the order removing respondent as trustee.

[2] Respondent first argues that the trial court erred by exercising jurisdiction over the proceedings. Respondent asserts that the consolidated proceedings should have been heard as civil actions rather than estate actions, and that the trial court erred by entering various orders in the matter. We disagree.

N.C. Gen. Stat. § 7A-104(a1) (2003) provides that "[t]he clerk may disqualify himself in a proceeding in circumstances justifying disqualification or recusement by a judge." Following such a disqualification, N.C. Gen. Stat. § 7A-104(b) provides that any party in interest may thereafter request that the trial court make "all necessary orders and judgments in any proceeding in which the clerk is disqualified[.]"

In the instant case, following petitioners' request to remove respondent as trustee, the Clerk recused himself from the case, stating that any ruling by him in the action "would be subject to the inter-

pretation of having been influenced by [a] pending matter in the Declaratory Judgment action relating to the request for prosecution of the Clerk" by respondent. Petitioners thereafter filed a N.C. Gen. Stat. § 7A-104(b) motion, which the trial court subsequently allowed. On appeal, respondent contends that the trial court was without jurisdiction to hear or enter orders regarding his removal as trustee because the matter "is an action for breach of fiduciary duty, negligence, and fraud[.]" However, respondent's contention ignores the plain language of petitioners' pleadings as well as our state's general statutes.

N.C. Gen. Stat. § 36A-23.1(a) (2003) defines the jurisdictional reach of the clerks of our superior courts. Notwithstanding exceptions inapplicable to this case, N.C. Gen. Stat. § 36A-23.1(a) grants the clerks exclusive jurisdiction "over all proceedings initiated by interested persons concerning the internal affairs of trusts," including "those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries[.]" Specifically included in the list of such proceedings are those hearings "[t]o appoint or remove a trustee[.]" N.C. Gen. Stat. § 36A-23.1(a)(1).

In the instant case, although petitioners' filings detail various acts of alleged fraud, negligence, and breach of fiduciary duty, the filings only request the issuance of an order removing respondent as trustee of the three separate trusts. It is clear the petitions were not filed in an effort to recover damages or to commence a civil action against respondent. Instead, petitioners' efforts to recover damages from respondent were limited to 02 CVS 1091, a case properly filed against respondent in civil court. Therefore, as the Clerk in the instant case had recused himself, we conclude that the trial court did not err by exercising jurisdiction over the matter or entering orders regarding the removal of respondent as trustee. Furthermore, because the instant matter was limited only to those estate proceedings aimed at removing respondent as trustee, we conclude that the trial court did not err by denying respondent's motion to join the instant matter with 02 CVS 1091. Accordingly, we overrule respondent's first argument.

[3] Respondent next argues that the trial court erred by denying his motions to dismiss. Respondent asserts that service regarding the individual cases was improper, and that therefore the matter should have been dismissed. We disagree.

N.C. Gen. Stat. § 36A-26.1 (2003)[1] provides in pertinent part as follows:

> Proceedings under G.S. 36A-23.1 are initiated by filing a petition in the office of the clerk of superior court. Upon the filing of the petition, the clerk shall docket the cause as an estate matter. All trustees and interested persons not joined as petitioners shall be joined as respondents. The clerk shall issue the summons for the respondents. . . . The summons shall notify the respondents to appear and answer the petition within 10 days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action.

In the instant case, a special proceedings summons was issued in file number 97 SP 576 and served upon respondent on 11 August 1997. Two additional special proceedings summons were issued in file numbers 04 SP 620 and 04 SP 621 and served upon respondent on 7 April 2004. On 20 April 2004, prior to his disqualification from the matter, the Clerk filed two separate orders reclassifying 04 SP 620 and 04 SP 621 as 04 E 620 and 04 E 621, respectively. On 10 June 2004, the trial court entered an order allowing "petitioners to classify [97 SP 576] as an estate matter and amend the 'SP' caption . . . ."

On appeal, respondent contends that because the proceedings were originally docketed as special proceedings rather than estate matters, the process served upon him did not comply with N.C. Gen. Stat. § 36A-26.1 and was thus ineffectual. However, we decline to read N.C. Gen. Stat. § 36A-26.1 so broadly. Instead, we conclude that where, as with 97 E 576, an estate matter was properly filed and served prior to the effective date of current N.C. Gen. Stat. § 36A-26.1, the petitioner is not required to thereafter re-serve the respondent with an "E"-captioned summons.

As to 04 E 620 and 04 E 621, we note that although respondent contested the effectiveness of the service of these cases at the hearing, respondent managed to file, *inter alia*, a set of interrogatories and a request for production of documents, as well as motions seeking the dismissal and continuance of the actions. In one motion to continue, respondent alleged that he was "served herein on April 7,

1. N.C. Gen. Stat. § 36A-26.1 was amended by Session Laws 2003-261, s. 3. The amended version is applicable to all trusts created before or after 1 January 2004.

2004" and had "filed and served a Motion to Dismiss . . . this action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure . . . ." In light of the foregoing, we are not convinced that respondent suffered any prejudice as a result of either petitioners' initial failure to file the cases under an "E" caption or the Clerk and trial court's subsequent orders allowing the reclassification of the files. Accordingly, we overrule respondent's second argument.

[4] Respondent next argues that the trial court erred by denying his motions to continue the proceedings. Respondent asserts that the Rules of Civil Procedure apply to estate proceedings and thus he was entitled to discovery as well as twenty days to prepare a responsive pleading following the denial of his motions to dismiss. We disagree.

Although our general statutes provide procedures allowing the removal of trustees, they do not expressly provide that the resulting hearings are governed by the Rules of Civil Procedure. Rule 1 of the Rules of Civil Procedure provides in pertinent part as follows:

> These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute.

N.C. Gen. Stat. § 1A-1, Rule 1 (2003). Similarly, N.C. Gen. Stat. § 1-393 (2003) provides that "[t]he Rules of Civil Procedure and the provisions of this Chapter on Civil Procedure are applicable to special proceedings, except as otherwise provided."

While respondent would have us conclude that any estate matter is subject to the Rules of Civil Procedure by virtue of its nature and similarity to a special proceeding, we note that, as detailed above, trustee removal proceedings are held "in an estate matter and *not in a special proceeding or in a civil action*." N.C. Gen. Stat. § 36A-26.1 (emphasis added). Although Chapter 36A does not expressly or "otherwise" prescribe "differing [rules of] procedure," we are not persuaded that, in addition to the duties already placed upon them, clerks of court must also make decisions regarding discovery and other issues of law arising during estate matters. Instead, we conclude that the clerks of our superior courts hear the matters before them summarily, and are responsible for determining questions of fact rather than providing judgment in favor of one party or the other. Thus, where a clerk of superior court is presented with a petition to remove a trustee, the clerk examines the affidavits and evidence of

the parties and determines only whether the trustee is qualified or fit to faithfully discharge his or her duties. The process due to the parties during such a determination, having not been expressly prescribed by statute, is only that which is reasonable when applying general principles of law. *See Edwards v. Cobb*, 95 N.C. 5, 12 (1886) ("The statute conferring power on the Clerk to remove executors and administrators, does not prescribe in terms how the facts in such matters shall be ascertained, but it plainly implies that he shall act promptly and summarily. Applying general principles of law, the method of procedure we have above indicated, or one substantially like it, is the proper one.").

In the instant case, after careful review of the record, we conclude that the trial court conducted the proceedings in a consistent and fair manner, thereby providing the parties with that amount of process due to them under general principles of law. The trial court allowed extensive presentation of evidence and argument from both parties, allowing each side to introduce necessary exhibits and cross-examine opposing witnesses. The proceedings lasted six days, and took place over a period of three weeks. In light of the foregoing, there is no indication that respondent suffered any prejudice by the trial court's refusal to allow written discovery or a continuance to file a responsive pleading. Accordingly, respondent's third argument is overruled.

[5] Respondent's final argument is that the trial court erred by entering the order removing him as trustee. In his corresponding assignments of error, respondent makes several assertions in support of this argument, including that he "rendered to [p]etitioners the annual accountings of [Jerry's testamentary trust] each year in compliance with requirements of the Will," that he "performed the powers and duties and complied in all respects with the express terms and limitations set forth in the Trusts," and that he "acted honestly in a reasonable, open, fair, and honest manner" in following the provisions of the trusts.[2] In his brief, respondent also asserts that he "did not, and does not, object to a distribution to [the] beneficiaries, of which he is one, or to his removal[.]" Despite the inconsistencies inherent in

2. Respondent also contends that the trial court erred by entering the order because "[t]his proceeding is time barred by N.C.G.S. § 1-52, the statute of limitations of 3 years." However, we note that respondent failed to proffer such a contention at the hearing, and on appeal, respondent has failed to indicate which provision of N.C. Gen. Stat. § 1-52, a statute relevant to civil actions, applies to this trustee removal action. Accordingly, we conclude that respondent has waived his right to assert this issue on appeal.

these assertions, we have reviewed respondent's argument and, as detailed below, we conclude that the trial court did not err.

This Court has previously stated that "[t]rust beneficiaries may expect and demand the trustee's complete loyalty in the administration of any trust. Should there be any self-interest on the trustee's part in the administration of the trust which would interfere with this duty of complete loyalty, a beneficiary may seek the trustee's removal." *In re Trust Under Will of Jacobs*, 91 N.C. App. 138, 143, 370 S.E.2d 860, 864 (citing *Trust Co. v. Johnston*, 269 N.C. 701, 153 S.E.2d 449 (1967)), *disc. review denied*, 323 N.C. 476, 373 S.E.2d 863 (1988).

> The court will always compel the trustee to exercise a mandatory power. It is otherwise, however, with respect to a discretionary power. The court will not undertake to control the trustee with respect to the exercise of a discretionary power, except to prevent an abuse by him of his discretion. The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment.

Woodard v. Mordecai, 234 N.C. 463, 471, 67 S.E.2d 639, 644 (1951) (citations omitted). As the removal of a trustee is left to the discretion of the clerks of superior court, or in this case, the trial court, our review is limited to determining whether the trial court abused its discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Under this standard, we accord "great deference" to the trial court, and its ruling may be reversed only upon a showing that its action was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Id.*

In the instant case, the trial court based its order removing respondent as trustee upon its conclusions that "the . . . contempt and deep hostility which [respondent] holds for three of the beneficiaries of the three Trusts . . . makes it impossible for him to exercise that degree of unbridled loyalty to the beneficiaries" required by our law, and that respondent's "self-interest and . . . animosity towards the remainder beneficiaries" led to his "refus[al] to distribute the assets of the Trust[s]" and "carry out the terms of the Trusts . . . ." These conclusions were supported by several findings of fact detailing respondent's "animosity, hostility, disloyalty, and self-interest" toward petitioners, including his refusal to pay indebtedness due to

Anne, Paul, and Reba's Estate, his participation in "divisive and costly" litigation, his refusal to distribute the assets of the trusts more than five years following Reba's death, and his "artificial[] inflat[ion] [of] the principal of the Trusts by including . . . baseless claims [against petitioners] as Trust assets [and] adding eight percent (8%) annually, thereby paying himself improper commissions on the principal of the Trusts each year." The trial court's findings were supported by competent evidence introduced during the hearings, including testimony from respondent, who admitted that "there is a great deal of conflict between [him] and the other beneficiaries" and that he believes "there's a deep, a fundamental conflict of character between [his] brothers and sisters." Respondent further testified that he had no intention of distributing money to petitioners until he had been reimbursed for his participation in the lawsuits, and he admitted to physically assaulting Anne, attempting to strike Paul, informing Anne's employer that she had filed incompetency litigation against her mother, and informing the Georgia State Bar of Joseph's alleged misdeeds.

After reviewing the record in this case, we conclude that sufficient evidence supports the trial court's findings of fact, and its findings of fact support its conclusions of law. Although respondent introduced several properly filed accountings and offered explanations for his decisions while serving as trustee, it is clear from a reading of the record that much of respondent's actions and inactions were beyond the bounds of reasonable judgment and uncharacteristic of a trustee demonstrating complete loyalty to the trust beneficiaries. As the trial court noted, "when the wills and trust documents are read the primary an[d] overriding purpose of these trusts was for the distribution of the fruits of [Jerry and Reba's] labor . . . to be distributed to their four children equally[.]" However, due to his "contempt" for petitioners, respondent has failed to "exercise that type of unbridled loyalty" due to the beneficiaries of the trusts, and he has thereby prevented the distribution of the trusts' assets more than six years after Reba's death. Therefore, in light of the foregoing, we conclude that the trial court did not abuse its discretion by ordering that respondent be removed from serving as trustee of Jerry and Reba's trusts. Accordingly, we overrule respondent's final argument.

In light of the foregoing conclusions, we affirm the trial court orders removing respondent as trustee of the trusts, denying his motions to continue and dismiss the proceedings, and allowing the reclassification and consolidation of the actions.

Affirmed.

Chief Judge MARTIN and Judge WYNN concur.

IN THE MATTER OF: T.R.P., MINOR CHILD

No. COA04-1356

(Filed 4 October 2005)

Child Support, Custody, and Visitation— subject matter jurisdiction—failure to duly verify initial juvenile petition

The trial court lacked subject matter jurisdiction to enter a child custody review order entered on 16 June 2004, and the order is vacated and dismissed because: (1) the initial juvenile petition was not duly verified as required by law when the petition was notarized but the petition was neither signed nor verified by the DSS director or an authorized representative of the director; and (2) a defense based on lack of subject matter jurisdiction cannot be waived and may be asserted at any time.

Judge LEVINSON dissenting.

Appeal by respondent-mother from an order entered 16 June 2004 by Judge Edgar B. Gregory in Wilkes County District Court. Heard in the Court of Appeals 14 June 2005.

Paul W. Freeman, Jr. for petitioner-appellee Wilkes County Department of Social Services.

Sherrie Hodges for Guardian ad Litem.

Robert W. Ewing for respondent-appellant.

HUNTER, Judge.

Renee Browe ("respondent-mother") appeals a custody review order ("Order") entered on 16 June 2004 as to the minor child ("TRP"). The issues before the Court are: (I) Whether the trial court lacked jurisdiction to enter the Order, because the initial juvenile petition was not verified as required by law, and (II) whether the trial court erred in ordering the physical custody of the minor child to her father, Ronnie Parks ("Parks"), when it failed to make findings

that the minor child would receive proper care and supervision in a safe home.

On 21 April 2003, respondent-mother and her live-in boyfriend, Michael Russell ("Russell"), were charged with operating a methamphetamine laboratory in the bathroom of their home. Both pled guilty to several felony charges and received probationary sentences.

Respondent-mother and her three children had been living with Russell for several months prior to the discovery of the laboratory. At the time of the discovery of the laboratory by police, TRP was present in the home. The chemicals used in the methamphetamine laboratory were found to be volatile and explosive, and a danger to the three children living in the home.

On 22 August 2003, Wilkes County Department of Social Services ("DSS") filed a Juvenile Petition ("Petition") alleging that TRP, a minor child, was a neglected juvenile, in that the juvenile "does not receive proper care, supervision, or discipline from the juvenile's parent" and "lives in an environment injurious to the juvenile's welfare." Furthermore, DSS recommended that it would be in TRP's best interest for DSS to have physical and legal custody of the child and for TRP to be placed with her maternal aunt.

Although the Petition was not verified by an authorized representative of DSS, it was notarized by Linda Garrett and submitted to the trial court. On 23 February 2004, the trial court, finding that it had jurisdiction over the case, concluded that there was clear and convincing evidence that TRP was in a state of neglect. The trial court placed legal and physical custody of the minor child with DSS after concluding it would be in TRP's best interest. The trial court also ordered that Parks submit to a mental health evaluation before being allowed overnight visits with TRP. Additionally, the trial court ordered that respondent-mother sign all releases and consent forms required by DSS and be more cooperative with DSS.

On 24 May 2004, a review hearing was held pursuant to N.C. Gen. Stat. § 7B-906 for the purposes of reviewing the custodial status of TRP. The trial court found that respondent-mother was more cooperative with DSS, but was currently pregnant with Russell's child, unemployed, and living in a mobile home owned by Russell's family. The trial court also found that Russell was currently incarcerated due to probation violations. Additionally, the trial court found that Parks was cooperative with DSS, receiving counseling, and had passed

seven drug tests. The trial court also found that Parks had a full-time and part-time job.

On 16 June 2004, the trial court entered an Order concluding that it would be in the best interest of TRP to remain in the legal and physical custody of DSS. However, the trial court also concluded that "it appears that return of the child to her father's home is in her best interest in the near future[.]" Additionally, the trial court concluded that when school started, TRP's physical custody would be transferred to Parks upon the express conditions that: (1) he continue counseling, (2) remain alcohol and drug free, and (3) submit to DSS a written plan for daycare. Respondent-mother appeals from this Order.

In her first assignment of error, respondent-mother contends that the trial court lacked jurisdiction to enter the review order since the initial juvenile petition was not verified as required by law. We agree.

> "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute."

In re McKinney, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (citations omitted). N.C. Gen. Stat. § 7B-200(a) confers on the trial court exclusive, original jurisdiction "over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2003). " '[O]nce jurisdiction of a court attaches it exists for all time until the cause is fully and completely determined.' " *In the Matter of Arends*, 88 N.C. App. 550, 554, 364 S.E.2d 169, 171 (1988) (citation omitted) (holding that the trial court had continuing jurisdiction over all subsequent custody orders once the trial court acquired jurisdiction); N.C. Gen. Stat. § 7B-201 (2003).

"[A] court's inherent authority does not allow it to act where it would otherwise lack jurisdiction." *In re McKinney*, 158 N.C. App. at 443, 581 S.E.2d at 795. " 'A court cannot undertake to adjudicate a controversy on its own motion . . . before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.' " *Id.* at 444, 581 S.E.2d at 795 (emphasis omitted) (citation omitted). For this reason, a defense based upon lack of subject matter jurisdiction "cannot be waived and may be asserted at any time. Accordingly, the

appellants may raise the issue of jurisdiction over the matter for the first time on appeal although they initially failed to raise the issue before the trial court." *In re Green*, 67 N.C. App. 501, 504, 313 S.E.2d 193, 195 (1984) (citations omitted), *see also In re Z.T.B.*, 170 N.C. App. 564, 568, 613 S.E.2d 298, 300 (2005) (holding that when defects in a petition raise a question of the trial court's subject matter jurisdiction over the action, the issue may properly be raised for the first time on appeal).

The dissent contends that as respondent-mother appeals from a review order and not the initial custody order in this matter, the right to challenge subject matter jurisdiction has been waived, citing *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984). However, *Sloop* does not hold that failure to appeal a complete lack of subject jurisdiction for an initial adjudication of abuse, neglect, or dependency bars a respondent from raising the lack of jurisdiction when appealing from a subsequent review of that determination. Rather, *Sloop* states that "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." *Id.* at 692-93, 320 S.E.2d at 923. The Court noted that the defendant in *Sloop* did not point to any substantive deficiencies in jurisdiction and found that general subject matter jurisdiction existed. *Id.* at 693, 320 S.E.2d at 923. *Sloop* held that the issue raised was merely whether such jurisdiction was "*properly exercised* according to the statutory requirements *in [that] particular case*." *Id. Sloop* further stated that "[a]n *absolute want* of subject matter jurisdiction might constitute a fatal deficiency," but that grounds were available to deny a subsequent motion attacking jurisdiction in the unique case of a party who had originally agreed to a consent judgment that had been entered and acquiesced to for several years. *Id.*

Such cases are readily distinguishable from the instant case, which does not involve a consent judgment entered at the behest of both parties, but rather concerns adversarial State action to remove a child from its parent on the grounds of dependency, neglect, or abuse. Here, respondent-mother raises a substantive challenge to the trial court's subject matter jurisdiction in this case, based on the lack of verification of the original petition. "In juvenile actions, the requirement that petitions be verified is 'essential to both the validity of the petition and to establishing the jurisdiction of the court.' " *In re Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993) (quoting *In re Green*, 67 N.C. App. at 504, 313 S.E.2d at 195). As a ver-

ified petition is necessary to invoke the jurisdiction of the court over the subject matter for a dependency, neglect, or abuse proceeding, the court's lack of subject matter jurisdiction cannot be waived and can be raised at any time. *See Triscari*, 109 N.C. App. at 288, 426 S.E.2d at 437. Because the court may not " 'adjudicate a controversy on its own motion' " without an " 'appropriate application invoking the judicial power of the court,' " *McKinney*, 158 N.C. App. at 444, 581 S.E.2d at 795 (citation omitted), this Court must review the initial custody order to determine whether the trial court properly obtained jurisdiction over the matter.

"In the absence of a statutory requirement or rule of court to the contrary, it is ordinarily not necessary to the validity of a petition that it be signed or verified." *In re Green*, 67 N.C. App. at 503, 313 S.E.2d at 194. "On the other hand, where it is required by statute that the petition be signed and verified, these essential requisites must be complied with before the petition can be used for legal purposes." *Id.* at 503, 313 S.E.2d at 194-95.

A juvenile action, including a proceeding in which a juvenile is alleged to be abused or neglected, is commenced by the filing of a petition. N.C. Gen. Stat. § 7B-405 (2003). The pleadings relevant to an abuse, neglect, and dependency action are the petition, and it is specifically required by statute that "the petition shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing." N.C. Gen. Stat. § 7B-403(a) (2003).

In *Green*, this Court held that "the failure of the petitioner to sign and verify the petition before an official authorized to administer oaths rendered the petition fatally deficient and inoperative to invoke the jurisdiction of the court[.]" *Green*, 67 N.C. App. at 504, 313 S.E.2d at 195. Additionally, *Green* stated:

> The Juvenile Code requisites that the petition be signed and verified are therefore essential to both the validity of the petition and to establishing the jurisdiction of the court. The primary purpose to be served by signature and verification on the part of the petitioner is to obtain the written and sworn statement of the facts alleged in such official and authoritative form as that it may be used for any lawful purpose, either in or out of a court of law. Under the Juvenile Code, these requirements also serve to invoke the jurisdiction of the court.

Id. (citation omitted). As discussed *supra*, in *In re Triscari Children*, 109 N.C. App. at 288, 426 S.E.2d at 437, this Court affirmed *Green* and held that verified pleadings in juvenile proceedings are necessary to invoke the jurisdiction of the court over the subject matter.

Verification requires a petitioner to attest "that the contents of the pleading verified are true to the knowledge of the person making the verification[.]" N.C. Gen. Stat. § 1A-1, Rule 11(b) (2003). Verification is defined as "[a] notarial act in which a notary certifies that a *signer*, whose identity is personally known to the notary or proven on the basis of satisfactory evidence, has, in the notary's presence, voluntarily signed a document and taken an oath or affirmation concerning the document." N.C. Gen. Stat. § 10A-3(9) (2003) (emphasis added). Our Supreme Court has held that notarization is insufficient to constitute verification. *See Martin v. Martin*, 130 N.C. 27, 28, 40 S.E. 822, 822 (1902) (holding that the phrase " 'sworn and subscribed to' " is defective as a verification).

Here, the Petition was notarized, the notarization reading "[s]worn and subscribed to before me." However, the Petition was neither signed nor verified by the director or an authorized representative of the director. Thus, the Petition requesting the juvenile be adjudicated neglected was not in compliance with the statute requiring that all Petitions be verified pursuant to N.C. Gen. Stat. § 7B-403, and the trial court, therefore, lacked subject matter jurisdiction to adjudicate this matter.

DSS, however, relying on *In re Mitchell*, 126 N.C. App. 432, 485 S.E.2d 623 (1997), argues the failure to sign the Petition is not fatal, because the trial court obtained jurisdiction by issuance and service of process. They contend that as the issuance and service of process were proper, the trial court had subject matter jurisdiction to enter the initial custody order finding TRP neglected.

Such reliance on *Mitchell* is misplaced. *Mitchell* does not hold that petition formalities are unnecessary to obtain jurisdiction, but rather discusses a further procedural requirement to establish subject matter jurisdiction in a juvenile action. *Id.* at 433, 485 S.E.2d at 624. The dispositive issue in *Mitchell* was whether the trial court had obtained jurisdiction when a summons was not issued, and the question of the verification of the petition was not before the Court. *Id.* at 433, 485 S.E.2d at 623. The Court in *Mitchell* recognized that a properly filed petition was the necessary first step in the trial court obtaining jurisdiction, stating that, "[a] juvenile action, including a

proceeding in which a juvenile is alleged to be abused or neglected, is commenced by the filing of a petition." *Id.* at 433, 485 S.E.2d at 624. Hence, without a properly filed petition, the trial court cannot have jurisdictional authority to issue a summons. *Id.* As *Mitchell* addressed the failure to properly issue a summons rather than the formalities required of a juvenile petition, it is not controlling in this matter.

We share the dissent's concerns for the welfare of TRP, and would caution DSS to be observant as to the statutory requirements for the filing of juvenile petitions so as to avoid future errors of this nature. However, we are bound by the requirements established by our legislature and the prior decisions of this Court, which reflect a need to ensure that petitions to remove a child from the custody of their guardians be filed only when the underlying facts have been verified by the appropriate authorities. Therefore, under *Green* and *Triscari*, the failure of the director to sign and verify the Petition before the notary rendered the Petition fatally deficient and inoperative to invoke the jurisdiction of the court. As there is no evidence in the record suggesting later filings sufficient to invoke jurisdiction as to the review order, the trial court erred in proceeding on the matter due to lack of subject matter jurisdiction.

As the trial court lacked jurisdiction to enter the contested Order, we do not reach respondent-mother's remaining assignment of error.

Because the Petition was not duly verified as required by law, we conclude that the trial court lacked subject matter jurisdiction. Therefore, the Order of the trial court must be vacated and the case dismissed.

Vacated and dismissed.

Judge McGEE concurs.

Judge LEVINSON dissents in a separate opinion.

LEVINSON, Judge dissenting.

I respectfully disagree with the holding of the majority. The respondent's failure to appeal the 15 March 2004 adjudication and disposition order bars her challenge to the trial court's jurisdiction to enter the 16 June 2004 custody review order at issue. Accordingly, I dissent from the majority's holding that the trial court lacked subject matter jurisdiction to enter the custody review order.

The majority holds that the trial court lacked subject matter jurisdiction to enter the order of adjudication and disposition, on the grounds that the original petition alleging neglect did not contain a verified signature of an authorized representative of Wilkes County DSS. However, respondent did not appeal the adjudication and disposition order placing custody of T.R.P. with Wilkes County DSS. Rather, she appeals only the review order entered several months after the adjudication, which ordered that, when T.R.P.'s father met certain conditions, the child would be placed in his custody within a few months. Respondent thus attempts to raise the issue of the court's jurisdiction over the original adjudication proceeding for the first time on appeal, not from the adjudication and disposition order, but from a later order entered on custody after a proper hearing.

Respondent does not question the trial court's general jurisdiction over custody review or its authority to review dispositional orders. Her only ground for challenging the court's subject matter jurisdiction is that the petition in the earlier adjudication lacked a necessary signature. A similar issue was addressed by this Court in *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984). In *Sloop*, the defendant challenged the trial court's exercise of jurisdiction over a custody determination only after the court had entered various custody orders over a period of years. This Court held:

> [Defendant] first challenges the district court's exercise, beginning in 1980, of subject matter jurisdiction[.] . . . It is true that the question of subject matter jurisdiction may be raised at any point in the proceeding, and that such jurisdiction cannot be conferred by waiver, estoppel or consent. . . . However, the district courts of this State do undoubtedly possess general subject matter jurisdiction over child custody disputes. . . . The real question under the Act is whether such jurisdiction is properly exercised according to the statutory requirements in this particular case. . . . The court's 1980 findings relative to the jurisdictional prerequisites . . . appear sufficient on their face to justify exercising jurisdiction. [Defendant] does not, on this appeal, point to any substantive deficiencies therein. He chose to withdraw his appeal in 1980 and to acquiesce in the judgment for several years. Accordingly, we hold that he has failed to preserve his objection and the assignment is without merit.

Sloop, 70 N.C. App. at 692-93, 320 S.E.2d at 923. *See also*, *Ward v. Ward*, 116 N.C. App. 643, 645, 448 S.E.2d 862, 863 (1994) ("Plaintiff's

sole contention on appeal is that [the trial court] lacked subject matter jurisdiction to enter the [orders] . . . plaintiff has waived his right to challenge the validity of both orders on the grounds asserted, because he could have presented the same challenges in his initial appeals which were dismissed"). Thus:

> An absolute want of jurisdiction over the subject matter may be taken advantage of at any stage of the proceedings[, but] . . . "objection to jurisdiction based on any ground other than lack of jurisdiction of the subject matter, such as . . . irregularity in the method by which jurisdiction of the particular case was obtained, is usually waived by failure to raise the objection at the first opportunity, or in due or seasonable time, or within the time prescribed by statute." 21 C.J.S., Courts, § 110.

Pulley v. Pulley, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961).

I would apply the reasoning of the cases discussed above in resolving this issue. Here, respondent (1) does not challenge the court's general jurisdiction over custody review or allege jurisdictional infirmities specifically associated with the custody review proceedings and/or the resulting order, and (2) did not appeal the earlier adjudication and disposition order. She cannot, therefore, bring a belated challenge to the court's jurisdiction to enter the earlier order on abuse, neglect or dependency by attacking the present order on appeal. This collateral attack on the authority of the court to act cannot be sustained.[1]

The majority opinion relies upon appellate authorities concerning jurisdiction that are inapposite to the current appeal. While the black-letter law concepts contained in these cases cannot be seriously questioned, it is significant that all of them involve jurisdictional deficiencies in proceedings and orders that were the subject of a direct appeal. My research has not revealed any authority that supports the majority's application of the law concerning subject matter jurisdiction. Moreover, the majority holding does not comport with concepts

1. DSS also argues, in the alternative, that the trial court's subject matter jurisdiction also arises from its obligation to hold a review hearing because T.R.P. was removed from the parent's care. *See* N.C. Gen. Stat. § 7B-906(a) (2003) ("In any case where custody is removed from a parent, guardian, custodian, or caretaker the court shall conduct a review hearing within 90 days from the date of the disposition hearing and shall conduct a review hearing within six months thereafter."). The majority has not addressed this argument. I have not addressed this argument because I would conclude that the trial court had subject matter jurisdiction for the reasons discussed in this dissenting opinion.

concerning judicial finality, and leaves the trial court and this child in a legal quagmire: while the order on appeal is vacated, the majority must necessarily leave the 15 March 2004 order on adjudication and disposition intact; indeed, that order is not before this Court and we are without authority to disturb it. In my view, even if the review order on appeal is reversed on some valid grounds, the earlier adjudication and disposition order unambiguously continues the child within the jurisdiction of the juvenile court. One can only wonder what the trial court is now to do, given the fact that there is a child within its jurisdiction who still needs its assistance and protection. Presumably, under the holding of the majority, the trial court is presently without the authority to do anything. But, according to the undisturbed adjudication and disposition order, the juvenile court is statutorily obligated to enter appropriate orders consistent with the ongoing needs of the child.

Absent relief from our Supreme Court, county social services entities that have supervisory responsibilities for children within the jurisdiction of the juvenile court might wish to reexamine the petition(s) which triggered their courts' jurisdiction. Indeed, children who have been in foster care for many years may need to be returned to their parents unless new petitions and associated nonsecure custody orders are issued. Like respondent-mother in the present case who did not take an appeal until she became dissatisfied with the court's decision to place the child with father, the majority holding allows interested persons in juvenile proceedings to acquiesce in the actions of the juvenile court until they become dissatisfied with the same—and then attempt to undo what they could and should have done by taking a direct appeal months and years earlier. This is, in my view, the inevitable result of the majority's misapplication of the phrase, "jurisdiction . . . can be raised at any time."

I would reject not only respondent's argument that the trial court lacked subject matter jurisdiction to enter the custody review order on appeal, but also the remaining arguments she sets forth in her brief. The order on appeal should therefore be affirmed in all respects.

IN THE MATTERS OF: As.L.G. AND Au.R.G., MINOR CHILDREN

No. COA04-1226

(Filed 4 October 2005)

1. Termination of Parental Rights— delays—no prejudice shown

An order terminating parental rights was not reversed, despite reservations about delays in filing the petition to terminate respondent's parental rights, where there was no showing of prejudice to respondent or to the best interests of the children. N.C.G.S. § 7B-907(e).

2. Termination of Parental Rights— guardian ad litem for parent—not appointed

There was no error in the District Court's failure to appoint a guardian ad litem for the respondent in a termination of parental rights proceeding. References to respondent's need for counseling and drug treatment did not rise to the level of being so intertwined with the neglect of her children as to be virtually inseparable.

3. Termination of Parental Rights— children neglected—left in foster care without progress

There was clear, cogent, and convincing evidence supporting the court's findings and conclusions and its termination of respondent's parental rights on the grounds that her children were neglected and that she willfully left the children in foster care for more than twelve months without progress in her family plan.

4. Termination of Parental Rights— poverty—failure to obey court orders—no connection

Although the respondent in a termination of parental rights proceeding argued that her actions were due to her poverty, the Court of Appeals saw no connection between her impoverished state and her failure to abide by the trial court's orders.

5. Termination of Parental Rights— grounds for termination—abuse of discretion standard

The trial court did not abuse its discretion by determining that termination of respondent's parental rights was in the best interest of her children where at least one ground for termination was proven.

Appeal by respondent-mother from orders entered 14 April 2004 by Judge David V. Byrd in Wilkes County District Court. Heard in the Court of Appeals 20 April 2005.

Charlotte Gail Blake for respondent-mother.

Paul W. Freeman, Jr. for petitioner-appellee.

Sherrie R. Hodges as Guardian ad Litem.

ELMORE, Judge.

Brenda Lee Fausnet (respondent) appeals from the orders terminating her parental rights to her two children, A.R.G. and A.L.G. On 1 May 2002, DSS filed petitions alleging that the children were not receiving proper care and were living in an environment injurious to their welfare. At the 3 June 2002 adjudication hearing, the district court, in part, found the following:

> 6. Although the mother of the children is in need of psychiatric counseling, she has failed to secure same.
>
> 7. The environment in which the children have been living is one characterized by violence and lack of proper supervision.
>
> 8. The Wilkes County Department of Social Services has utilized reasonable efforts to eliminate the need for placement of the children, including encouraging the parents to maintain a clean home, securing mental health assistance for the parents, finding a safe environment for the children.

The district court also found that the family had a history of domestic violence, including threats to harm the children, and that the children were filthy and living in extremely dirty conditions. Based on these findings the district court adjudicated the children neglected as defined by N.C. Gen. Stat. § 7B-101(15). According to the record, the district court "entered"[1] the order in open court on the "2nd day of June, 2002"; however, the hearing was on the 3rd of June. Also, the order was signed "this 12 day of September, 2003, *nunc pro tunc*, June 2, 2002," and filed on 16 September 2003.

On 10 February 2003, the district court conducted a permanency planning hearing. It found that the children would best be served by

1. For a discussion of when an order is entered see N.C. Gen. Stat. § 1A-1, Rule 58 (2003), *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991), and *In re Hayes*, 106 N.C. App. 652, 418 S.E.2d 304 (1992). *See also In re L.L.*, 172 N.C. App. 689, 698, 616 S.E.2d 392, 397 (2005).

a permanent plan of adoption and ordered the Wilkes County Department of Social Services (DSS) to cease reunification efforts.[2] The district court also ordered that:

> [w]ithin sixty (60) days from the date of this Order, the Wilkes County Department of Social Services shall institute a termination of parental rights action with regard to the parents and shall pursue the completion of such termination of parental rights proceeding. If such termination of parental rights proceeding results in the termination of the children's parents' rights, the Department of Social Services shall then pursue adoption of the children.

The district court's order was "entered" in open court on 10 February, signed the 20th day of February, and filed the next day.

Notably though, DSS failed to initiate a termination of parental rights proceeding within sixty days. In fact, on 18 August 2003, the district court, during a mandated review hearing, again directed DSS to file the petition.

> The Court has heretofore approved a permanent plan of adoption for the children, and has directed that [DSS] institute a termination of parental rights proceeding in order to help accomplish the plan of adoption. For reasons unexplained, this has not yet been done. The Court admonished the attorney for [DSS] to make haste in following through with the prior direction of the Court.

Although finding no reason for the delay in institution of termination proceedings, the district court gave DSS an additional ten days "from the filing of this Order" to comply. The order was filed on 5 September 2003. On 29 September 2003, twenty-four days after the second district court's order and over seven months after the first order, DSS filed a petition for termination of parental rights. Respondent argues that the five-month delay by DSS in filing for termination of parental rights prejudiced her case and is therefore reversible error. We disagree.

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2. Although the permanency planning order is not before us, we find it imperative to note that the district court may rely on and incorporate previous orders or reports submitted to it, but it cannot delegate its role as an independent finder of ultimate facts. *See In Re J.S.*, 165 N.C. App. 509, 598 S.E.2d 658 (2004) (findings that are conclusions or mere recitation of the status of the case do not meet the requirements of N.C. Gen. Stat. § 7B-907); *In Re Harton*, 156 N.C. App. 655, 577 S.E.2d 334 (2003) (district court may rely on outside reports but cannot delegate its independent fact finding role to another party).

[1] The statutory time limitation at issue here is N.C. Gen. Stat. § 7B-907(e) (2003), which mandates that DSS "file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing" if termination is "necessary in order to perfect the permanent plan for the juvenile[.]" *Id.* The General Assembly has placed this burden on DSS "unless the court makes written findings why the petition cannot be filed within 60 days," in which case DSS would comply with the time frame mandated by the district court.[3] *Id.*

The permanency planning hearing here, in which adoption was identified as the permanent plan, occurred on 10 February 2003. According to the statute then, DSS should have filed its petition to terminate respondent's parental rights on or before 10 April 2003. But DSS did not file the necessary petition until 29 September 2003. Thus, DSS violated the statutory framework which required it to file a petition for termination of respondent's parental rights within sixty days of the permanency planning hearing. Moreover, DSS violated the district court's order demanding the same conduct of them. Then, after admonishment from the district court and a new deadline set, DSS still failed to comply, violating a second order of the court. These violations are clear error and we must now assess whether prejudice has been shown to the parties.

Whether a party has adequately shown prejudice is always resolved on a case-by-case basis; however, determining prejudice is not a rubric by which this Court vacates or reverses an order when, in our opinion, the order is not in the child's best interest. Nor is prejudice, if clearly shown by a party, something to ignore solely because the remedy of reversal further exacerbates the delay. If we were to operate as such, we would either reduce the General Assembly's time lines to a nullity, *see In re L.E.B.*, 169 N.C. App. 375, 381-82, 610 S.E.2d 424, 428 (Timmons-Goodson, J., concurring) (stressing that reversal was necessary to restore the effectiveness of the General Assembly's mandates), *disc. review denied*, 359 N.C. 632, —— S.E.2d —— (2005); or worse, escalate violations of them beyond the reason for their existence: the best interests of the child. *See* N.C. Gen. Stat. § 7B-100; *In re R.T.W.*, 359 N.C. 539, 547, 614 S.E.2d 489, 494 (2005)

3. According to the plain language of N.C. Gen. Stat. § 7B-907(e) there is nothing to prevent a district court judge from making findings in the permanency planning order that address the time frame in which DSS shall file the petition to terminate parental rights, so long as an extension is in the best interests of the child. *Cf.* N.C. Gen. Stat. § 7B-1109(a) and (d) (2003) (noting that extensions in holding the hearing beyond 90 days "shall be granted only in extraordinary circumstances").

(protracted custody proceedings leaving the relationship of the child and parent unresolved "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)); *In re D.J.D.*, 171 N.C. App. 230, 244, 615 S.E.2d 26, 35 (2005) ("We reiterate that the best interests of the children are the paramount concern, . . . and they are at issue here, not respondent's hopes for the future.") (internal citations and quotations omitted)).

In *In re C.J.B.*, 171 N.C. App. 132, 614 S.E.2d 368 (2005), this Court clarified a growing number of cases dealing with prejudice arising from the district court's delay in filing the order terminating parental rights. There we reaffirmed our prior holdings that any violation of the statutory time lines was not reversible error *per se*, as many respondents have argued, but that an appropriate showing of prejudice arising from the delay could constitute reversal. *See id.* at 134, 614 S.E.2d at 369. Importantly, while we stated that prejudice arising from excessive delays "will be readily apparent," we did not alter the appellate rules that the party asserting prejudice must actually bear its burden of persuasion. *Id.*; *see also* N.C.R. App. Pro. 10(c)(1) and 28(b)(6). Even if prejudice is apparent without argument, "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *See Viar v. N.C. Dep't of Transp.* 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

Appellants in both *In re B.M.*, 168 N.C. App. 350, 607 S.E.2d 698 (2005), and *In re C.L.C.*, 171 N.C. App. 438, 615 S.E.2d 704 (2005), failed to adequately argue prejudice from a delay. *In re B.M.* dealt with an eight-month delay by DSS in filing a petition to terminate parental rights. Although noting that this delay "clearly violated" the statute, the Court stated that respondent "failed to show they were prejudiced by the late filing . . . ." *Id.* at 354, 607 S.E.2d at 701.[4] In *In re C.L.C.*, this Court also reviewed a violation of N.C. Gen. Stat. § 7B-907(e). In so doing, we again stated that "this Court has held that time limitations in the Juvenile Code are not jurisdictional in cases such as this one and do not require reversal of orders in the absence of a showing by the appellant of prejudice resulting from the time delay." *Id.* at 443, 615 S.E.2d at 707 (citing *In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391, *disc. review denied*, 359 N.C. 68, 604

4. The Court in *In re B.M.* also stated: "we find no authority compelling that the termination of parental rights order be vacated," *Id.* at 354, 607 S.E.2d at 701, however, *In re B.M.* was decided before *In re L.E.B.*, 169 N.C. App. 375, 610 S.E.2d 424, *disc. review denied*, 359 N.C. 632, —— S.E.2d —— (2005), the first case of several to provide that authority.

S.E.2d 314 (2004); *In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 172, *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004)). As in *In re B.M.*, the respondent in *In re C.L.C.* fell short of meeting her burden of showing prejudice. "The only prejudice that the mother identifies is that 'DSS ceased reunification but waited many months to initiate termination proceedings.' She does not explain in what manner the delay prejudiced her . . . ." *Id.* at 445, 615 S.E.2d at 708. These cases highlight the need to argue prejudice. Both interpret delays by DSS associated with filing a petition for termination, an eleven-month delay and a three-month delay respectively, but since prejudice was not articulated by any party it could not serve as a basis for reversal.

However, in *In re L.E.B.*, 169 N.C. App. at 379, 610 S.E.2d at 426, respondent-mother argued prejudice on the basis that the delay in filing a termination order, *see* N.C. Gen. Stat. § 7B-1109(e) (2003), adversely affected the children's relationship with her and her foster parents. We agreed, and in reversing the TPR order further noted that prejudice could befall foster parents—who must continue to wait for adoption—and children, who "are prevented from settling into a permanent family environment until the order is entered and the time for any appeals has expired." *Id.* at 379, 610 S.E.2d at 426-27; *see also In re T.L.T.*, 170 N.C. App. 430, 612 S.E.2d 436 (2005).

In *In re B.P.*, 169 N.C. App. 728, 612 S.E.2d 328 (2005), we evaluated N.C. Gen. Stat. § 7B-905(a), which directs the district court to enter dispositional orders of custody within thirty days of the hearing. There, respondent argued prejudice on the basis that for five unnecessary months she was denied necessary information "from which she could prepare for future proceedings." *Id.* at 736, 612 S.E.2d at 333. Reversing in agreement, we also noted that respondent articulated prejudice due to the facts that she "was unable to visit the children during the six month delay[,] [t]he children were delayed in receiving a permanent family environment[,] . . . [and the] prospective adoptive parents [were] prevented from moving forward with adoption proceedings. *Id.* at 737, 612 S.E.2d at 334.

In *In re D.J.D.*, we held that respondent could not show prejudice from the court's forty-four day delay in scheduling his hearing date regarding termination when he added sixty-eight days to the overall delay by asking for an additional continuance himself. *Id.* at 243, 615 S.E.2d at 35. We also noted that reversal was not in the best interests of the children, since for a substantial time they had already been

placed with foster parents who were going to adopt them upon termination of respondent's parental rights. *Id.*

In *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005), we reversed a trial court's order that was delayed eight months beyond the statutory thirty-day requirement in N.C. Gen. Stat. § 7B-906(d). The "unusual circumstances" of the case had both respondent and DSS arguing prejudice from the delayed order. *Id.* at 699, 616 S.E.2d at 398. After extensive discussion on the issue, we concluded that "the circumstances of this case demonstrate prejudice to L.L., the parents, [DSS], and the statutorily-mandated permanency planning process." *Id.*

Thus, it is apparent that prejudice can manifest itself in many forms and can equally befall parties other than the respondent, but it must nonetheless be appropriately articulated. Here, respondent has argued prejudice; however, we cannot agree that any befell her from DSS's delay. And without any additional information regarding the best interests of the children, typically expressed by a guardian *ad litem*, we can ultimately find no prejudice in this case.

Respondent failed to attend the 23 March 2004 hearing on termination of her parental rights. This failure was after the court granted a continuance due to the fact that respondent had not communicated with her attorney before the previously scheduled 18 February 2004 hearing on termination. Respondent does not assert that if DSS timely filed its petition (and a hearing was scheduled reasonably close to the ninety-day deadline), she would have attended. In fact, respondent was barely involved with her children once the permanency plan changed to adoption. Thus, despite respondent's assertions to the contrary, we cannot agree that she was prejudiced by any delay.

It is abundantly clear that despite the General Assembly's mandate that termination proceedings begin within sixty days of the permanency hearing, and in contravention of two court orders requiring termination, along with knowledge from the children's foster parents that they would adopt the children, DSS inexplicably delayed the custody and termination process by five months. Yet, without any input at the appellate level from the guardian *ad litem*, we are left with only speculation regarding potential prejudice to the children and foster parents in this case and whether the delay contravened the best interest of the children. A.L.G. and A.R.G. resided with their maternal aunt and uncle in foster care since the time when DSS first obtained custody of them. From that point until the termination order was filed,

nearly two years passed by. The record also indicates that since first being placed in their care, the children's aunt and uncle had committed to DSS that they would adopt the children. Thus, despite great reservation about the delays in this case, we cannot reverse the termination order absent a showing of prejudice to respondent or any indication that the best interests of the children were prejudiced. *Cf. In re D.J.D.*, 171 N.C. App. 230, 615 S.E.2d 26 (2005) (no prejudice to respondent; no showing that delays prejudice the child's best interest); *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005) (best interest of the child prejudiced); *In re L.E.B.*, 169 N.C. App. 375, 610 S.E.2d 424 (2005) (prejudice to respondent-mother).

[2] Respondent next argues that the district court erred in failing to appoint her a guardian *ad litem*. It is unclear from respondent's assignment of error whether she is alleging she was entitled to a guardian *ad litem* pursuant to N.C. Gen. Stat. § 7B-1101 or N.C. Gen. Stat. § 7B-602(b). In *In re J.D.*, we interpreted section 7B-1101 and reversed the trial court's order denying a guardian *ad litem* because, although DSS alleged termination of parental rights was based on neglect instead of dependency, the evidence of respondent's mental health issues and the child's neglect "were so intertwined at times as to make separation of the two virtually, if not, impossible." 164 N.C. App. 176, 182, 605 S.E.2d 643, 646, *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). We recently applied the analysis of *In re J.D.* to that of section 7B-602 as well. *See In re C.B.*, 171 N.C. App. 341, 614 S.E.2d 579, 581-82 (2005). However, under either statute, we cannot agree with respondent that the sparse references to her need for counseling and drug treatment rise to the level of being so intertwined with the neglect of her children as to be virtually inseparable. *C.f. In re C.B.*, 171 N.C. App. at 346, 614 S.E.2d at 582 (reversing for failure to appoint guardian *ad litem*); *In re B.M.*, 168 N.C. App. at 356-57, 607 S.E.2d at 702-03 (same). Here, DSS recommended counseling as part of respondent's family plan, and no significant evidence exists in the record that would suggest respondent's parental rights were terminated due to any mental illness or substance abuse. Accordingly, based on the record before us, we would not agree with respondent that she was entitled to the appointment of a guardian *ad litem*.

[3] Respondent also argues that the district court erred in terminating her parental rights on the grounds that the children were neglected and that she willfully left the children in foster care for more than twelve months without progress in her family plan. *See*

N.C. Gen. Stat. § 7B-1111(a)(1) and (2) (2003). We find clear, cogent, and convincing evidence in the record supporting the district court's findings of fact, which in turn support its conclusion to terminate respondent's parental rights. *See In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996) ("In a termination proceeding, the appellate court should affirm the trial court where the court's findings of fact are based upon clear, cogent and convincing evidence and the findings support the conclusions of law.").

[4] Although respondent properly assigns error to several of the district court's findings, and arguably briefs them, there is no citation of any authority that would support her position. Essentially, she argues that her actions or omissions in parenting that led to the district court's finding two grounds on which to terminate her rights, can all be accounted for by her poverty. Several examples of this interconnectedness cited by respondent are her failure to obtain psychological evaluations or attend counseling, and her inability to leave a working phone number where she could be contacted. We see no connection between respondent's failure to abide by the district court's orders and her impoverished state.

Respondent also argues, when rebutting the findings and conclusions of neglect, that the allegations reflect her mental illness and she should have had a guardian *ad litem*. We have already determined this was not the case and find no support for this argument either. Thus, without more from respondent, we find that the evidence supports the trial court's findings and those findings support its conclusions.

[5] We further conclude that since at least one ground was proven to terminate respondent's parental rights, the district court did not abuse its discretion in determining that termination was in the children's best interest. *See id.* at 569, 471 S.E.2d at 88; *In re D.J.D.*, 171 N.C. App. at 238, 615 S.E.2d at 32. We have carefully reviewed respondent's other assignments of error and find them to be without merit. Accordingly, we affirm the orders of the district court terminating respondent's parental rights to A.L.G. and A.R.G.

Affirmed.

Judges McGEE and CALABRIA concur.

ELLIS Y. COLEMAN, D/B/A EYC COMPANIES AND H. TATE MCKEE TRUST, PLAINTIFFS/PETITIONERS V. TOWN OF HILLSBOROUGH, DEFENDANT/RESPONDENT

ELLIS Y. COLEMAN, D/B/A EYC COMPANIES AND H. TATE MCKEE TRUST, PLAINTIFFS/PETITIONERS V. TOWN OF HILLSBOROUGH, AND TOWN OF HILLSBOROUGH BOARD OF COMMISSIONERS, DEFENDANTS/RESPONDENTS

No. COA04-1274

(Filed 4 October 2005)

1. Zoning— special use permit—protest petitions—not timely—supermajority vote not needed

The trial court did not err by granting summary judgment for petitioners, who were denied a special use permit for a retirement community. The Planning Board mistakenly thought a supermajority was necessary for the permit because the Planning Director applied a mistaken deadline for protest petitions (which must be filed two working days before the zoning hearing), and did not adequately determine and document that the required threshold of protest petitions had been met.

2. Zoning— special use permit—retirement community—mistakenly denied

The trial court did not err by ordering a Town Board to issue a special use permit where the permit had been denied based on a mistaken deadline for protest petitions which resulted in the mistaken belief that a supermajority was required.

3. Zoning— special use permit—invalid denial—issuance ordered

It was appropriate for the trial court to order the issuance of a special use permit without remanding the issue to the Town Board for further findings where the sole basis set forth for the Board's denial was determined to be invalid.

4. Appeal and Error— preservation of issues—lack of cited authority

The lack of cited authority meant abandonment of an argument that the court abused its discretion in denying the Town's motion for relief under Rules 59 and 60 of the Rules of Civil Procedure. Moreover, the evidence upon which the motion was based was readily available through due diligence.

Appeal by defendant Town of Hillsborough from order granting summary judgment and appeal by defendant Town of Hillsborough Board of Commissioners from order granting special use permit entered 25 June 2004 by Judge Wade Barber in Orange County Superior Court. Heard in the Court of Appeals 19 April 2005.

Poyner & Spruill, LLP, by Robin L. Tatum and Kacey Sewell Ragsdale, for plaintiffs/petitioners-appellees.

The Brough Law Firm, by Robert E. Hornik, Jr., for Town of Hillsborough, defendant/respondent-appellant.

JACKSON, Judge.

Appellant, Town of Hillsborough appeals from an order granting summary judgment to appellees, Ellis Coleman, d/b/a EYC Companies and H. Tate McKee Trust (collectively "EYC") entered 25 June 2004 in Orange County Superior Court.

Appellants, Town of Hillsborough and Town of Hillsborough Board of Commissioners, ("the Town Board"), both appeal from an Order Granting Special Use Permit to appellees, Ellis Coleman, d/b/a EYC Companies and H. Tate McKee Trust (collectively "EYC") entered 25 June 2004 in Orange County Superior Court. Collectively, appellants Town of Hillsborough and Town of Hillsborough Board of Commissioners are denominated as "The Town".

EYC submitted a re-zoning application, a special use permit ("SUP") application and a major subdivision preliminary plan application to the Town. EYC sought to have an approximately forty (40) acre parcel of land outside the Hillsborough town limits, but within its extraterritorial zoning jurisdiction, re-zoned from R-20 to mixed residential special use ("MRSU") in order to develop it into a retirement community. EYC's applications were placed on the agenda for the 22 October 2002 joint Town Board and Town Planning Board public hearing. The required notice of the public hearing was published and written notice was mailed to the owners—as determined by the County tax records—of property within 500 feet of the property in question on 8 October 2002.

The written notice sent to adjacent property owners was a standard notice used by the Town Planning Director for all re-zoning applications. The notice provided no deadline for filing a valid statutory protest petition nor any other information regarding protest petitions other than to contact the Planning Department for information. EYC's

applications proposed that the development would consist of seventy (70) detached, single-family homes; thirty-five (35) town homes; 144 apartments, and seventy-two (72) assisted care units. The notice contained a summary of the proposed development consistent with these numbers. Various protest petitions were received on or before Friday, 18 October 2002.

The Town Planning Director, Margaret Hauth ("Hauth"), reviewed the petitions and determined that they were signed by owners of more than twenty percent (20%) of the property within 100 feet of the subject property. Hauth did not, however, document how she calculated the percentage of the surrounding land represented by the petitions, how she determined the validity of the protest petitions, nor did she record the date or time of their filing.[1]

At the 22 October meeting, EYC presented its proposal and several of the landowners in the area of the proposed development, including some who had signed petitions, spoke in opposition to the proposed changes. Areas of concern raised at the meeting included the size of the buffer, density of the development, traffic and the height of the proposed buildings. The meeting closed without a decision from the board. Discussions between EYC, the Town and the concerned neighbors took place in the months following the meeting. EYC redesigned the project in an effort to address the concerns regarding the project expressed by the Town and the neighbors.

When the redesign was completed, EYC filed a revised application for re-zoning reflecting the changes made to the first proposal. The second proposal had fewer units, reduced density, and an altered buffer. All of these changes were intended to address the concerns expressed by both the Town and the neighbors regarding the first proposal. These changes included reducing the number of units to seventy (70) detached homes and duplexes combined, 102 apartments, and forty (40) assisted living units; reducing the density by thirty-five percent (35%) (which would result in reduced traffic); doubling the buffer; and eliminating all three story buildings. Because of the changes, the new proposal was scheduled to be addressed at a public hearing on 15 April 2003.

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1. The submission of valid protest petitions signed by more than twenty percent (20%) of the adjacent landowners imposes a requirement, pursuant to North Carolina law, that the re-zoning be approved by a super-majority vote of the Town Board before the request can be granted. N.C. Gen. Stat. 160A-385(a) (2003).

Hauth published a new notice of hearing and sent letters to the required landowners. The notice provided information about the changes contained in the new proposal. The notice also stated: "There is an active protest petition on this project. If you previously signed and are still opposed, no further action is required. If you want to add or remove your name, please contact the Planning Department." No new protest petitions were filed, none of the previous petitions were withdrawn, and no one who previously had filed a protest petition spoke against the project at the second hearing. After the meeting, the Town Planning Board voted to recommend approval of the second proposal and it was then submitted to the Town Board.

The Town Board did not vote on the proposal until 13 October 2003. The Town Board then voted 3-2 in favor of approving the revised proposal. The SUP also received a 3-2 vote in favor of approval. Due to the protest petitions that had been filed regarding the original proposal, the Board members believed that a super-majority vote was required to approve the re-zoning request and therefore determined that the request had not been approved. After being advised by the county attorney that the property first must have been re-zoned before the SUP could be allowed, the board re-voted on the SUP and voted 4-1 against it. This re-vote was based solely on the belief that the re-zoning request had not been granted.

EYC appealed the denial of the re-zoning request and SUP application to the Superior Court of Orange County on the basis that the protest petitions requiring the re-zoning to be approved by a super-majority vote were invalid. Both EYC and the Town filed motions for summary judgment. EYC's motion was granted and the Town's denied. The court then reversed the denial of the SUP and directed the Town to issue the SUP. The Town timely filed notice of appeal.

The Town argues on appeal that the trial court erred in granting EYC's motion for summary judgment on the grounds that valid protest petitions had been filed and, therefore, a simple majority vote of the Town Board was insufficient for approval of the re-zoning request; erred in ordering the Town Board to issue the SUP rather than remanding the SUP issue to the Town Board for consideration in light of the trial court's holding on the re-zoning petition; and the trial court abused its discretion by denying its Rule 59 and 60 motions.

[1] The Town first argues that the trial court erred in granting EYC's motion for summary judgment. It is well established that "[t]he standard of review on appeal from the granting of a motion for summary

judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 705, 707, 582 S.E.2d 343, 345 (2003) *aff'd*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004). The burden of showing that there exists no genuine issue of material fact falls on the moving party. *Id.* at 708, 582 S.E.2d at 345.

In the case *sub judice*, the determinative issue to be resolved was whether the documents upon which Hauth based her determination that the owners of over twenty percent (20%) of the adjacent land had signed protest petitions were valid. In support of its motion for summary judgment EYC submitted the depositions of Hauth, Ellis Y. Coleman, and Mary Beerman. The Town filed a cross-motion for summary judgment supported by the pleadings, the record of a companion certiorari case, the affidavit of Hauth, and the same supporting documents submitted by EYC in support of its motion.

In re-zoning proceedings, the municipality has "an affirmative duty to determine the sufficiency, timeliness, and percentage of the protests" to impose the super-majority vote provided for by North Carolina General Statutes section 160A-385(a) (2003). *Unruh v. Asheville*, 97 N.C. App. 287, 290, 388 S.E.2d 235, 237 (1990). Without an adequate determination of those factors it cannot be presumed that the municipality complied with the requirements for a valid action on the subject re-zoning proceeding. *Id.*; *see Morris Communications v. City of Asheville*, 356 N.C. 103, 111-12, 565 S.E.2d 70, 75-76 (2002) (holding that "any and all portions" of a city ordinance were "invalid" where the record demonstrated that the City "conducted both an incomplete and inaccurate review of the submitted petitions protesting the ordinance at issue[.]"). Zoning regulation is in derogation of common law property rights and therefore must be strictly construed to limit such derogation to that intended by the regulation. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 304, 554 S.E.2d 634, 638 (2001) (citing *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966)).

North Carolina General Statutes section 160A-386 provides that no protest petition is valid "unless it shall have been received by the city clerk in sufficient time to allow the city at least two normal work days, excluding Saturdays, Sundays and legal holidays, *before* the date established for a public hearing on the proposed change or

amendment to determine the sufficiency and accuracy of the petition." N.C. Gen. Stat. § 160A-386 (2003) (emphasis added). Here, the initial hearing was scheduled for Tuesday, 22 October 2001 and therefore protest petitions must have been received two working days before, not including, that date in order to be valid, *i.e.*, the petitions should have been received by the close of business on Thursday, 17 October. Hauth's testimony is unequivocal, however, that she believed the deadline to be 5:00 p.m. on Friday, the 18th, and that she considered valid any petition filed prior to that time. Such an interpretation would allow only one working day (Monday, October 21st) prior to the date of the hearing, clearly in contravention of the statutory requirements. Hauth's testimony also is clear that she failed to log in or record the petitions as they were received and therefore was unable to determine definitively which, if any, petitions were received prior to the statutorily required deadline of close of business on Thursday, 17 October 2002.

The Town argues that the purpose of the two working day requirement is to ensure that the governing body has adequate time to make the required determinations of sufficiency prior to the hearing, and since Hauth claims that she was able to do so, the potential untimeliness of the petitions should not be used to invalidate them. As discussed *infra*, Hauth, in fact, did not adequately determine the sufficiency of the petitions prior to the hearing. Further, to allow a governing body the discretion to waive the two working day requirement could create a situation in which there is unequal treatment under the law. This cannot be allowed and therefore the Town lacked the authority to consider any petitions that were not timely filed within the mandatory parameters of North Carolina General Statutes section 160A-386.

The evidence before the trial court on the motion for summary judgment also showed that, at the time of the first hearing, Hauth lacked any documentation of the calculations she made to determine whether the protest petitions met the twenty percent (20%) threshold and that she failed to investigate the validity of petitions signed by only one owner of co-owned properties. Accordingly, the Town did not show that it had satisfied its affirmative duty to determine the sufficiency of the protest petitions that it received. Without a showing that the Town made an adequate determination that the protest petitions were valid, the legitimacy of the Town's actions regarding the rezoning issue cannot be presumed. *Unruh*, 97 N.C. App. at 290, 388 S.E.2d at 237.

Hauth's affidavit submitted by the Town in support of its motion for summary judgment indicates that the petitions that were filed were valid and represented more than twenty percent (20%) of the adjacent property. This affidavit is irrelevant, however, as those determinations were made subsequent to the hearing in anticipation of the summary judgment proceedings and had not been made in advance of the zoning hearing as required. The requirement that petitions must be filed in such time as to allow the municipality at least two normal work days prior to the date of the hearing to allow the municipality to determine the sufficiency and accuracy of the petitions clearly indicates that such determinations must be made prior to such a hearing. Therefore, this assignment of error is overruled.

[2] The Town next argues that the trial court erred in ordering the Town Board to issue the special use permit. In reviewing a town board's decision, the superior court must decide whether the reasons for the denial were supported by competent, material, and substantial evidence. *Guilford Fin. Servs. v. City of Brevard*, 356 N.C. 655, 576 S.E.2d 325 (2003) (adopting dissent of Tyson, Judge, 150 N.C. App. 1, 563 S.E.2d 27 (2002)). In the case *sub judice*, the parties both agree that the sole reason given by the Town Board for the denial of the SUP was that the re-zoning application had been denied due to the lack of a super-majority vote, and that, consequently, the proposed use was not a permitted use under the R-20 zoning classification that remained in place.

As we have held already, the trial court was correct in its determination that the protest petitions were invalid and therefore, a super-majority vote of the Town Board was not required for approval of the zoning change. Accordingly, because a simple majority of the Town Board voted in favor of the zoning change, the property in question had been re-zoned successfully from R-20 to MRSU, a classification in which the proposed use was allowed. As the property had been re-zoned from R-20 to MRSU, the use proposed by the SUP was permitted in the property's zoning classification and the original vote in favor of approval was valid. Consequently, the Town Board's denial of the SUP was not supported by competent, material, and substantial evidence.

[3] The Town argues alternatively that the SUP properly should be sent back for a new hearing because the Town Board failed to consider the factors required for approval of a SUP under the Town's zoning ordinance. The Town fails to consider the fact, however, that the

Board voted initially to approve the SUP by a simple majority and only voted to deny it in the mistaken belief that the re-zoning had not been approved and, therefore, the SUP could not be approved.

The Town of Hillsborough Zoning Ordinance section 4.39, contained in the Town Code, governs issuance of SUP's. Section 4.39 provides in relevant part:

> 4.39.1 Subject to 4.39.2, the Board of Commissioners *shall* issue the requested permit unless it concludes, based upon the information submitted at the hearing that:
>
> a) The requested permit is not within its jurisdiction according to the Table of Permissible Uses, or
>
> b) The application is incomplete, or
>
> c) If complete as proposed in the application the development will not comply with one or more requirements of this chapter (not including those the applicant is not required to comply with under the circumstances specified in Non-Conformities)
>
> 4.39.2 Even if the permit-issuing boards finds that the application complies with all other provisions of this chapter, it may still deny the permit if it concludes, based upon the information submitted at the hearing, that if completed as proposed, the development, more probably that not:
>
> a) Will materially endanger the public health or safety, or
>
> b) Will substantially injure the value of adjoining or abutting property, or
>
> c) Will not be in harmony with the area in which it is to be located, or
>
> d) Will not be in general conformity with the land-use plan, thoroughfare plan, or other plan officially adopted by the council.

(Emphasis added.)

This ordinance clearly provides that a SUP *shall* be issued unless the Town Board finds at least one of the enumerated reasons provided in the ordinance for denying the SUP. Here, the sole basis for the Town Board's denial of the SUP was that the proposed use was

not permitted in an R-20 Zoning District and, consequently, did not meet the requirements of Zoning Ordinance Section 4.3(c) and (d). Sections 4.3(c) and (d) require, respectively, that the requested use not "substantially injure the value of contiguous property . . ." and be "in compliance with the general plans for the physical development of the Town . . . ." As we already have determined, EYC's re-zoning request was granted and, accordingly, the use proposed in the SUP was authorized in the new zoning classification—MRSU. Consequently, the basis for the Town Board's denial of the SUP was not valid.

As the Hillsborough Town Code requires issuance of a requested SUP in the absence of findings by the Town Board of the existence of any of the specifically enumerated bases for denial of such permit, and the sole basis set forth for the Town Board's denial of the SUP has been determined to be invalid, it was appropriate for the trial court to order the issuance of the SUP without remanding the issue to the Town Board for further findings. Therefore this assignment of error is overruled.

[4] The Town's final argument is that the trial court abused its discretion in denying the Town's motion filed pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. The Town fails to provide any authority in support of this argument, however. The Town simply makes the bare assertion that "it was an abuse of the lower court's discretion to disregard Mr. Jones' affidavit—which contained new information—and to deny the motion." Rule 28 of the North Carolina Rules of Appellate Procedure requires that an appellant's brief contain an argument which includes citations of the authorities upon which the appellant relied. N.C.R. App. P. Rule 28(b)(6) (2005). Assignments of error which are not supported by legal authority are deemed abandoned. *Pharmaresearch Corp. v. Mash*, 163 N.C. App. 419, 428, 594 S.E.2d 148, 154, *disc. review denied*, 358 N.C. 733, 601 S.E.2d 858 (2004). Consequently, this assignment of error is deemed abandoned.

Further, this assignment of error could not have succeeded even if considered on the merits. Rules 59 and 60 provide for the possibility of relief under limited circumstances, including when there is newly discovered evidence that could not have been discovered and produced at trial through the reasonable diligence of the party seeking relief under one of these rules. N.C. Gen. Stat. § 1A-1, Rules 59 (a)(4) and 60(b)(2). In the instant case the evidence upon which the requested relief is based was readily available to the Town at trial

through the exercise of reasonable diligence. Consequently, the Town's motions pursuant to Rules 59 and 60 were properly denied.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

STATE OF NORTH CAROLINA v. HARDIN ELI ROSS, III

No. COA04-1134

(Filed 4 October 2005)

1. Constitutional Law— double jeopardy—deferred prosecution agreement—plea of guilty never entered

The trial court did not err in an embezzlement of State property of a value of $100,000 or more by aiding and abetting case by denying defendant's motion to dismiss on double jeopardy grounds or, in the alternative, by denying his motion to enforce the terms of a deferred prosecution agreement even though defendant contends the deferred prosecution agreement constituted a plea of guilty to the five counts of misdemeanor failure to file or failure to pay withholding tax, because: (1) while defendant acknowledged his guilt in fact in the deferred prosecution agreement, a plea of guilty was neither tendered by defendant nor accepted by the trial court; (2) evidence of defendant's opportunity to plead not guilty upon failing to meet the conditions of the agreement supports the conclusion that the agreement did not comprehend a plea of guilty; (3) the record is devoid of any evidence indicating the trial court made a determination of a factual basis for a guilty plea; and (4) the acknowledgment of guilt contained in the transcript of the agreement, without more, is insufficient to raise the legal inference that a guilty plea was entered and accepted. N.C.G.S. § 15A-1341(a1).

2. Appeal and Error— *Anders* review—denial of motion to dismiss

An independent review of the evidence by the Court of Appeals pursuant to *Anders v. California*, 386 U.S. 738 (1967), revealed that the trial court did not err in an embezzlement of State property of a value of $100,000 or more by aiding and abet-

ting case by denying defendant's motion to dismiss, because the State presented substantial evidence that defendant embezzled State property in excess of $100,000 by aiding and abetting.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from judgment entered 5 February 2004 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 14 April 2005.

Attorney General Roy Cooper, by Assistant Attorney General Rudy Renfer, for the State.

Parrish, Smith & Ramsey, L.L.P., by Richard D. Ramsey, for defendant-appellant.

CALABRIA, Judge.

Hardin Eli Ross, III ("defendant") appeals a judgment entered on a jury verdict finding him guilty of embezzlement of State property of a value of $100,000 or more by aiding and abetting. Defendant asserts the trial court erred by denying his motion to dismiss on double jeopardy grounds or, in the alternative, by denying his motion to enforce the terms of a deferred prosecution agreement. We find no error.

Defendant was the registered agent, president, and CEO of OLI Corporation d/b/a Outsource Leasing ("OLI"). As of 31 January 2000, OLI had operated for over two and one-half years with no liability to the North Carolina Department of Revenue ("DOR") for employee income tax withholding and maintained two operating accounts throughout 2000. Defendant, as CEO, was the only person authorized to withdraw funds from the two accounts. OLI filed all of its 2000 quarterly employee income tax withholding reports late. The first quarterly report was submitted to DOR approximately three months late on 24 July 2000. The second quarterly report was submitted approximately one year late on 17 July 2001. The third quarterly report was submitted approximately three months late on 1 February 2001, and the fourth quarterly report was filed approximately six months late on 17 July 2001. In the four reports, OLI reported withholdings of $27,607.57, $35,649.98, $48,992.48, and $48,992.48, respectively, for a total amount of $161,242.45. However, OLI failed to remit to DOR any portion of the $161,242.45. On 31 January 2000, OLI's two operating accounts contained $11,175.66 and $16,492.66, for a total of $27,668.32. On 31 January 2001, one operating account was

overdrawn by negative $4,009.05, while the other had a balance of $4,591.80, for a total balance of $582.55.

During an interview with a Special Agent from DOR, defendant stated the funds OLI withheld from employee wages were deposited into one of OLI's two operating accounts before remitting to DOR. Defendant stated he understood the withheld funds were to be held in trust for DOR and were not available for either OLI's use or his own. However, he was unaware of what happened to the withheld funds. OLI's office manager testified: (1) defendant decided which bills to pay; (2) no bill was paid without his knowledge; (3) all checks were signed by defendant or with a signature stamp at his direction; and (4) no checks were ever issued with a computer signature.

On 12 March 2001, defendant was charged with five counts of misdemeanor failure to file or failure to pay withholding tax. On 19 July 2001, defendant entered into a deferred prosecution agreement ("the agreement"), in which he acknowledged his guilt in fact to the charges enumerated in the agreement and agreed to comply with the conditions, *inter alia*, to pay restitution to DOR in the amount of $285,231.65 by paying $12,000 a month beginning 1 August 2001. Specifically, the agreement provided that, if defendant successfully performed the conditions of the agreement, the State would dismiss all charges. However, failure to comply with the conditions of the deferred prosecution agreement would result in termination of the agreement. Defendant failed to comply with the conditions of the agreement, therefore, the State voluntarily dismissed the charges referenced in the agreement in order for the Attorney General's Office to pursue prosecution on other charges.

On 23 September 2003, defendant was indicted for aiding and abetting OLI in the embezzlement of State property in the amount of $161,242.45. The defendant filed a pretrial motion to dismiss based on double jeopardy and included in his motion, an alternative, to enforce the State's deferred prosecution agreement. The trial court, after making findings of fact and conclusions of law, denied both of defendants motions. On 5 February 2004, the jury found defendant guilty of embezzlement of State property of a value of $100,000 or more by aiding and abetting, and the court sentenced him to a minimum of fifty-eight months and a maximum of seventy-nine months in the custody of the North Carolina Department of Correction. Defendant appeals.

[1] Defendant asserts the deferred prosecution agreement constituted a plea of guilty to the five counts of misdemeanor failure to file or failure to pay withholding tax. Therefore, to avoid subjecting defendant to double jeopardy, the State's only recourse upon defendant's breach of the deferred prosecution agreement was to have defendant sentenced on the charges to which he plead guilty. We disagree.

We note initially that deferred prosecution agreements are authorized by N.C. Gen. Stat. § 15A-1341 (2003), which provides in pertinent part:

> (a1) Deferred Prosecution.—A person who has been charged with a Class H or I felony or a misdemeanor may be placed on probation as provided in this Article on motion of the defendant and the prosecutor if the court finds each of the following facts:
>
> > (1) Prosecution has been deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.
> >
> > (2) Each known victim of the crime has been notified of the motion for probation by subpoena or certified mail and has been given an opportunity to be heard.
> >
> > (3) The defendant has not been convicted of any felony or of any misdemeanor involving moral turpitude.
> >
> > (4) The defendant has not previously been placed on probation and so states under oath.
> >
> > (5) The defendant is unlikely to commit another offense other than a Class 3 misdemeanor.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, protects individuals against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Cameron*, 283 N.C. 191, 198, 195 S.E.2d 481, 485-86 (1971). In a criminal jury case in North Carolina, "jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been

empaneled and sworn to make true deliverance in the case." *State v. Bell*, 205 N.C. 225, 228, 171 S.E. 50, 52 (1933) (citation omitted). Jeopardy may also attach upon the court's acceptance of a plea of guilty. *See State v. Wallace*, 345 N.C. 462, 467, 480 S.E.2d 673, 676 (1997); *State v. Johnson*, 95 N.C. App. 757, 760, 383 S.E.2d 692, 694 (1989). Before a plea of guilty can be accepted, the trial court must first determine that there is a factual basis for the plea. *State v. Sinclair*, 301 N.C. 193, 198, 270 S.E.2d 418, 421 (1980). The factual basis for the plea must appear on the record on appeal. *Id.* A defendant's bare admission of guilt contained in the transcript of a plea does not provide the factual basis for that plea. *Id.*, 301 N.C. at 199, 270 S.E.2d at 421. On appeal, we review the findings of the trial court to determine if such findings are supported by competent evidence in the record, but we review the trial court's conclusions of law *de novo*. *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997).

Defendant does not challenge N.C. Gen. Stat. § 15A-1341 (a1) as a whole, nor does he argue that jeopardy would attach in every instance where a criminal defendant enters into a deferred prosecution pursuant to this statute. Nonetheless, defendant contends that under the terms of his deferred prosecution agreement, a plea of guilty was contemplated and accepted by the trial court. Specifically, defendant points to the following: (1) the agreement's provision reciting defendant's acknowledgment of his "guilt in fact of the offenses charged"; (2) the provision reciting that defendant understands failure to comply will terminate his participation in the deferred prosecution program and will cause his "return[] to court for sentencing of [his] case(s)"; and (3) the trial court's order "that the sentencing in the case(s) is . . . stayed during the period of the continuance."

However, the trial court, when ruling on defendant's double jeopardy motions, found as fact that "[w]hile defendant acknowledged his guilt in fact in the Deferred Prosecution Agreement, a plea of guilty was neither tendered by the defendant nor accepted by the court." This finding is supported by the affidavit of Tiffany Bennett, an Assistant District Attorney in the Forsyth County Judicial District where the agreement was executed, who stated that "when a defendant enters into the deferred prosecution program [in the Forsyth County Judicial District] they are acknowledging guilt in fact. The State does not arraign the defendant, does not present evidence against the defendant, and no witnesses are sworn. No trial will take place unless the defendant fails to complete the program and *then pleads not guilty*." (emphasis added). This statement indicates that if

the State pursued the original misdemeanor charges against defendant after he failed to complete the program, he would have had the opportunity to obtain a jury trial by pleading not guilty. It is axiomatic that evidence of defendant's opportunity to plead not guilty upon failing to meet the conditions of the agreement supports the conclusion that the agreement did not comprehend a plea of guilty. Furthermore, the record is devoid of any evidence indicating the trial court made a determination of a factual basis for a guilty plea. The acknowledgment of guilt contained in the transcript of the agreement, without more, is insufficient to raise the legal inference that a guilty plea was entered and accepted. In light of these facts, we hold that there is competent evidence to support the trial court's conclusion that a guilty plea was neither tendered by defendant nor accepted by the trial court. As defendant was neither tried on, nor pled guilty to, the original misdemeanor charges, jeopardy never attached. Accordingly, defendant's double jeopardy argument is without merit.

[2] Defendant next asserts the trial court erred by denying his motion to dismiss based on insufficiency of the evidence. Defendant concedes sufficient evidence on the record exists to support the jury's conviction. Nonetheless, under *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), defendant requests this Court to independently review the evidence and determine this issue. *See State v. Syriani*, 333 N.C. 350, 386, 428 S.E.2d 118, 138 (1993) (addressing pursuant to *Anders* a defendant's assignment of error regarding the trial court's denial of his motion to dismiss a first-degree murder charge).

A defendant's motion to dismiss should be denied where, taking the evidence in the light most favorable to the State, there is substantial evidence of each element of the offense charged and that the defendant committed the offense. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). "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). "Whether evidence presented constitutes substantial evidence is a question of law for the court." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Pursuant to N.C. Gen. Stat. § 14-91 (2003), "any . . . person having or holding in trust for the [State] . . . property and effects of the [State,]" which have a value of $100,000 or more, shall be guilty of a class C felony if that person "embezzle[s] or knowingly and willfully misappl[ies] or convert[s] the [property] to his own use, or . . . knowingly and willfully aid[s] and abet[s] or otherwise assist[s]" or joins another in such embezzlement, misapplication, or

conversion. We have closely examined all the proceedings, including the transcript, record, and briefs, and hold the State presented substantial evidence that defendant embezzled State property in excess of $100,000 by aiding and abetting OLI.

We have carefully considered defendant's remaining arguments and consider them to be without merit. For the foregoing reasons, we hold defendant received a fair trial free from error.

No error.

Judge GEER concurs.

Judge TIMMONS-GOODSON dissents with a separate opinion.

TIMMONS-GOODSON, Judge, dissenting.

Because I believe the State's decision in this case violated defendant's right to fundamental fairness and due process, I dissent.

The record reflects that after being charged with five counts of failure to file or pay withholding tax, defendant entered into a deferred prosecution agreement with the State on 19 July 2001. The agreement stated that defendant "**acknowledge[d] [his] guilt in fact of the offense charged herein**[,]" and that defendant understood that if he failed to cooperate with or perform the duties required of him, his "participation in the program w[ould] terminate, and [he] w[ould] be returned to court for sentencing of [his] case(s)." (emphasis in original). The corresponding court order again acknowledged that defendant was charged with five counts of failure to file or pay withholding tax, and it permitted entry of a deferred prosecution of the charges. The trial court found in pertinent part that "defendant has been apprised and understands [his] legal rights to a speedy trial, waives same, and **allows the case(s) to be continued**[,]" and that "defendant acknowledges guilt in [his] case(s) and understands that **non-compliance will result in sentencing**." (emphasis in original). Based upon these findings, the trial court approved the deferred prosecution and ordered that "sentencing in the case(s) is hereby stayed during the period of continuance[.]"

Until January 2002, defendant thereafter complied with the terms of the agreement. On 2 August 2002, an assistant district attorney of the 21st Prosecutorial District notified defendant's counsel that "[s]ince January 2002 [defendant] has not paid any monies towards

his Deferred Prosecution Agreement" and that "[a]s a result his case has been set for sentencing . . . ." However, rather than proceeding to sentencing on the misdemeanor charges of failure to file or pay withholding tax, the State voluntarily dismissed the charges on 6 September 2002. On 23 September 2003, defendant was indicted for aiding and abetting the embezzlement of state property, a felony.

The majority upholds the State's decision to pursue prosecution for the felony charge rather than sentencing for the misdemeanor charges based upon the theory that a defendant's agreement to the terms of a deferred prosecution is an admission of guilt in fact rather than guilt in law. However, recognizing the similarities between such agreements and ordinary contracts, I believe this Court should examine the plain language of the deferred prosecution agreement rather than the subjective intent of the parties entering into it. Here, as detailed above, the plain language of the agreement clearly defines defendant's charges, imposes certain duties upon him, and states that if he fails to cooperate with or perform those duties, he will be returned to court for sentencing of his "case(s)." The "case(s)" referred to in the agreement are detailed as "[t]his case coming on to be heard before the undersigned presiding judge, wherein [defendant] is charged with the criminal offense of 5 cts fail to file/Pay Income tax." There is no indication that "case(s)" refers to the felony charge thereafter sought by the State, or any other charge. By unilaterally engrafting the additional felony charge into the agreement, I believe the State violated defendant's right to fundamental fairness and due process.

In *Lassiter v. Department of Social Services*, 452 U.S. 18, 68 L. Ed. 2d 640 (1981), the United States Supreme Court recognized that

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Id. at 24-25, 68 L. Ed. 2d at 648 (citation omitted).

In North Carolina, although deferred prosecutions are becoming increasingly more common (most often in those situations where a first-time offender faces narcotics or driving under the influence charges), our courts have yet to address the numerous issues involved in the execution and satisfaction of their underlying agreements. Nevertheless, the fundamental idea of a deferred prosecution is clear: the defendant agrees to perform certain duties and conditions placed upon him by the trial court, in exchange for the State's agreement to dismiss the defendant's charges upon his or her completion of those duties. In the instant case, although he initially complied with the duties and conditions placed upon him, defendant failed to complete those requirements listed in the deferred prosecution agreement. Thus, by virtue of its terms, the State was well within its rights to thereafter pursue sentencing on the charges detailed in the agreement. However, the State chose instead to dismiss the misdemeanor charges and pursue conviction on a felony charge. As discussed above, this decision was counter to the express terms of the agreement both relied upon by defendant and adopted by the parties. Because I conclude this decision was also counter to the right to fundamental fairness and due process granted by our Constitution, I would reverse defendant's conviction for aiding and abetting the embezzlement of state property. Accordingly, I dissent.

JERRY L. MORGAN, EXECUTOR OF THE ESTATE OF JOHN W. MORGAN, PLAINTIFF v. R. CLAYTON STEINER, M.D., AND MOORE SURGICAL CENTER, P.A., DEFENDANTS

No. COA04-1187

(Filed 4 October 2005)

Costs— trial expenses-deposition costs—costs for obtaining medical records—mediation costs—expert witness fees—trial exhibit fees

The trial court's order in a negligence case ordering plaintiff to reimburse defendants for trial expenses in the amount of $31,082.87 was proper in part and erroneous in part, and the case is remanded with instructions to modify the award of costs, because: (1) the award of deposition costs of $4,685.23 was proper since they are within the category of common law costs permissible under N.C.G.S. § 6-20 prior to 1983; (2) the award of costs for obtaining medical records in the amount of $2,153.31

was erroneous since medical records are not among the costs enumerated in N.C.G.S. § 7A-305(d) and our courts have not heretofore recognized the cost of obtaining medical records as an expense taxable to a party under N.C.G.S. § 6-20; (3) the award of mediation costs for the fee of the mediator was proper since it was authorized under N.C.G.S. § 7A-305(d)(7), although ordering plaintiff to pay the cost of the lunch defendants voluntarily provided during the conference totaling $100.97 was improper; (4) the award of costs for three expert witnesses who were brought in to testify on the same issue, although one did not testify, was erroneous in part when N.C.G.S. § 7A-314(e) prohibits the award of costs for a third expert witness subpoenaed to prove a single material fact, and thus, $6,762.50 for the third witness's expenses in this case is reversed; (5) the award of expert witness fees in the amount of $1,350 for an economist who attended the trial pursuant to subpoena and served as a consultant but never testified was improper, as well as costs for another expert in the amount of $2,250 for reviewing records and consulting with defense counsel, since there is no statutory authority for awarding costs for case review, research, estimation of discounted present values, revision of report, and consultation; and (6) the award of costs in the amount of $1,835.03 for trial exhibit fees was erroneous since it is not enumerated in N.C.G.S. § 7A-305(d) and there was no common law authority for the assessment of costs for these fees prior to 1983.

Appeal by plaintiff from judgment entered 23 May 2004 by Judge Mark E. Klass in Richmond County Superior Court. Heard in the Court of Appeals 22 April 2005.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for plaintiff-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Mark E. Anderson and Tobias S. Hampson, for defendants-appellees.

TIMMONS-GOODSON, Judge.

Plaintiff appeals a judgment of the trial court ordering plaintiff to pay the cost of defendants' trial expenses. For the reasons stated herein, we affirm the trial court's order in part and reverse in part.

The factual and procedural history of this case is as follows: On 23 November 1999, John Morgan ("decedent") died as a result of

internal injuries sustained in a farm equipment accident. Jerry Morgan ("plaintiff"), decedent's brother and executor of his estate, filed a complaint for negligence on 20 November 2001, naming the following parties as defendants: FirstHealth of the Carolinas; Dr. Paula Adkins and her practice, Sandhills Emergency Physicians, P.A.; and R. Clayton Steiner, M.D. and his practice, Moore Surgical Center, P.A. On 17 December 2002, all parties participated in a mediated settlement conference. Although a settlement was not reached at the time, plaintiff later negotiated a settlement with FirstHealth, Dr. Adkins and Sandhills Emergency Physicians. Plaintiff voluntarily dismissed his complaint against these parties. Remaining for trial were plaintiff's negligence claims against Dr. Steiner and his practice, Moore Surgical Center (collectively, "defendants").

On 2 February 2004, defendants extended an offer of judgment to plaintiff pursuant to Rule 68 of the North Carolina Rules of Civil Procedure. Plaintiff did not accept the offer of judgment and the matter was tried before a jury beginning 16 February 2004. At the close of the evidence, the jury returned a verdict in favor of defendants, which judgment was entered by the trial court on 2 March 2004. Defendants subsequently filed a motion for costs, seeking reimbursement for all trial costs in the amount of $43,781.11. The trial court granted defendants' motion in part and concluded as a matter of law that plaintiff should pay defendants $31,082.87. It is from this order that plaintiff appeals.

The sole issue raised on appeal is whether the trial court erred by ordering plaintiff to reimburse defendants' trial expenses. Specifically, plaintiff argues that defendants' trial expenses "are neither statutorily mandated nor judicially approved by the Supreme Court of North Carolina." We address each enumerated cost.

Where an appeal presents a question of statutory interpretation, this Court conducts a *de novo* review of the trial court's conclusions of law. *Coffman v. Roberson*, 153 N.C. App. 618, 623, 571 S.E.2d 255, 258 (2002). In the instant case, the trial court concluded as a matter of law that defendants were entitled to reimbursement in the amount of $31,082.87 "pursuant to Rule 68 of the North Carolina Rules of Civil Procedure," as well as "Chapters 6 and 7A of the North Carolina General Statutes". Thus, we review the trial court's order *de novo*.

Rule 68 of the North Carolina Rules of Civil Procedure provides that where a defendant makes an offer of judgment at least ten days before trial, the plaintiff rejects the offer of judgment, and the judg-

ment finally obtained by the plaintiff is less favorable than the offer of judgment, the plaintiff must pay the costs incurred by defendant after the offer was rejected. N.C.R. Civ. P. Rule 68(a) (2004).

N.C. Gen. Stat. §§ 6-18 and 6-19 (2003) delineate the types of actions in which costs shall be awarded to the prevailing party in civil actions. N.C. Gen. Stat. § 6-20 (2003) provides that "[i]n other actions [not listed in §§ 6-18 and 6-19], costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." N.C. Gen. Stat. § 6-1 (2003) provides: "To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this chapter."

Section 305 of Chapter 7A of the General Statutes sets forth a list of expenses that may be assessed in civil actions:

(1) Witness fees, as provided by law.

(2) Jail fees, as provided by law.

(3) Counsel fees, as provided by law.

(4) Expense of service of process by certified mail and by publication.

(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.

(6) Fees for personal service and civil process and other sheriff's fees, as provided by law. Fees for personal service by a private process server may be recoverable in an amount equal to the actual cost of such service or fifty dollars ($50.00), whichever is less, unless the court finds that due to difficulty of service a greater amount is appropriate.

(7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(8) Fees of interpreters, when authorized and approved by the court.

(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

N.C. Gen. Stat. § 7A-305(d) (2003). "The costs set forth in [§ 7A-305(d)] are complete and exclusive, and in lieu of any other costs and fees." N.C. Gen. Stat. § 7A-320 (2003). However, the trial court may, in its discretion, award additional costs pursuant to N.C. Gen. Stat. § 6-20 if the costs were "established by case law prior to the enactment of N.C. Gen. Stat. § 7A-320 in 1983." *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 734, 596 S.E.2d 891, 895 (2004) (citing *Department of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C. App. 461, 586 S.E.2d 780 (2003)). Thus, the trial court's authority to award costs is strictly limited to "those items (1) specifically enumerated in the statutes, or (2) recognized by existing common law." *Charlotte Area*, 160 N.C. App. at 468, 586 S.E.2d at 784.

In *Lord*, this Court outlined a three-step analysis to guide the determination of whether costs may be properly assessed.

> First, if the costs are items provided as costs under N.C. Gen. Stat. § 7A-305, then the trial court is required to assess these items as costs. Second, for items not costs under N.C. Gen. Stat. § 7A-305, it must be determined if they are "common law costs" under the rationale of *Charlotte Area*. Third, as to "common law costs" we must determine if the trial court abused its discretion in awarding or denying these costs under N.C. Gen. Stat. § 6-20.

164 N.C. App. at 734, 596 S.E.2d at 895. We now examine each cost assessed by the trial court in the instant case.

Deposition Costs

The trial court ordered plaintiff to pay deposition costs in the amount of $4,685.23. The trial court did not err in ordering plaintiff to pay this cost.

Deposition costs are not among the costs enumerated in N.C. Gen. Stat. § 7A-305(d). Thus, we must determine whether deposition costs are common law costs recognized prior to the 1983 enactment of N.C. Gen. Stat. § 7A-305. In *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 296 S.E.2d 512 (1982), this Court held that deposition expenses are recoverable costs when awarded in the trial court's discretion under § 6-20.

> As a general rule, recoverable costs may include deposition expenses unless it appears that the depositions were unnecessary. 20 Am. Jur. 2d Costs § 56 (1965). Even though deposi-

> tion expenses do not appear expressly in the statutes they may be considered as part of "costs" and taxed in the trial court's discretion.

59 N.C. App. at 286, 296 S.E.2d at 516. *See also Alsup v. Pittman*, 98 N.C. App. 389, 391, 390 S.E.2d 750, 752 (1990).

Deposition costs are within the category of "common law costs" permissible under § 6-20 because they were recognized in 1982 (prior to the enactment of N.C. Gen. Stat. § 7A-320) as an appropriate cost to be taxed in the trial court's discretion. *Dixon*, 59 N.C. App. at 286, 296 S.E.2d at 516; *Charlotte Area*, 160 N.C. App. at 468, 586 S.E.2d at 784. This Court will not disturb a trial court award of expenses related to depositions absent an abuse of discretion. *Lord*, 164 N.C. App. at 736, 596 S.E.2d at 895. "Abuse of discretion is shown only when the challenged actions are manifestly unsupported by reason." *Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002) (quotation and citation omitted). Plaintiff has failed to show that the trial court abused its discretion in awarding expenses associated with depositions. Consequently, we hold that the trial court did not err by ordering plaintiff to pay these costs.

Costs for Obtaining Medical Records

The trial court also ordered plaintiff to pay defendants' expenses for obtaining copies of decedent's medical records, x-rays and CT scans in the amount of $2,153.31. The trial court erred in ordering plaintiff to pay the expenses.

Medical records are not among the costs enumerated in § 7A-305(d). Furthermore, our review of the relevant case law indicates that our courts have not heretofore recognized the cost of obtaining medical records as an expense taxable to a party under § 6-20.[1] Because there is no statutory or common law basis for ordering plaintiff to pay defendants' expenses for obtaining medical records, we conclude that the trial court erred by ordering plaintiff to pay these costs.

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1. This Court has heard only one case dealing with an award of the cost of obtaining medical records, *Sealey v. Grine*, 115 N.C. App. 343, 444 S.E.2d 632 (1994). In *Sealey*, the cost of medical records was included in the cost of deposition expenses. This Court held that the deposition costs were permissible, but because "the record does not show that the $615.00 in expenses 'for copies of x-ray films' and $164.25 'for copies made of records' relates to depositions and because these costs are not enumerated in Section 7A-305(d), the trial court erred in taxing such costs against plaintiff." 115 N.C. App. at 348, 444 S.E.2d at 635.

Mediation Costs

The trial court also ordered plaintiff to pay mediation costs in the amount of $634.30. The amount includes $100.97 paid by defendants for lunch during the mediated settlement conference. Plaintiff concedes the fee of the mediator is an expense authorized under N.C. Gen. Stat. § 7A-305(d)(7); however, plaintiff excepts to the assessment for the cost of the lunch defendants voluntarily provided during the conference. We conclude the trial court erred in ordering plaintiff to pay the cost of lunch.

Section 7A-305 (d)(7) provides that "[f]ees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law" may be assessed or recovered as costs in civil actions. The statute further provides that "[t]he fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary." The statute does not authorize the assessment of any costs associated with the services listed except for stenographic assistance.

Because the cost for the lunch defendants provided during the mediated settlement conference is not authorized by statute and defendant has not cited any case law authorizing the assessment of the expense for lunch, we hold the trial court erred in taxing plaintiff with the costs of the lunch defendants provided at the mediation settlement conference.

Expert Witness Fees for Trial

The trial court also ordered plaintiff to pay costs for four of defendants' expert witnesses in the amount of $21,775.00. The trial court erred in taxing plaintiff with certain portions of defendants' expenses for expert witness fees.

Section 7A-305(d)(1) of the North Carolina General Statutes provides that witness fees are recoverable as provided by law. This provision is to be read in conjunction with § 7A-314, which governs fees for witnesses. *Lord*, 164 N.C. App. at 735, 596 S.E.2d at 895. Section 7A-314(a) provides for the payment of witnesses who are in attendance at trial pursuant to a subpoena. Section 7A-314(d) allows the court, in its discretion, to authorize the payment of fees for an expert in excess of the statutory amount authorized for lay witnesses in § 7A-314(a). *State v. Johnson*, 282 N.C. 1, 27-28, 191 S.E.2d 641, 658-59 (1972). Section 7A-314(e) provides as follows: "If more than two witnesses are subpoenaed, bound over, or recognized, to prove a

single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena." Section 7A-314(e) modifies 314(d) to the extent that where there are more than two witnesses on the same point, the party issuing the subpoena is responsible for the costs associated with the third witness.

In the case *sub judice*, defendants seek expenses associated with four expert witnesses. All defense experts were under subpoena to testify at trial, although two of the experts never testified. Plaintiff argues that although Dr. Stirman did not testify at trial, if he had testified he would have been the third expert on the same point and therefore, the award of costs for expenses associated with Dr. Stirman was in error. We agree. Defendants concede that Drs. Godwin, Ely, and Stirman were subpoenaed to testify as to the same material fact. Section 7A-314(e) prohibits the award of costs for a third expert witness subpoenaed to prove a single material fact. Therefore, the trial court was not authorized to assess costs for the expert witness expenses associated with Dr. Stirman. We reverse the trial court's award of $6,762.50 for his expenses.

Plaintiff also contends the trial court erred in awarding defendants' expenses for Dr. Bays, an economist who attended the trial pursuant to subpoena and served as a consultant but never testified. We agree. The trial court awarded costs of $1,350.00 for "case review, research, estimation of discounted present values, revision of report and consultation" for Dr. Bays. There is no statutory authority for awarding costs for "case review, research, estimation of discounted present values, revision of report and consultation" and defendants have cited no common law authority for such an award. We reverse the trial court award of $1,350.00 for expenses for Dr. Bays.

The trial court awarded defendants $7,562.50 for expert witness fees for Dr. Godwin which includes $2,250.00 for reviewing records and consulting with defense counsel. Likewise, the trial court awarded a total of $6,100.00 for expert witness fees for Dr. Ely which includes expenses for records review and meeting with defense counsel in the amount of $4,100.00. There is no statutory or common law authority for the award for consulting with counsel and reviewing records. Therefore, the award of costs for expert witness fees must be modified to eliminate the award of costs for Drs. Stirman and Bays and costs for reviewing records and consultation with defense counsel for Drs. Godwin and Ely.

Trial Exhibit Fees

The trial court also ordered plaintiff to pay defendants' trial exhibit fees in the amount of $1,835.03. The trial court erred by ordering plaintiff to pay these costs.

Trial exhibit fees are not among the costs enumerated in § 7A-305(d). Furthermore, there was no common law authority for the assessment of costs for trial exhibit fees prior to 1983. We recognize that since 1983, some cases from this Court have allowed the award of costs for trial exhibits. *See Estate of Smith v. Underwood*, 127 N.C. App. 1, 12-13, 487 S.E.2d 807, 814-15 (1997); *Lewis v. Setty*, 140 N.C. App. 536, 539-40, 537 S.E.2d 505, 507 (2000); *Coffman v. Roberson*, 153 N.C. App. 618, 629, 571 S.E.2d 255, 262 (2002). Other cases from this Court have not allowed the award of costs for trial exhibits. *See Charlotte Area*, 160 N.C. App. at 472, 586 S.E.2d at 786.

In *Charlotte Area*, this Court declined to follow *Smith*, *Lewis* and *Coffman* because the decisions were deemed inconsistent with *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E.2d 179 (1972). In *McNeely*, our Supreme Court stated, "Costs in this state are entirely creatures of legislation, and without this they do not exist." 281 N.C. at 691, 190 S.E.2d at 185 (quotation and citation ommitted). We are bound to follow decisions of the Supreme Court until the Supreme Court rules otherwise. *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 621, 504 S.E.2d 102, 106 (1998).

Because there is neither a statutory basis for ordering plaintiff to pay trial exhibit fees nor a common law basis established prior to 1983 for ordering plaintiff to pay trial exhibit fees, we conclude that the trial court lacked discretion to tax plaintiff with the costs of defendants' trial exhibits.

We have reviewed all of plaintiff's assignments of error properly brought forward. For the reasons stated herein, we affirm the award of deposition costs and fees for the mediator to defendants. We affirm in part and reverse in part the award for expert witness fees. We reverse the award of costs for the lunch defendants provided during the mediated settlement conference, the cost of medical records and trial exhibit fees. We remand the matter to the trial court with instructions to modify the award of costs in accord with this opinion.

AFFIRMED in part, REVERSED in part and REMANDED.

Judges McCULLOUGH and STEELMAN concur.

MICHAEL W. McLAMB, AND WIFE DEBORAH McLAMB; BARRY SUTTON; G. KEITH HANDY AND WIFE DONNA W. HANDY; MICHAEL McKAY, AND WIFE JILL McKAY; AND STEVE OWEN, PLAINTIFFS V. T.P. INC., DEFENDANT

No. COA04-1472

(Filed 4 October 2005)

1. Vendor and Purchaser— reservation agreements for coastal property—not an option contract

Reservation agreements for coastal property which did not require defendants to develop the property or to convey the lots to plaintiffs did not involve an offer to sell held open for a particular time and were not option contracts. The trial correctly granted a Rule 12(b)(6) motion to dismiss a claim for breach of those agreements.

2. Vendor and Purchaser— reservation agreements for coastal real property—refundable deposits—no consideration

Plaintiffs could not allege consideration in reservation agreements and deposits on coastal real estate where each deposit was fully refundable on request and had to be used, if at all, as payment toward the land.

3. Unfair Trade Practices— real estate reservation agreement—alleged loss of contract rights—invalid contract

The trial court did not err by dismissing an unfair and deceptive trade practices claim concerning a reservation agreement and deposit on coastal land. The practices alleged to be unfair involved the loss of contract rights under the reservations, but it was decided elsewhere in this opinion that these reservations were not contracts.

Appeal by plaintiffs from judgment entered 30 July 2004 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 24 August 2005.

Shipman Gore Mason & Wright, LLP, by Gary K. Shipman and William G. Wright, for plaintiff appellants.

Manning Fulton & Skinner, P.A., by William C. Smith, Jr., for defendant appellee.

McCULLOUGH, Judge.

Plaintiffs appeal from an order dismissing their claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). We affirm.

Facts

Plaintiffs are a group of individuals who sought to purchase real estate in the Oceanaire Subdivision, which defendant T.P. Inc. contemplated developing in Surf City, North Carolina. At various points in 2002 and 2003, each of the plaintiffs signed a "Reservation Agreement" (hereinafter "reservation(s)") with defendant. With each reservation, one of the plaintiffs purported to reserve the right to purchase one or more lots in Oceanaire Estates. The reservations required a $500 per lot deposit "[a]s consideration" from each plaintiff. Each reservation contained the following clause, which governed the holding and use of the deposits:

> Said deposit shall be held by Anchor Real Estate Corp. until the first to occur of the following:
>
> a) [the particular plaintiff] requests cancellation of this Agreement and refund of the deposit[; or]
>
> b) the [parties] enter into an Offer to Purchase and Contract, in which case said deposit shall be credited to [the particular plaintiff] at the time of closing.

Further, some of the reservations contained the following provisions:

> c) Seller expects to have infrastructure in place and the plat map recorded by [a specified date].
>
> d) Buyer shall enter into an Offer to Purchase and Contract with Seller within 2 weeks after "c" has been completed with a closing date not to exceed 30 days from the date of the contract.

In addition, some of the reservations contained a provision which made the reservation void if the buyer had not either requested his deposit back or "enter[ed] into an Offer to Purchase and Contract [with seller]" by a specified date. Citing an inability to obtain necessary permits, defendant recanted the reservation agreements and returned plaintiffs' deposits in December 2003.

Plaintiffs thereafter filed a lawsuit against defendant. Plaintiffs' complaint alleged that the reservations constituted binding option contracts, that defendant was in fact able to obtain the necessary per-

mits to develop Oceanaire Estates, and that defendant had claimed that it could not obtain permitting in an attempt to avoid plaintiffs' reservations and make a greater profit on the sale of the land. Plaintiffs sought specific performance of the reservations and damages under the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-16, *et seq*. The trial court dismissed plaintiffs' lawsuit for failure to state a claim upon which relief could be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Plaintiffs appeal.

I.

In their first argument on appeal, plaintiffs contend that the trial court erred by dismissing their breach of contract claims. Plaintiffs claim that they pled the existence of an option contract that was breached by defendant. We disagree.

"On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). Dismissal under Rule 12(b)(6) is proper if "(1) the complaint on its face reveals that no law supports the . . . claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the . . . claim." *Id.*

"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). This Court has held that where the complaint alleges each of these elements, it is error to dismiss a breach of contract claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). *Toomer v. Garrett*, 155 N.C. App. 462, 481-82, 574 S.E.2d 76, 91, *appeal dismissed*, *disc. review denied*, 357 N.C. 66, 579 S.E.2d 576 (2003). The instant case presents questions as to whether plaintiffs alleged the existence of an offer by defendant to sell land and whether any such offer was made irrevocable by consideration given by plaintiffs.

A. Whether Plaintiffs Alleged An Offer to Sell Land

[1] "A contract is simply a promise supported by consideration, which arises . . . when the terms of an offer are accepted by the party to whom it is extended." 17 C.J.S. *Contracts* § 2 (1999); *see also Copy Products*, *Inc. v. Randolph*, 62 N.C. App. 553, 555, 303 S.E.2d 87, 88 (1983). " '[A]n "option" [contract] is a contract by which the owner agrees to give another the exclusive right to buy property at a fixed

price within a specified time.' In effect, an owner of property agrees to hold his offer [to sell] open for a specified period of time." *Normile v. Miller*, 313 N.C. 98, 105, 326 S.E.2d 11, 16 (1985) (citations omitted). For there to be a valid option, there must be an express "promise or agreement that [an offer will] remain open for a specified period of time." *Id.*

> For instance, in *Ward v. Albertson*, 165 N.C. 218, 81 S.E. 168 (1914) . . . , defendant-seller had agreed in writing as follows: ". . . I agree that if [prospective purchaser] pays me nine hundred and ninety-five dollars prior to January 1, 1913, to convey to him all the timber and trees . . . ." *Id.* at 219, 81 S.E. at 168. Similarly, in *Thomason v. Bescher*, 176 N.C. 622, 97 S.E. 654 (1918), defendant-seller agreed in writing: ". . . we, J. C. and W. M. Bescher, do hereby contract and agree with said [prospective purchaser] to sell and convey . . . all that certain tract . . . at his or their request on or before the 18th day of August, 1917 . . ." *Id.* at 624, 97 S.E. at 654. And finally, in *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976), defendant-sellers agreed in writing: ". . . we C. F. Early and Bessie D. Early, hereby irrevocably agree to convey to [prospective purchaser] upon demand by him within 30 days from the date hereof, . . . a certain tract or parcel of land . . . ." *Id.* at 346, 222 S.E. 2d at 396.

Normile, 313 N.C. at 105, 326 S.E.2d at 16. Our Supreme Court has held that an option contract does not exist where "[t]here is no language indicating that [seller] in any way agreed to sell or convey her real property to [prospective buyers] at their request within a specified period of time." *Id.* at 106, 326 S.E.2d at 16.

In the instant case, all of the reservations stated that "SELLER is desirous of selling lots in Oceanaire Estates" and "BUYER reserves the right to purchase a lot." Further, some of the reservations contained the following provisions:

> c) Seller expects to have the infrastructure in place and the plat map recorded by [date].
>
> d) Buyer shall enter into an Offer to Purchase and Contract with Seller within 2 weeks after "c" has been completed with a closing date not to exceed 30 days from the date of the contract.

In addition, some of the reservations contained a provision which made the reservation void if the buyer had not either requested his deposit back or "enter[ed] into an Offer to Purchase and Contract

[with seller]" by a specified date. However, nothing in the reservations actually required defendant to develop the property upon which plaintiffs' lots were to be located or to convey such lots to plaintiffs.

Accordingly, plaintiffs could not allege that the reservations represented an offer to sell that defendant would hold open for a particular period of time. As such, they could not allege the existence of option contracts. Without such contracts, there could be no claims for breach. Therefore, the trial court properly dismissed plaintiffs' breach of contract claims.

B. Whether Plaintiffs Gave Consideration to Make the Alleged Offer to Sell Irrevocable

[2] Even assuming *arguendo* that plaintiffs could allege that the reservations represented offers by defendant to allow plaintiffs to buy property at a fixed price within a specified time, plaintiffs could not allege that they gave consideration so as to create a binding option contract. To be enforceable, "[an] option contract must . . . be supported by valuable consideration." *Normile*, 313 N.C. at 105, 326 S.E.2d at 16; *see also Ward*, 165 N.C. at 222, 81 S.E. at 169 (holding that the consideration given in exchange for the option must be such that the option agreement " 'constitutes a binding and irrevocable contract to sell if the other party shall elect to purchase within the time specified.' ") (citation omitted). "Consideration which is sufficient to support a contract 'consists of "any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." ' " *Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning Co.*, 86 N.C. App. 540, 542, 358 S.E.2d 539, 540 (1987) (citations omitted), *aff'd*, 322 N.C. 107, 366 S.E.2d 441 (1988).

The present plaintiffs contend that the $500 deposits supplied the necessary consideration for each option, notwithstanding that each plaintiff's deposit was refundable in full at his request and had to be used, if ever, as payment for the land alleged to be under option, because

> Plaintiffs . . . lost the benefit of the use of that money during the interim time period before they decided whether to exercise their options to purchase the subject lots. Defendant received the benefit of the use of this money to enable it to[,] *inter alia*[,] both receive and/or qualify for financing and to earn interest on the same should Defendant so desire.

In support of this view, plaintiffs urge us to adopt the reasoning of Florida appellate courts which have held that even a deposit which is refundable at the behest of a person giving the deposit is sufficient consideration. *See Benson v. Chalfonte Dev. Corp.*, 348 So. 2d 557, 559-60 (Fla. Dist. Ct. App. 1976) ("Although, under the terms of the option, appellants were to receive any accumulated interest if their deposits were returned, a jury might find that appellants suffered some detriment and inconvenience in that they were deprived of the free and unrestricted use of their money during the period it was on deposit."), *disc. review denied*, 354 So. 2d 979 (Fla. 1977); *King v. Hall*, 306 So. 2d 171, 173 (Fla. Dist. Ct. App. 1975) ("While buyer's . . . deposit could have been [with]drawn . . . , it did constitute sufficient consideration . . . as it was a detriment or inconvenience to buyer to post it. It was done to show good faith and buyer was deprived of the use of the money during the period it was posted. It does not matter that the burden to the buyer was small or that the benefit to sellers was small.").

We are not inclined to adopt the approach suggested by plaintiffs. Though no North Carolina appellate court has directly addressed whether deposits, such as the ones made by the present plaintiffs, are sufficient consideration, our courts have held that consideration which may be withdrawn on a whim is illusory consideration which is insufficient to support a contract. *See*, *e.g.*, *Kadis v. Britt*, 224 N.C. 154, 163, 29 S.E.2d 543, 548 (1944) ("A consideration cannot be constituted out of something that is given and taken in the same breath—of an employment which need not last longer than the ink is dry upon the signature of the employee [to a covenant not to compete] . . . ."); *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 78-79, 185 S.E.2d 278, 283 (1971) (holding that a profit sharing plan was illusory consideration in return for a covenant not to compete where, *inter alia*, it was drawn up by the employer, was subject to amendment by the employer, and was amended by employer to reduce, and for a period of two years eliminate, contributions to the plan), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972). Further, a number of authorities that have considered the issue now before us have adopted a view which is contrary to the one proffered by the present plaintiffs. *See Ford v. McGregor*, 234 S.W.2d 493, 495 (Ky. 1950) ("We think it is clear that there was no monetary consideration to support the option contract here involved. There was no money paid for the option itself. [A] $650 check [drawn by one of the parties] was simply an advance payment on the purchase price if the deal went through but, if not, to be refunded."); *First Dev. Corp. v. Martin Marietta Corp.*, 959 F.2d 617,

622 (6th Cir. 1992) ("[A]n 'option' without consideration can be withdrawn at any time before acceptance and . . . a refundable deposit which is simply an advance payment on the purchase price, if the sale of the real estate is ultimately consummated, does not constitute consideration for an irrevocable option."); *Country Club Oil Co. v. Lee*, 58 N.W.2d 247, 250 (Minn. 1953) ("Where the only consideration for the option is the obligation of the optionee to pay the stipulated purchase price of the property in case he elects to exercise the option and purchase the property, that is not a sufficient legal consideration for the option since the consideration for the option must be separate and distinct from the obligation of the optionee to pay the stipulated purchase price in case he elects to purchase the property.")[1]; *Aspinwall v. Ryan*, 226 P.2d 814, 817 (Or. 1951) ("The $100.00 payment was not intended as consideration for the option. It was simply an advance payment on the purchase price. To constitute a valid option, there must be a valuable consideration therefor apart from the consideration for the sale. If there is none, the option is in effect a mere offer, and may be withdrawn at any time before acceptance."); 3-11 CORBIN ON CONTRACTS § 11.7 n. 11 (1999) ("If no down payment were made and [an] option holder merely promised to pay . . . in the event the holder exercised the option, there would have been no sufficient consideration and the so-called 'option' would have been a revocable offer only."). Consistent with the general rules concerning what constitutes valid consideration under North Carolina contract law and with the result reached in other jurisdictions, we hold that an option is not supported by sufficient consideration if it is purported to be held open only by a deposit which is (1) refundable at the behest of the depositing party, and (2) to be applied as payment towards the object for which the option is offered if a sale occurs.

In the instant case, it is not disputed that each deposit was freely refundable at the request of the depositing plaintiff and that the deposit would be used, if ever, as payment towards the purchase price of the land that was alleged to be reserved by the option contract. Given these facts and circumstances, plaintiffs cannot show consideration for the alleged option contracts.

Accordingly, no valid option contracts existed pursuant to which the plaintiffs could allege breach by defendant. Therefore, the trial

1. The holding in *Country Club Oil Co.*, 58 N.W.2d at 249-50, was that $100 paid for a ninety-day option to purchase land for $3,000 could constitute consideration even though it was to be applied to the purchase price if the option was exercised because "in the event of the failure of the plaintiff to exercise the option the $100 was to be forfeited . . . ."

court properly dismissed plaintiffs' breach of contract claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). This assignment of error is overruled.

II.

[3] In their second argument on appeal, plaintiffs contend that the trial court erred by dismissing their unfair and deceptive trade practices claims. We disagree.

The elements of a claim for unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 are: "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991). Thus, "[r]ecovery according to [N.C. Gen. Stat. § 75-1.1 and 75-16] is limited to those situations when a plaintiff can show that plaintiff detrimentally relied upon a statement or misrepresentation and he or she 'suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation.' " *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1990) (citation omitted), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

In the instant case, plaintiffs alleged that defendant intentionally failed to honor the reservations because the property plaintiffs sought to buy had become more valuable and dishonestly represented that the reservations could not be honored because necessary permits could not be obtained. Plaintiffs further alleged that they suffered resulting damages because they lost the benefit of their bargains, the free and unrestricted use of their deposit money, and the opportunity to use their money elsewhere.

Significantly, plaintiffs did not allege that defendant intended to deceive them from the outset. As such, there was no allegation that an unfair or deceptive act by defendant induced plaintiffs either to pay the deposits mentioned in the reservations or to leave the deposits with defendant's agent rather than withdrawing them. Indeed, the unfair and deceptive acts averred in plaintiffs' complaint involved defendant's return of the deposits and failure to honor the reservations. Therefore, the damage to plaintiffs, if any, was the loss of their contract rights under the reservations. However, because plaintiffs did not have any contract rights under the reservations, they could not allege any damage by virtue of defendant's alleged unfair and deceptive acts.

Accordingly, the trial court properly dismissed plaintiffs' unfair and deceptive trade practices claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). This assignment of error is overruled.

For the foregoing reasons, the trial court's order of dismissal is

Affirmed.

Judges TYSON and BRYANT concur.

CRAIG B. HILLIARD, PETITIONER v. NORTH CAROLINA DEPARTMENT OF CORRECTION, RESPONDENT

No. COA04-780

(Filed 4 October 2005)

1. Administrative Law— summary judgment—standard of review

Summary judgment is a matter of law and the appropriate standard of review of an administrative law judge's grant of summary judgment is de novo.

2. Public Officers and Employees— agency interpretation of rules—unacceptable professional conduct

On judicial review, an agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language. In this case, the undisputed facts showed that a state employee's conduct constituted unacceptable professional conduct and the State Personnel Commission's interpretation of its own regulations and work rules did not contain any qualification or exception for the explanations defendant offered. The trial court properly affirmed the administrative law judge's summary judgment for respondent.

3. Public Officers and Employees— demotion of state employee—substantial evidence—whole record

The superior court properly employed the whole record test in reviewing evidence supporting the demotion of a state employee. The record contained sufficient substantial evidence to support the demotion of a state employee.

4. Constitutional Law— equal protection—demotion of state employee

The trial court properly applied the de novo standard of review to determine that a demoted state employee was not denied equal protection.

Petitioner appeals from order entered on 25 August 2003 by W. Erwin Spainhour in Superior Court in Rowan County. Heard in the Court of Appeals 21 March 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III, for the State.

J. Stephen Gray, for petitioner-appellant.

HUDSON, Judge.

In May 2001, after a pre-disciplinary hearing, petitioner Hilliard was demoted by his employer, the North Carolina Department of Corrections ("DOC"), from his position as superintendent in charge of the Davidson County Correctional Center ("DCC"). Hilliard filed a contested case petition with the Office of Administrative Hearings ("OAH") and DOC filed a motion for summary judgment. On 15 December 2001, Senior Administrative Law Judge, Fred G. Morrison, granted summary judgment to DOC. Hilliard appealed to the State Personnel Commission (SPC) and on 21 March 2002 the SPC adopted and affirmed the OAH decision. Hilliard filed a petition for judicial review in Superior Court in Rowan County, where he resides. On 25 August 2003, the court affirmed SPC's decision. Petitioner Hilliard appeals. For the reasons below, we affirm.

The evidence tends to show that Hilliard, an employee with DOC for almost eighteen years, was superintendent at DCC from October 1999 to March 2001. In 2001, following an internal investigation, DOC determined that he had engaged in multiple acts of misconduct. On 17 May 2001, Hilliard attended a pre-disciplinary conference, about which he had been earlier informed. After the conference, Hilliard received a letter dated 31 May 2001 and modified 24 July 2001, in which DOC demoted him from a correctional superintendent to a programs supervisor, effective 1 June 2001.

DOC based its disciplinary action on seven acts of alleged misconduct, but only four of these are at issue in this appeal. In summary, DOC alleged that Hilliard:

1. Ate food from the DCC dining facility without signing or paying for it;

2. Accepted personal services from DCC inmates by having them sew patches on uniforms of his son's athletic teams;

3. Accepted personal services from subordinate State employees at DCC on State time and using State equipment, e.g., having his secretary type up his son's team rosters, game and practice schedules, and directions to ballfields;

4. Used State equipment on State time by using fax machines and making long distance calls on State business telephones.

OAH and SPC determined that Hilliard committed these acts of misconduct and concluded that these offenses were unacceptable personal conduct ("UPC") under SPC regulations and, therefore, "just cause" for demotion.

Hilliard argues that the trial court erred in affirming OAH's order granting summary judgment because there were insufficient findings of fact justifying summary judgment and contested issues of fact. We disagree.

When reviewing a trial court's order affirming a decision by an administrative agency, the scope of review of this Court is the same as it is for other civil cases. N.C. Gen. Stat. § 150B-52 (2003); *Henderson v. N.C. Dep't of Human Res.*, 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988). We must examine the trial court's order for errors of law and determine whether the trial court exercised the appropriate scope of review and whether the trial court properly applied this standard. *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 443 S.E.2d 114 (1994). As in other civil cases, we review errors of law *de novo*. *See York Oil Co. v. N.C. Dep't of Env't, Health and Natural Res.*, 164 N.C. App. 550, 554, 596 S.E.2d 270, 273 (2004).

[1] First, we must determine whether the trial court applied the correct standard of review here. "Judicial review of the final decision of an administrative agency in a contested case is governed by [N.C. Gen. Stat. §] 150B-51(b) of the APA." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). The nature of the error asserted determines the appropriate manner of review; where appellant contends legal error in the agency's decision, the trial court must review *de novo*. *Dillingham v. N.C. Dep't of*

Human Res., 132 N.C. App. 704, 513 S.E.2d 823 (1999). Here, Hilliard asserts that the trial court erred in affirming the ALJ's grant of summary judgment. As summary judgment is a matter of law, the appropriate review was *de novo*. *See Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). Here, the trial court properly applied a *de novo* review and correctly affirmed the final agency's grant of summary judgment.

[2] The court may grant summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. 1A-1, Rule 56(c) (2003). N.C. Gen. Stat. 126-35(a) (2003) states that "no career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." *Id.* "Just cause" may consist of "unacceptable personal conduct." 25 N.C.A.C. 1J.0604(b) (2003). Unacceptable Personal Conduct (UPC) includes:

> (1) conduct for which no reasonable person should expect to receive prior warning; or
>
> * * *
>
> (4) the willful violation of known or written work rules;
>
> or
>
> (5) conduct unbecoming a state employee that is detrimental to state service;

25 N.C.A.C. 1J.0614(i) (2003). One act of UPC presents "just cause" for any discipline, up to and including dismissal. 25 N.C.A.C. 1J.0604(a), 1J.0608(a), 1J.0612(a)(3), and 1J.0614(i) (2003). No showing of actual harm is required to satisfy definition (5) of UPC, only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer). *Eury v. Employment Sec. Comm'n*, 115 N.C. App. 590, 610-11, 446 S.E.2d 383, 395-96, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). Under subsection (4) of 25 N.C.A.C. 1J.0614(i), the employer's work rules may be written or "known" and a willful violation occurs when the employee willfully takes action which violates the rule and does not require that the employee intend his conduct to violate the work rule. *See N.C. Dep't of Corr. v. McNeely*, 135 N.C. App. 587, 592-93, 521 S.E.2d 730, 734 (1999).

The undisputed facts here show that defendant's conduct constituted UPC. Hilliard admits the alleged conduct, but offers explana-

tions for it that he argues justified it. For example, he argues that he was "testing" the food and believed this was a valid exception to the rule requiring payment for the food; that he did not pay inmates for sewing his son's uniforms and regarded this as public service work; that his employees had no other work and did not mind performing personal services for him; and that he only used the business phone for long distance calls during a family emergency and offered to pay for the calls.

On judicial review, an agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language. *Britt v. N.C. Sheriff's Educ. and Training Stds. Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998). Here, SPC determined that its regulations and the work rules did not contain any qualification or exception for the explanations Hilliard asserted. A fact is material only if it constitutes a legal defense to a charge, or would affect the result of the action, or its resolution would prevent the party against whom it is asserted from prevailing on the point at issue. *Bone Int'l, Inc. v. Brooks*, 304 N.C. 371, 375 283 S.E.2d 518, 520 (1981). Thus, we conclude that as no material fact was in dispute here, the court did not err in affirming summary judgment.

[3] Hilliard next argues that a review pursuant to the whole record test does not show substantial findings of fact and conclusions of law to justify demotion. We disagree.

Where appellant contends the agency's decision was not supported by the evidence or was arbitrary and capricious, the whole record test is used. *Dillingham*, 132 N.C. App. at 708, 513 S.E.2d at 826. The record here indicates that the superior court employed the correct standard of review, as its order affirming OAH states that "[t]he Court has considered the entire record in this matter," and that it made its findings "[a]fter applying the whole record test." We must now determine whether it exercised this review properly.

"The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977) (internal citation omitted). "The 'whole record' test does not allow the reviewing court to replace the [agency]'s judgment as

between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). After reviewing the record, we conclude that it contains sufficient substantial evidence to support Hilliard's demotion. As discussed, Hilliard admits that he committed the conduct alleged to be UPC. Thus, the superior court properly employed the whole record test and did not err.

[4] Finally, Hilliard contends that SPC's order affirming OAH was made upon unlawful procedures in violation of due process of law and equal protection. We disagree. Because these are issues of law, they are reviewed *de novo*. Here, the trial court properly applied a *de novo* review.

Hilliard contends that he was denied due process because he was only given two days notice prior to the pre-disciplinary conference and because the persons involved in the investigation and the conference were his supervisors. Hilliard only cites one case in support of his due process argument: *Owen v. UNC-G*, 121 N.C. App. 682, 468 S.E.2d 813 (1996). However, *Owen* states that:

> Under federal due process an employee's property interest in continued employment is sufficiently protected by "a pretermination opportunity to respond, coupled with post-termination administrative procedures. Further, the federal due process concern for fundamental fairness is satisfied if the employee receives oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To interpret the minimal protection of fundamental fairness established by federal due process as requiring more than this . . . would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id. at 686, 468 S.E.2d at 816 (internal citations and quotation marks omitted). Moreover, the North Carolina Supreme Court has held that a State employee's due process rights are satisfied by the opportunity to pursue a contested case hearing before OAH. *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 324-25, 507 S.E.2d 272, 278-79 (1998).

Although Hilliard asserts that he was denied equal protection, he fails to cite any cases in support of this argument or to adequately brief it. To succeed on a claim of equal protection, Hilliard must show

that he was treated significantly differently than similarly situated employees and that this difference was because of discrimination against a protected class; if the different treatment, even if for similarly situated persons, was not based on a protected characteristic, it need only have a rational basis. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84, 145 L. Ed. 2d 522, 542 (2000); *Richardson v. N.C. Dep't of Corre.*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). Here, Hilliard fails to show that there were actually any similarly situated persons who were treated differently and he does not argue that any difference in discipline was based on a protected characteristic or was without rational basis. Accordingly, we overrule this assignment of error.

Finally, Hilliard asserts again that SPC and OAH's decisions were arbitrary and capricious. As stated earlier, the trial court correctly reviewed this argument pursuant to the whole record test, and our review of the record reveals that there is substantial evidence to support the findings of fact and conclusions of law made by SPC and OAH.

Affirmed.

Chief Judge MARTIN and Judge JACKSON concur.

STATE OF NORTH CAROLINA v. LUVIE ALLEN HIGHSMITH, DEFENDANT

No. COA04-1675

(Filed 4 October 2005)

1. Evidence— motion in limine—defendant's statement he took pain medication—corroboration—corpus delicti rule

The Court of Appeals exercised its discretion pursuant to N.C. R. App. P. 2 and determined that the trial court did not err in a habitual driving while impaired case by denying defendant's motion in limine to exclude the statement defendant made to a trooper that he had taken the pain medication called Floricet, because testimony from a pharmaceuticals expert about the effects of Floricet and the testimony from the trooper about defendant's behavior corroborate defendant's statement about

consuming Floricet, and admission of the statement did not violate the corpus delicti rule.

2. Motor Vehicles— habitual driving while impaired—trial not bifurcated—constitutionality of statute

The trial court did not err by failing to bifurcate defendant's trial for habitual impaired driving because habitual impaired driving is a substantive offense for which predicate convictions are an element which must be proven at trial. Furthermore, defendant could not challenge the constitutionality on appeal of N.C.G.S. § 15A-928, which permits a defendant to stipulate to prior DWI convictions and thus prevent the State from presenting evidence of those convictions before the jury, where he did not challenge the constitutionality of the statute at trial.

3. Motor Vehicles— habitual driving while impaired—motion to dismiss—sufficiency of evidence—knowing consumption of impairing substance

The trial court did not err in a habitual driving while impaired case by denying defendant's motion to dismiss based on alleged insufficient evidence that defendant knowingly consumed an impairing substance, because: (1) an expert in pharmaceuticals testified that the pain medication Floricet was an impairing substance and that a healthcare professional should have warned defendant of its effects; and (2) defendant knew or should have known that a prescription medication such as Floricet could impair him, and he was on notice that he risked crossing over the line into the territory of proscribed conduct by driving after taking Floricet.

4. Motor Vehicles— habitual driving while impaired—involuntary intoxication—no inference based on failure to administer Intoxilyzer or blood test

The trial court did not err in a habitual driving while impaired case by failing to instruct the jury on involuntary intoxication and on the permitted inferences arising from a trooper's failure to administer an Intoxilyzer or blood test to defendant, because: (1) defendant presented no evidence that he was forced to consume the medication he took, but instead that he took the substance voluntarily without knowing it was intoxicating; and (2) there is no legal authority for defendant's assertion that an inference should arise that he was not intoxicated based on the State's failure to administer the Intoxilyzer or to administer a blood test.

5. Criminal Law— motion for mistrial—curative instruction

The trial court did not abuse its discretion in a habitual driving while impaired case by failing to declare a mistrial after the State's comment during closing arguments that defendant says he went to the dentist and went under anesthesia, but he did not provide evidence as such, because: (1) the trial court gave the jury a curative instruction; and (2) defendant did not make a showing that the jury failed to follow the trial court's curative instruction.

Appeal by defendant from judgment entered 19 July 2004 by Judge Benjamin G. Alford in the Superior Court in Craven County. Heard in the Court of Appeals 25 August 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

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

HUDSON, Judge.

At the 19 July 2004 Criminal Session of the superior court in Craven County, a jury found defendant Luvie Allen Highsmith guilty of driving while impaired ("DWI") and driving left of center. Based on defendant's stipulation, the court found defendant guilty of habitual driving while impaired and found him a prior record level II for purposes of sentencing. The court then consolidated the charges and sentenced defendant to 19 to 23 months in prison. Defendant appeals. For the reasons discussed below, we find no error.

The evidence tended to show that, on the afternoon of 7 November 2003, Trooper Gary Fox saw defendant driving a pickup truck on Brices Creek Road. As Trooper Fox followed, defendant's truck crossed the center line several times, once running off the left side of the road. Trooper Fox pulled defendant over, and found his movements sluggish and his speech slurred, but did not smell alcohol on defendant. When Trooper Fox asked defendant what was wrong, defendant replied that he was on his way home from the dentist and was on a pain medication called Floricet. Based on his observations and defendant's statement, Trooper Fox arrested defendant and took him to the Craven County Sheriff's Department. Trooper Fox did not administer an Intoxilyzer or blood test to defendant. Kevin Popkin, an expert in pharmaceuticals, testified about the impairing effects of Floricet.

[1] Defendant first argues that the court erred in allowing defendant's uncorroborated statements into evidence to prove an element of the charges against him. We disagree.

Defendant contends that the court erred in denying his motion *in limine* to exclude the statements he made to Trooper Fox about taking Floricet because they were contradictory and uncorroborated. Defendant did not object to this evidence at trial. Our Courts have long held that "a motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *State v. Roache*, 358 N.C. 243, 292, 595 S.E.2d 381, 413 (2004). The General Assembly attempted to change this law by amending Rule 103(a) of the North Carolina Rules of Evidence to provide: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2004). This amendment applies to the case before us. 2003 N.C. Sess. Laws ch. 101 (stating that the amendment applies to rulings made on or after 1 October 2003).

This Court has recently held that "to the extent that N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) is inconsistent with N.C. R. App. P. 10(b)(1), it must fail." *State v. Tutt*, 171 N.C. App. 518, 524, 615 S.E.2d 688, —— (2005). N.C. R. App. P. 10(b)(1) states:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

However, because it

> would be a manifest injustice to Defendant to not review his appeal on the merits after he relied on a procedural statute that was presumed constitutional at the time of trial, we [will review] the evidence at our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure.

Tutt, 171 N.C. App. at 524, 615 S.E.2d at —— (citing N.C. R. App. P. 2).

Defendant asserts that the admission of his statements to Trooper Fox that he had been given pain medication at his dentist office violates the *corpus delicti* rule. This rule "requires that there be corrob-

orative evidence, independent of the defendant's confession, which tends to prove the commission of the crime charged." *State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985). The Supreme Court went on to state that

> independent evidence of the *corpus delicti* . . . does not equate with independent evidence as to each essential element of the offense charged. Applying the more traditional definition of *corpus delicti*, the requirement for corroborative evidence would be met if that evidence tended to establish the essential harm, and it would not be fatal to the State's case if some elements of the crime were proved solely by the defendant's confession.

Id. at 232, 337 S.E.2d at 493. Here, testimony from Mr. Popkin about the effects of Floricet and from Trooper Fox about defendant's behavior corroborate defendant's statement about consuming Floricet. Thus, we overrule this assignment of error.

[2] Defendant next assigns error to the court's failure to bifurcate defendant's trial. Defendant acknowledges that under current law, because habitual DWI is a substantive offense for which predicate convictions are an element which must be proven at trial, habitual DWI cases are not bifurcated as habitual felon cases are. *State v. Burch*, 160 N.C. App. 394, 396-97, 585 S.E.2d 461, 462-63 (2003). Defendant stipulated to prior DWI convictions pursuant to N.C. Gen. Stat. § 15A-928(c) (2004). "The purpose of this procedure is to afford the defendant an opportunity to admit the prior convictions which are an element of the offense and prevent the State from presenting evidence of these convictions before the jury." *Burch*, 160 N.C. App. at 397, 585 S.E.2d at 463. Defendant contends, however, that the current law prejudices him and violates his constitutional rights. Defendant did not challenge the constitutionality of N.C. Gen. Stat. § 15A-928 at trial, and he may not raise a constitutional claim here for the first time. *State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

N.C. Gen. Stat. § 20-138.5 defines habitual DWI as both a status and a substantive offense. *See also State v. Vardiman*, 146 N.C. App. 381, 385, 552 S.E.2d 697, 700 (2001), *appeal dismissed*, 355 N.C. 222, 559 S.E.2d 794 (2002), *cert. denied*, 537 U.S. 833, 154 L. Ed. 2d 51, 123 S. Ct. 142 (2002) ("Habitual impaired driving . . . is a substantive offense *and* a punishment enhancement (or recidivist, or repeat-offender) offense."). Defendant's contentions for a change in the current law on habitual DWI are more properly addressed to the

General Assembly than to this Court. We are bound by the holding in *Burch. In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989) (holding that "one panel of the Court of Appeals may not overrule the decision of another panel"). This assignment of error is overruled.

[3] Defendant also argues that the court erred in denying his motion to dismiss for insufficiency of the evidence. We disagree.

The standard of review on denial of a motion to dismiss for insufficiency of the evidence is well-established:

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Barnes, 334 N.C. 67, 75-76, 430 S.E.2d 914, 918-19 (1993) (internal citations and quotation marks omitted). Defendant contends that the State failed to present evidence that defendant knowingly consumed an impairing substance.

"A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance . . . ." N.C. Gen. Stat. § 20-138.1 (2004). In upholding the DWI statute against a claim of unconstitutional vagueness, the Supreme Court has stated:

> Although drivers may not know precisely when they cross the forbidden line, they do know the line exists; and they do know that drinking enough alcohol before or during driving may cause them to cross it. Persons who drink before or while driving take the

> risk they will cross over the line into the territory of proscribed conduct. This kind of forewarning is all the constitution requires. It is not a violation of constitutional protections "to require that one who goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952).
>
> There are other criminal statutes which clearly prohibit certain conduct although not in terms which permit persons to know precisely when conduct in which they are engaging actually crosses the line into criminal behavior. In these cases the law simply places persons who engage in certain conduct at risk that their conduct will at some point exceed acceptable behavior.

State v. Rose, 312 N.C. 441, 445, 323 S.E.2d 339, 341-42 (1984). An expert in pharmaceuticals, Kevin Poplin, testified that Floricet was an impairing substance and that a healthcare professional should have warned defendant of its effects. Defendant knew or should have known that a prescription medication such as Floricet could impair him, and was thus on notice that, by driving after taking Floricet, he risked "cross[ing] over the line into the territory of proscribed conduct." *Rose*, 312 N.C. at 445, 323 S.E.2d at 341. This assignment of error is overruled.

[4] Defendant next argues that the court erred in failing to instruct the jury on involuntary intoxication and on the permitted inferences arising from Trooper Fox's failure to administer an Intoxilyzer or blood test to him. We disagree.

"The trial court bears the burden of declaring and explaining the law arising on the evidence relating to each substantial feature of the case." *State v. Moore*, 339 N.C. 456, 464, 451 S.E.2d 232, 236 (1994) (internal quotation marks omitted). In addition,

> a trial court is required to comprehensively instruct the jury on a defense to the charged crime when the evidence viewed in the light most favorable to the defendant reveals substantial evidence of each element of the defense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Ferguson, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000) (internal citations and quotation marks omitted).

Defendant first contends that the court erred in denying his request for an instruction on involuntary intoxication.

> [I]nvoluntary intoxication is a very rare thing, and can never exist where the person intoxicated knows what he is drinking, and drinks the intoxicant voluntarily, and without being made to do so by force or coercion. . . . [I]t is only when alcohol has been introduced into a person's system without his knowledge or by force majeure that his intoxication will be regarded as involuntary.

State v. Bunn, 283 N.C. 444, 457, 196 S.E.2d 777, 786 (1973). Defendant presented no evidence that he was forced to consume the medication he took; rather he asserts that he took the substance voluntarily, but did not know it was intoxicating. These facts do not support an instruction on involuntary intoxication.

Defendant also contends that the court erred in rejecting his request for an instruction on the law of Intoxilyzer and blood tests results. Specifically, defendant asserts that because a fact-finder may infer that a defendant who refuses to take an Intoxilyzer or blood test does so because he is impaired, the inference should also arise that the State failed to administer these tests because defendant was not impaired. Defendant cites no authority for this assertion, and we can find none. There is no logical relationship between these two inferences. This assignment of error is overruled.

[5] Defendant also assigns error to the court's failure to declare a mistrial after the State made improper comments during closing. We disagree.

During closing, the prosecutor rhetorically asked the jury, "[I]f he says he went to the dentist and went under anesthesia, how come he didn't produce those records, where is the evidence?" Defendant objected and moved for a mistrial, and the court sustained the objection, denied the motion, and gave the jury a curative instruction. Defendant contends that this question was an impermissible comment on his right not to testify and requires a new trial. *See State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994). "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (2004). The State bears the burden of showing such an error is harmless. *Id.*

Pursuant to N.C. Gen. Stat. § 15A-1061, a "judge must declare a mistrial upon the defendant's motion if there occurs during the trial

an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." The decision as to whether substantial and irreparable prejudice has occurred lies within the court's discretion and, absent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal. *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422-23 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999). The trial court's decision is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable. *State v. Hill*, 347 N.C. App. 275, 297, 493 S.E.2d 264, 276 (1997). In *State v. McCollum*, a first-degree murder case in which a police officer testified that, in an unrelated case, police seized a gun that appeared to be the gun defendant used to kill defendant's victim, this Court refused to reverse defendant's conviction because defendant did not show that the jury failed to follow the court's curative instruction. 157 N.C. App. 408, 415, 579 S.E.2d 467 (2003), *cert. denied*, 357 N.C. 466, 586 S.E.2d 467, 471-72 (2003), *aff'd*, *without op.*, 358 N.C. 132, 591 S.E.2d 519 (2004). Here, defendant has made no showing that the jury failed to follow the trial court's curative instruction.

No error.

Judges TIMMONS-GOODSON and ELMORE concur.

ANTHONY SUSI, PLAINTIFF v. LOIS AUBIN, DEFENDANT

NORTH COUNTRY DEVELOPMENT OF JEFFERSON COUNTY, INC., PLAINTIFF v. LOIS AUBIN, DEFENDANT

NO. COA04-449
No.COA04-450

(Filed 4 October 2005)

1. Judgments— judgment debtor exemptions—valuation—equities

The trial court had no authority to base its exemptions from the enforcement of judgments on its assessment of the equities rather than on the actual value of the property.

2. Judgments— judgment debtor exemptions—valuation of stock at zero—findings—not sufficient

The trial court's valuation of stock at zero in determining exemptions from enforcement of judgments was vacated and remanded because its findings were not sufficiently specific for appellate review. A finding that the company was so mired in litigation that a third party would have no reasonable interest in the stock did not allow a determination of the methodology used by the court.

Appeal by plaintiffs from order entered 1 December 2003 by Judge Wayne L. Michael in Davidson County District Court. Heard in the Court of Appeals 18 November 2004.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips and Andrew J. Haile, for plaintiffs-appellants.

Brinkley Walser, PLLC, by G. Thompson Miller, for defendant-appellee.

GEER, Judge.

This opinion addresses the appeals of plaintiffs Anthony Susi and North Country Development of Jefferson County, Inc. ("North Country") from the trial court's order in a proceeding to determine defendant Lois Aubin's exemptions, finding that the fair market value of Aubin's stock in a closely-held corporation was zero. Plaintiff Susi's appeal (No. COA04-449) and plaintiff North Country's appeal (No. COA04-450) were previously consolidated for hearing. They are now consolidated for decision. Because the trial court's findings were based, in part, on an impermissible consideration and are not adequate to set out the basis for the court's determination of the fair market value of the stock, we vacate the decision and remand for further findings of fact.

Facts

North Country is a New York corporation and Susi is its sole shareholder. Susi and Aubin are each 50% shareholders in Bluebird Corporation ("Bluebird"), a real estate holding and development company. Although Bluebird previously owned and managed several properties, it currently owns only a residential subdivision called Harborgate, located on High Rock Lake in Davidson County, North Carolina.

Ultimately, the relationship between Susi and Aubin deteriorated. Aubin sued Susi and Bluebird regarding Harborgate, but in 2002, this Court affirmed the trial court's dismissal of that action. *Aubin v. Susi*, 149 N.C. App. 320, 560 S.E.2d 875, *disc. review denied*, 356 N.C. 610, 574 S.E.2d 474 (2002). North Country and Susi subsequently sued Aubin and her real estate brokerage company in New York state court after Aubin had defaulted on loans that Susi and North Country had made to Aubin's company and that Aubin had personally guaranteed. Susi and North Country each obtained judgments against Aubin.

In September 2001, pursuant to N.C. Gen. Stat. § 1C-1705(b) (2003), plaintiffs sought to enforce the foreign judgments in North Carolina, where defendant now resides. On 8 November 2001, the Davidson County Superior Court entered orders granting enforcement of two judgments, one in favor of Susi and one in favor of North Country. As required by N.C. Gen. Stat. § 1C-1603(a)(4) (2003), plaintiffs served upon Aubin a notice of her right to have exemptions designated. Aubin responded with a motion to exempt certain property, including her stock in Bluebird. Relying upon the "wildcard" exemption of N.C. Gen. Stat. § 1C-1601(a)(2) (2003), allowing exemption of "any property" not exceeding $3,500.00, Aubin asserted that the fair market value of the stock was zero and that the stock was subject to a lien of $300,480.00 held by Brinkley Walser PLLC.[1]

Plaintiffs objected to Aubin's motion on the grounds that the motion contained estimated values of property that were "below the true fair market values of the subject properties," specifically including the Bluebird stock. Plaintiffs requested that the clerk of superior court set Aubin's motion for hearing and "further request[ed] that the Court appoint a qualified person to examine the property owned by Aubin and to report their [sic] value to the Court pursuant to N.C. Gen. Stat. § 1C-1603(e)(8)." In support of the objections, Susi submitted an affidavit stating that "[d]espite the fact that the liabilities of Bluebird exceed its assets, I am willing to pay at least $3,500.00, plus any administrative fees associated with the sale of the Stock, in order to purchase the Stock subject to the lien in favor of Brinkley Walser."

1. We note that N.C. Gen. Stat. § 1C-1601 and -1603 have been amended in the most recent session of our General Assembly. *See* An Act to Amend the Cap on Property of a Judgment Debtor That Is Free of the Enforcement of the Claims of Creditors, and to Exempt Certain Types of Property from Enforcement, H.B. 1176, 2005 Gen. Assemb., Reg. Sess. (N.C. 2005). Although the bill has not yet been signed into law, it is scheduled to go into effect on 1 January 2006. Its pertinent provisions modify the notice requirements under N.C. Gen. Stat. § 1C-1603(a)(4) and change the "wildcard" exemption allowance from $3,500.00 to $5,000.00 under N.C. Gen. Stat. § 1C-1601(a)(2).

Following a hearing on 30 October 2003, the district court found with respect to the Bluebird stock:

> Although the Bluebird stock described in paragraph 8 [of the motion] may have intrinsic value to the two shareholders, Anthony Susi and Lois Aubin, it has no fair market value. The company is mired in litigation such that a third party would have no reasonable interest in buying Defendant's stock. Furthermore, it would be unfair and inequitable to allow Mr. Anthony Susi to purchase the stock for $3,500 when he has been at least partially responsible for the litigation.

Based on its findings, the trial court concluded that "[t]he exemptions requested by the Defendant Lois Aubin are proper and legal in all respects and should be approved." Plaintiffs Susi and North Country have appealed from this order to the extent it relates to the Bluebird stock.

Discussion

Once plaintiffs objected to the exemptions claimed by Aubin, the clerk was required to set Aubin's "motion for hearing by the district court judge, without a jury, at the next civil session." N.C. Gen. Stat. § 1C-1603(e)(7). At such a hearing, "[t]he district court judge must determine the value of the property." N.C. Gen. Stat. § 1C-1603(e)(8). In making this determination, the district court judge "may appoint a qualified person to examine the property and report its value to the judge." *Id.* Following the hearing, "[t]he district court judge must enter an order designating exempt property." N.C. Gen. Stat. § 1C-1603(e)(9). A party may appeal the district court's designation of exempt property to this Court, but "[d]ecisions of the Court of Appeals with regard to questions of valuation of property are final as provided in G.S. 7A-28." N.C. Gen. Stat. § 1C-1603(e)(12). *See also* N.C. Gen. Stat. § 7A-28(b) (2003) ("Decisions of the Court of Appeals upon review of valuation of exempt property under G.S. 1C are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise.").

The sole question on appeal is the trial court's valuation of Aubin's 50% ownership of Bluebird, which she had claimed as exempt under N.C. Gen. Stat. § 1C-1601(a)(2). Section 1C-1601(a)(2) permits a debtor to exempt her "aggregate interest in any property, not to exceed three thousand five hundred dollars ($3,500) in value less any amount of the exemption used under subdivision (1)." The statute defines "value" as the "fair market value of an individual's interest in

property, less valid liens superior to the judgment lien sought to be enforced." N.C. Gen. Stat. § 1C-1601(b). Thus, we must determine whether the trial court properly determined the fair market value of defendant's Bluebird stock.

Although the General Assembly did not further define "fair market value," it is generally defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction." *Black's Law Dictionary* 1587 (8th ed. 2004). In this case, the trial court made only two findings of fact related to the valuation of defendant's stock in Bluebird: (1) that Bluebird is "mired in litigation such that a third party would have no reasonable interest" in buying Aubin's stock and (2) that it would be "unfair and inequitable to allow Mr. Anthony Susi to purchase the stock for $3,500 when he has been at least partially responsible for the litigation."

[1] We address the second finding first. The sole task before the district court was calculation of the fair market value of Aubin's stock. The statute is precise: it directs that "[t]he district court judge must determine the value of the property." N.C. Gen. Stat. § 1C-1603(e)(8). This is a question of fact to be decided based on the evidence. Aubin has cited no authority, and we have found none, that would permit a district court to base its allowance of a party's claim of exemption on the court's assessment of the equities between the parties rather than on the actual value of the property.

This case highlights the problems with allowing a trial court to do so. Implicit in the trial court's finding of unfairness and inequity is an assumption that Susi behaved inappropriately in connection with unspecified litigation proceedings. To the extent that the district court was referring to the litigation that gave rise to the foreign judgments being enforced, the Davidson County District Court was prohibited from revisiting the merits of the litigation. The Davidson County Superior Court had already entered orders rejecting Aubin's defenses and directing enforcement of the judgments.[2] To the extent the district court was referring to Aubin's litigation against Susi, this Court affirmed the dismissal of those claims. The dismissed claims cannot now be re-litigated in the guise of an exemption hear-

2. Significantly, once a creditor establishes, under N.C. Gen. Stat. § 1C-1705(b), that a foreign judgment is entitled to full faith and credit, the judgment may only be attacked on the grounds of fraud, public policy, or lack of jurisdiction. *Reinwand v. Swiggett*, 107 N.C. App. 590, 593, 421 S.E.2d 367, 369 (1992). No evidence was offered that such grounds exist in this case.

ing. The pendency of the remaining litigation involving Harborgate can be considered as a factor in calculating the fair market value of Aubin's stock.

[2] With respect to the first finding—that "[t]he company is mired in litigation such that a third party would have no reasonable interest in buying [d]efendant's stock"—we are unable to determine from that single statement how or by what methodology the district court arrived at its conclusion that Bluebird's "value" was zero. Plaintiffs point to a $4.5 million offer made by an unrelated third party for Harborgate—the sole asset of Bluebird—at a point when litigation by Harborgate homeowners was already pending against Bluebird. Although Aubin responds that subsequent to that time, two other lawsuits were filed, plaintiffs counter that those two lawsuits had been disposed of at the time of the exemption proceeding. We cannot determine from the district court's order how it resolved these various factual disputes. Moreover, the record contains no evidence that, purely as a result of pending litigation, Bluebird had no fair market value.

Aubin has argued on appeal that other reasons exist for valuing her stock at zero, including (1) the negative book value of Bluebird and the lack of any evidence of good will, (2) potential purchasers' unwillingness to become Susi's partner, and (3) the lien of Aubin's law firm. The trial court, however, made no findings regarding those contentions. Further, we note that Aubin testified, contrary to her position on appeal, that she did not believe that the listed book value was accurate, but rather held the opinion that Harborgate was worth more and liabilities were significantly less. We cannot determine whether Aubin's current contentions formed any part of the basis for the trial court's valuation or, if so, how the court resolved related questions such as the book value of Bluebird or whether the law firm's lien was superior to the judgment lien.

We conclude that the district court's findings of fact regarding its valuation of Aubin's 50% ownership in Bluebird are not sufficiently specific for appellate review. "Without proper findings of fact, we cannot perform our review function even though there may be evidence to support the judgment." *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 806, 323 S.E.2d 368, 369 (1984).

Accordingly, we vacate the district court's decision to the extent it sets a value of zero for Aubin's Bluebird stock and remand for further findings of fact regarding the value of that stock, including the

methodology used in reaching that valuation. *Cf. Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (holding in an equitable distribution case that "the trial court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied" (internal quotation marks omitted)). As in the equitable distribution context, if it appears on appeal that the trial court reasonably determined the value of the stock based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed. *Offerman v. Offerman*, 137 N.C. App. 289, 293, 527 S.E.2d 684, 686 (2000).

Vacated and remanded.

Judges TIMMONS-GOODSON and TYSON concur.

WENDY G. BOGGESS AND HUSBAND, SCOTT BOGGESS, PLAINTIFFS V. RALPH SPENCER AND WIFE, BETTY SPENCER, R.L. SPENCER, JR., SUE S. LUFFMAN AND HUSBAND, ARVIL LUFFMAN, DEFENDANTS

No. COA05-118

(Filed 4 October 2005)

1. Civil Procedure— directed verdict—close of plaintiffs' evidence

Defendants waived their motion for a directed verdict made at the close of plaintiffs' evidence by presenting evidence.

2. Civil Procedure— directed verdict—standard of review

The standard of review for a denial of directed verdict is whether the evidence, considered in the light most favorable to the non-moving party, is sufficient to be submitted to the jury.

3. Easements— necessity—sufficiency of evidence to go to jury

The trial court did not err by refusing defendants' motion for a directed verdict at the close of all the evidence on the question of easement by necessity. An earlier conveyance had severed title to plaintiffs' property from that of defendants; no evidence shows public road access other than by a road over defendants'

property; and the road over defendants' property had been used by all of plaintiffs' predecessors in title as a means of ingress and egress.

4. Appeal and Error— preservation of issues—review limited to questions in briefs

The Court of Appeals did not consider the question of whether there was sufficient evidence of an easement by prescription to go to the jury where the jury did not reach the issue and defendants did not argue the issue on appeal. Review is limited to questions presented in the briefs.

Appeal by defendants from judgment entered 21 June 2004 by Judge David V. Byrd in Wilkes County District Court. Heard in the Court of Appeals 14 September 2005.

McElwee Firm, PLLC, by John M. Logsdon, for plaintiffs-appellees.

Franklin Smith, for defendants-appellants.

TYSON, Judge.

Ralph and Betty Spencer, R.L. Spencer, Jr., Sue S. and Arvil Luffman (collectively, "defendants") appeal from judgment entered 21 June 2004 after a jury found Wendy G. and Scott Boggess (collectively, "plaintiffs") to have an easement by necessity over defendants' property. We affirm.

I. Background

Plaintiffs are the owners of a parcel of land containing approximately 4.09 acres located in Wilkes County. Defendants are the owners of a parcel adjoining plaintiffs' property. The relevant conveyances with respect to these properties are as follows:

1) By deed dated 12 April 1933, J.C. and Maggie Spencer conveyed a northern portion of their property consisting of 3.5 acres to W.F. and Callie Gilliam. On the same day, W.F. and Callie Gilliam conveyed a southern portion of their property consisting of 3.5 acres to Lionel Spencer and wife, Irene Spencer. This property is the subject of this appeal.

2) By deed dated 14 January 1943, J.C. and Maggie Spencer conveyed the remainder of their property to Lionel Spencer and wife, Irene Spencer. Following this conveyance, Lionel and Irene Spencer

owned both the ninety-seven acre parcel and the adjacent 3.5 acre parcel acquired from W.F. and Callie Gilliam.

3) By deed dated 8 October 1943, Lionel and Irene Spencer conveyed the 3.5 acre parcel back to W.F. and Callie Gilliam.

4) By a series of mesne conveyances, the 3.5 acre parcel at issue was acquired by Henry Harp. Henry Harp conveyed the parcel to plaintiff Wendy Boggess on 11 August 1989. A new survey was performed prior to the 11 August 1989 conveyance and the original 3.5 acres was increased to 4.09 acres. The identical property is described in all previous deeds in the chain of title as the 3.5 acre parcel originally deeded by W.F. and Callie Gilliam to Lionel and Irene Spencer.

Plaintiffs' property does not adjoin a public road. Defendants' property adjoins Secondary Road 2026 ("Murray Road"), but its primary means of access is along a gravel road known as the "Old Ozark Road," which runs through the property of others. The sole issue at trial was whether plaintiffs have a right-of-way along an existing gravel road which extends from plaintiffs' property, across the creek, and through defendants property, to Old Ozark Road, which connects with Murray Road.

There is no written, recorded right-of-way describing this road. Plaintiffs retained an attorney to search the title prior to purchasing the property and were advised no written right-of-way was being acquired. Plaintiffs were also advised that the property had been conveyed thirteen previous times and none of the deeds contained a right-of-way description. Plaintiffs did not discuss the right-of-way with defendants prior to their purchase of the property. The existing gravel road served as ingress and egress to plaintiffs' property across defendants' property and was used by all previous owners of plaintiffs' property.

In or about 2000, plaintiff Scott Boggess approached defendant Ralph Spencer and offered to pay $3,000.00 for a written right-of-way, which defendant Ralph Spencer rejected. Shortly thereafter, defendants erected a sign along the gravel road stating, "Right of Way by Permission Only—The Spencers." Defendants did not revoke any oral consent for plaintiffs to use the road. As a result of the placement of the sign, plaintiffs were unable to sell their property to at least two prospective buyers.

Plaintiffs filed suit on 3 October 2002 and the case was heard on 27 April 2004. Defendants moved for a directed verdict pursuant to

N.C. Gen. Stat. § 1A-1, Rule 50. The trial court reserved its ruling on this motion until the close of all the evidence. Defendants renewed their motion for a directed verdict at the close of all the evidence and the trial court denied their motion.

The issues presented to the jury were whether plaintiffs were entitled to an easement by necessity across defendants' property and whether plaintiffs were entitled to an easement by prescription across defendants' property. Although the issue of prescriptive easement went to the jury in accordance with the jury instructions and the verdict sheet, the jury did not reach this issue. The jury returned a verdict in favor of plaintiffs finding that plaintiffs were entitled to an easement by necessity across defendants' property that existed along the gravel road. Defendants appeal.

II. Issue

The issue on appeal is whether the trial court erred in failing to grant defendants' motion for a directed verdict at the close of plaintiffs' evidence and at the close of all evidence.

III. Directed Verdict

A. At the Close of Plaintiffs' Evidence

[1] Defendants first contend the trial court erred in denying their motion for a directed verdict at the close of plaintiffs' evidence. We disagree.

> When a motion is made for directed verdict at the close of the plaintiff's evidence, the trial court may either rule on the motion or reserve its ruling on the motion. By offering evidence, however, a defendant waives its motion for directed verdict made at the close of plaintiff's evidence. Accordingly, if a defendant offers evidence after making a motion for directed verdict, "any subsequent ruling by the trial judge upon defendant's motion for directed verdict must be upon a renewal of the motion by the defendant at the close of all the evidence, *and the judge's ruling must be based upon the evidence of both plaintiff and defendant*."

Cox v. Steffes, 161 N.C. App. 237, 242, 587 S.E.2d 908, 912 (2003) (quoting *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 136-37, 539 S.E.2d 331, 332 (2000)). Defendants moved for directed verdict at the close of plaintiffs' evidence. The trial court reserved its ruling on the motion and defendants proceeded to present evidence. By pre-

senting evidence, defendants waived the motion for directed verdict made at the close of plaintiffs' evidence. *Id.* This assignment of error is dismissed.

B. At the Close of All Evidence

[2] Defendants next contend the trial court erred in failing to grant defendants' motion for directed verdict at the close of all evidence. In deciding whether to grant or deny a motion for directed verdict, "the trial court must accept the non-movant's evidence as true and view all the evidence in the light most favorable to him." *Williamson v. Liptzin*, 141 N.C. App. 1, 9-10, 539 S.E.2d 313, 318-19 (2000) (citations omitted). The trial court should deny the motion if there is "more than a scintilla of evidence supporting each element of the non-movant's claim." *Id.* at 10, 539 S.E.2d at 319. The standard of review of a denial of a motion for directed verdict is whether the evidence, considered in a light most favorable to the non-moving party, is sufficient to be submitted to the jury. *Di Frega v. Pugliese*, 164 N.C. App. 499, 505, 596 S.E.2d 456, 461 (2004) (citation omitted).

IV. Easement by Necessity

[3] Defendants argue the trial court erred in denying their motion for directed verdict on the issue of whether plaintiffs have an easement by necessity across defendants' property. We disagree.

> A way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over the land retained by the grantor or land owned by a stranger. An implied easement of necessity arises only by implication in favor of a grantee and his privies as against a grantor and his privies.

Wilson v. Smith, 18 N.C. App. 414, 417, 197 S.E.2d 23, 25 (1973) (citations omitted). It is not necessary that the party claiming the easement show absolute necessity. An easement by necessity may arise even where other inconvenient access to the parcel in question exists.

> It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the road in the same manner and to the same extent which his grantor had used it, because such use was reasonably necessary to the "fair," "full," "convenient and comfortable," enjoyment of his property.

Smith v. Moore, 254 N.C. 186, 190, 118 S.E.2d 436, 439-40 (1961) (internal quotations omitted).

Lionel and Irene Spencer acquired the 3.5 acre parcel now owned by plaintiffs from W.F. and Callie Gilliam by deed dated 12 April 1933. The parcel had no access to a public road. By deed dated 14 January 1943, Lionel and Irene Spencer acquired an adjoining ninety-seven acre parcel from J.C. and Maggie Spencer. This is the same servient parcel over which the easement at issue runs. After that conveyance, Lionel and Irene Spencer owned both the 3.5 acre parcel and the adjoining ninety-seven acre parcel. Lionel and Irene Spencer conveyed the 3.5 acre parcel to W.F. and Callie Gilliam by deed dated 8 October 1943. An easement by necessity is created, if at all, upon severance of title from common ownership. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 37 (1986). Title to plaintiffs' property was severed from common ownership by the 8 October 1943 deed from Lionel and Irene Spencer to W.F. and Callie Gilliam.

No evidence in the record shows W.F. and Callie Gilliam had public road access to plaintiffs' parcel by means other than the gravel road over defendants' property. The road over defendants' property had been used by all of plaintiffs' predecessors in title as a means of ingress and egress. Plaintiffs met their burden of showing an easement by necessity arose upon the conveyance from Lionel and Irene Spencer to W.F. and Callie Gilliam. Based upon the evidence, the jury found Lionel and Irene Spencer intended W.F. and Callie Gilliam and their successors in title to "have the right to continue to use the road in the same manner and to the same extent" which plaintiffs' predecessors in title used it. *Smith*, 254 N.C. at 190, 118 S.E.2d at 439-40. This assignment of error is overruled.

V. Easement by Prescription

[4] Defendants also argued in their motion for directed verdict that insufficient evidence was presented on the issue of whether plaintiffs had an easement by prescription across defendants' property. The jury did not reach this issue and defendants failed to argue the issue of an easement by prescription on appeal. Our review is limited to questions presented in the briefs. N.C.R. App. P. 28(a) (2004). We do not consider this issue.

VI. Conclusion

Defendants waived their motion for directed verdict at the close of plaintiffs' evidence by presenting evidence. The trial court did not

err in denying defendants' motion for directed verdict at the close of all evidence. Sufficient evidence was introduced to submit the issue to the jury of whether plaintiffs acquired an easement by necessity over defendants' property. The trial court's judgment is affirmed.

Affirmed.

Judges HUNTER and STEELMAN concur.

STATE OF NORTH CAROLINA v. TAHISIA L. BELCHER

No. COA04-1671

(Filed 4 October 2005)

1. Probation and Parole— probation revocation—credit for prior confinement

The trial court erred in a probation revocation hearing by failing to award defendant credit on her activated sentence for her prior confinement for violation of her probation, and the case is remanded for entry of a new judgment crediting defendant for her prior confinement, because: (1) N.C.G.S. § 15-196.1 manifests the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as the result of the charge; (2) our Supreme Court has held that a defendant receives credit for time previously spent incarcerated for violation of probation upon the revocation of probation and activation of a suspended sentence; and (3) defendant is entitled to a thirty-day credit for that time she previously spent incarcerated for violation of her probation.

2. Probation and Parole— probation revocation—findings of fact

The trial court did not err by revoking defendant's probation for obtaining property by false pretenses and activating her sentence, because: (1) although the trial court is required to make findings of fact demonstrating that it considered the evidence offered at a probation revocation hearing, it would not be reasonable to require the trial court to make specific findings of fact on each of defendant's allegations tending to justify her breach of

conditions; (2) assuming arguendo that the trial court erred by making the finding that defendant was not present at several curfew checks, defendant failed to demonstrate prejudice resulting from the alleged error; (3) a review of the record revealed that sufficient evidence supported the trial court's findings regarding defendant's other alleged probation violations; and (4) although defendant offered an explanation regarding several of the alleged violations, substantial evidence existed in the record to reasonably satisfy the trial court that defendant breached the conditions of her probation without lawful excuse.

Appeal by defendant from judgment entered 16 August 2004 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 25 August 2005.

Attorney General Roy Cooper, *by Assistant Attorney General Kathleen U. Baldwin*, *for the State.*

Appellate Defender Staples S. Hughes, *by Assistant Appellate Defender Kelly D. Miller*, *for defendant-appellant.*

TIMMONS-GOODSON, Judge.

Tahisia L. Belcher ("defendant") appeals the trial court judgment revoking her probation for obtaining property by false pretenses. For the reasons discussed herein, we hold that the trial court did not err by revoking defendant's probation, but we remand the case to the trial court for resentencing.

The facts and procedural history pertinent to the instant appeal are as follows: On 8 April 2003, defendant pled guilty to obtaining property by false pretenses, and she was sentenced to six to eight months incarceration. The trial court subsequently suspended defendant's sentence and placed her on supervised probation for twenty-four months. In addition to the usual terms and conditions of supervised probation, defendant was required to pay restitution and complete forty-eight hours of community service.

On 25 September 2003, the State filed a probation violation report against defendant, alleging that defendant: (i) failed to complete her required amount of community service; (ii) failed to report to her probation officer at the required time; (iii) failed to notify her probation officer of her change in address; and (iv) was in arrears of the monetary conditions of her probation. On 30 December 2003, the

trial court found defendant in contempt of court under N.C. Gen. Stat. § 15A-1344(e1), and it sentenced her to thirty days imprisonment. The trial court further ordered that defendant submit to intensive supervision for six months, and it granted defendant sixty additional days to complete her required amount of community service.

On 29 March 2004, the State filed a second probation violation report against defendant. The report alleged that defendant: (i) tested positive for cocaine; (ii) failed to complete her required amount of community service; (iii) failed to report for three scheduled office visits; (iv) failed to be present at her residence for twelve curfew checks; (v) failed to notify her probation officer of her change in address; and (vi) was in arrears of the monetary conditions of her probation.

A probation violation hearing was held on 16 August 2004. At the hearing, defendant admitted through counsel to testing positive for cocaine. Defendant also admitted to failing to complete her community service requirements, but she explained through counsel that she was pregnant at the time of the hearing, and that it was "a high-risk pregnancy" that left her unable to complete the requirements. Although she denied being absent for six curfew checks, defendant admitted being absent for the remaining six curfew checks. However, defense counsel later withdrew that admission, noting that there were no times alleged in association with the violations and that defendant thus did not know "what times they're alleging that she was not there[.]" As an explanation for her admitted failure to report for scheduled office visits and notify her probation officer of her change in address, defendant informed the trial court that she was working and that she and her sister had an argument and that she had moved from her sister's residence to her mother's residence. Defendant explained that she did not inform her probation officer about the move because "she was afraid she was already going to get violated and this would just result in her getting locked up." As to her being in arrears of the monetary conditions of her probation, defendant explained that "she has two children, she's got a third on the way, and . . . simply . . . doesn't have but so much money to go around and she's been using it to support herself and support her children."

Following testimony and argument from both parties, the trial court found "a wilful violation of probation" and adopted the allegations of the 29 March 2004 probation violation report. The trial court revoked defendant's suspended sentence and sentenced her to six to

eight months imprisonment, with credit for the nine days she spent incarcerated prior to entry of the judgment. Defendant appeals.

The issues on appeal are whether the trial court erred by: (I) failing to award defendant credit for her prior confinement for violation of her probation; and (II) revoking defendant's probation pursuant to the State's allegations.

[1] Defendant first argues that the trial court erred by failing to award her credit for her prior confinement for violation of her probation. We agree.

Regarding "Credits Against The Service Of Sentences And For Attainment Of Prison Privileges," N.C. Gen. Stat. § 15-196.1 (2003) provides as follows:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

In *State v. Farris*, 336 N.C. 552, 444 S.E.2d 182 (1994), our Supreme Court held that, upon the revocation of his probation and activation of his suspended sentence, the defendant was entitled to a ninety-day credit for time he previously spent incarcerated for violation of his probation. The Court concluded that "[t]he language of section 15-196.1 manifests the legislature's intention that a defendant be credited with all time [the] defendant was in custody and not at liberty as the result of the charge." *Id.* at 556, 444 S.E.2d at 185.

In the instant case, we note that the State, citing *Farris*, asserts in its brief that it "does not contest defendant's entitlement to 30 days credit for time served." After reviewing the applicable case and statutory law, we conclude that defendant is entitled to a thirty-day credit for that time she previously spent incarcerated for violation of her probation. Accordingly, we remand the case to the trial court

for entry of a new judgment crediting defendant for thirty days of prior confinement.[1]

[2] Defendant next argues that the trial court erred by revoking her probation. Defendant asserts that the trial court failed to consider all the evidence and made improper findings unsupported by competent evidence. We disagree.

A probation revocation hearing "is not governed by the rules of a criminal trial[,]" and therefore "a jury is not required . . . nor must the proof of violation be beyond a reasonable doubt." *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E.2d 723, 725, *disc. review denied*, 301 N.C. 99, 273 S.E.2d 304 (1980). Instead, the trial court's decision at a probation revocation hearing "takes account of the law and the particular circumstances of the case, and 'is directed by the reason and conscience of the judge to a just result.' " *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967) (quoting *Langnes v. Green*, 282 U.S. 531, 541, 75 L. Ed. 520, 526 (1931)). "The evidence need [only] be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the sentence was suspended." *Freeman*, 47 N.C. at 175, 266 S.E.2d at 725.

In the instant case, the trial court found defendant to have violated several conditions of her probation by: (i) testing positive for cocaine; (ii) failing to complete her required amount of community service; (iii) failing to be present at curfew checks and scheduled office visits; (iv) failing to notify her probation officer of her change of address; and (v) being in arrears of her required monetary payments. Defendant contends that the trial court's findings are conclusory and demonstrate that it failed to consider evidence regarding the willfulness of several of the probation violations as well as her denial of curfew violations. Although we note that the trial court is required to make findings of fact demonstrating that it considered the evidence offered at a probation revocation hearing, we also note that "[i]t would not be reasonable to require that [the trial court] make specific findings of fact on each of [the] defendant's allegations tend-

1. We note that in its judgment revoking defendant's probation, the trial court incorrectly checked the box indicating in part that defendant "waived a violation hearing" and admitted to the violations. As discussed *supra*, a violation hearing was actually held. Furthermore, although defendant admitted to several of the probation violations, as also discussed *supra*, she offered explanation for some of the violations. While defendant has failed to demonstrate any prejudice arising from this seemingly inadvertent error, because we remand the case for correction of the sentencing error, we further instruct the trial court to correct this error on remand as well.

ing to justify his breach of conditions." *State v. Williamson*, 61 N.C. App. 531, 535, 301 S.E.2d 423, 426 (1983). Therefore, although we encourage trial courts to be "explicit in [their] findings by stating that [they] ha[ve] considered and evaluated [the] defendant's evidence . . . and found it insufficient to justify breach of the probation condition, [a] failure to do so does not constitute an abuse of discretion." *Id.* Accordingly, we conclude that the trial court did not abuse its discretion in the instant case by failing to enter findings regarding the sufficiency of the explanations offered by defendant at the revocation hearing.

Defendant further contends that the trial court was prohibited from revoking her probation because the finding that she was not present at several curfew checks was based upon a deficient allegation as well as incompetent evidence. Assuming *arguendo* that the trial court erred by making this finding, defendant has failed to demonstrate prejudice resulting from the alleged error. Our courts have consistently held that violation of a single requirement of probation is sufficient to warrant revocation of that probation. *See State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973) ("The breach of any single valid condition upon which the sentence was suspended will support an order activating the sentence."); *State v. Seay*, 59 N.C. App. 667, 670-71, 298 S.E.2d 53, 55 (1982) ("It is sufficient grounds to revoke the probation if only one condition is broken."), *disc. review denied*, 307 N.C. 701, 301 S.E.2d 394 (1983). After reviewing the record in the instant case, we conclude that sufficient evidence supports the trial court's findings regarding defendant's other alleged probation violations. Although defendant offered an explanation regarding several of the alleged violations, we note that substantial evidence exists in the record to reasonably satisfy the trial court that defendant breached the conditions of her probation without lawful excuse. Accordingly, the trial court did not err by revoking defendant's probation and activating her sentence.

In light of the foregoing conclusions, we hold that the trial court did not err by revoking defendant's probation and activating her sentence, but we remand the case to the trial court for entry of a new judgment crediting defendant for her prior confinement.

No error in part; remanded in part.

Judges HUDSON and ELMORE concur.

WILLIAM L. COLLINS, JR.; BARBARA C. ROOKS; AND FREDDIE E. COLLINS, PLAINTIFFS v. ESTATE OF HELEN J. COLLINS; LLOYD ALLEN STROUPE, EXECUTOR OF THE ESTATE OF HELEN J. COLLINS; LLOYD ALLEN STROUPE, INDIVIDUALLY; AND ANY SUCCESSOR EXECUTOR OF THE ESTATE OF HELEN J. COLLINS, DEFENDANTS

No. COA04-1282

(Filed 4 October 2005)

Wills— mutual—without express contractual language or separate agreement—not a contract

The execution of mutual wills between a husband and wife without express contractual language did not create a binding contract that required the survivor to devise her property in the same manner. There was not a separate contract or trust agreement, and the circumstances of the will do not create a contract.

Appeal by defendants from order entered 8 August 2004 by Judge Robert P. Johnston in Lincoln County Superior Court. Heard in the Court of Appeals 11 May 2005.

Steve Dolley, Jr. for defendants-appellants.

Poyner & Spruill, LLP, by Cynthia L. Van Horne, for plaintiffs-appellees.

ELMORE, Judge.

This appeal presents the question of whether the execution of mutual wills[1] by a husband and wife creates a binding contract where the wills do not contain any contractual language. We determine that, in the absence of express contractual language, no contract arises between the husband and wife.

On 27 November 2001 William L. Collins (William) and Helen J. Collins (Helen), husband and wife, executed wills with identical language except for the name of the maker. The wills were prepared by the same attorney. Under the 2001 wills, William and Helen be-

1. A mutual will is "[o]ne of two separate wills in which two persons, usu. a husband and wife, establish identical or similar testamentary provisions disposing of their estates in favor of each other." *Black's Law Dictionary* 1629 (8th ed. 2004); *see also Godwin v. Trust Co.*, 259 N.C. 520, 529, 131 S.E.2d 456, 362 (1963) ("[A] mutual or reciprocal will is one in which two or more persons make mutual or reciprocal provisions in favor of each other.") As the wills in the instant case contained reciprocal testamentary provisions, they are properly classified as mutual wills.

queathed and devised all assets to the surviving spouse in fee simple. Upon the death of the survivor, the wills bequeathed and devised the property to their four children equally. Plaintiffs, William J. Collins, Jr., Barbara C. Rooks, and Freddie E. Collins, are the children of William L. Collins from a prior marriage. Defendant Lloyd Allen Stroupe (Allen) is the son of Helen J. Collins from a prior marriage.

William died on 1 November 2002. Subsequently, on 9 January 2003, Helen executed a will in which she bequeathed her entire estate and the inheritance from William's estate to her son Allen. On the same day, Helen presented the Clerk of Lincoln County Superior Court with a will of William executed on 29 April 1980. She applied for and was appointed executrix of his estate.

Helen died on 22 March 2003. On 9 April 2003, Allen presented Helen's will dated 9 January 2003 to the Clerk of Lincoln County Superior Court. Allen was appointed executor of Helen's estate and, accordingly, received Letters Testamentary. Allen was also appointed successor executor of William's estate. On 26 June 2003 plaintiffs filed a claim against Helen's estate. Allen, in his capacity as executor of Helen's estate, rejected this claim. On 7 July 2003 plaintiffs filed a caveat action in superior court, challenging the 1980 will of William that was admitted to probate. Plaintiffs alleged that the 1980 will had been revoked when William executed the 2001 will and that the 2001 will should have been probated. According to plaintiffs, all parties agreed in a consent order to probate William's 2001 will.

Plaintiffs filed a complaint in the instant action on 25 August 2003 against Helen's estate for breach of contract and constructive trust. Both parties filed motions for summary judgment. Plaintiffs argued that the mutual wills of William and Helen dated 27 November 2001 formed an agreement and that Helen was bound not to make a will different from her 2001 will. By executing her will on 9 January 2003, plaintiffs contended, Helen breached this agreement. On 8 August 2004 the trial court entered an order granting plaintiffs' motion for summary judgment and denying defendants' motion. Defendants appeal.

Defendants argue that because there was no contractual language in the wills and no separate contract or agreement incorporated into the wills, Helen was not contractually bound to bequeath her property in the manner stated in the 2001 wills. We agree with defendants that *Godwin v. Trust Co.*, 259 N.C. 520, 131 S.E.2d 456 (1963), sets the framework for our analysis. In that case, a husband and wife exe-

cuted two wills which were identical except for the names of the makers. *Godwin*, 259 N.C. at 524, 131 S.E.2d at 459. On the same day that they executed their respective wills, the husband and wife jointly executed a trust agreement. Each will declared that the property was to be disposed of as provided in the provisions of the trust agreement. *Id.* Subsequent to the wife's death, the husband executed a new will, thereby revoking his previous will. The trustee initiated an action to compel specific performance of the alleged contract between the husband and wife regarding the distribution of their property in accordance with their wills. *Id.* at 521, 131 S.E.2d at 457. Our Supreme Court recognized the general principle that a mutual or joint will may be revoked by either of the testators unless it was made in pursuance of a contract. *Id.* at 530, 131 S.E.2d at 463. "In the absence of a valid contract, . . . the mere concurrent execution of the will, with full knowledge of its contents by both testators, is not enough to establish a legal obligation to forbear revocation." *Id.* The Court concluded that the wills of the husband and wife established the existence of a contract, as each will expressly incorporated the trust agreement. *Id.*

Unlike the plaintiff in *Godwin*, plaintiffs in the instant case do not contend that there was a separate contract or trust agreement in addition to the wills. The *Godwin* Court examined a contractual document incorporated into the wills, rather than the language of the wills alone, as the basis for a contract. In two later cases addressing joint wills, however, the Supreme Court looked no further than the will itself to find the necessary contractual language.

In *Olive v. Biggs*, 276 N.C. 445, 173 S.E.2d 301 (1970), the husband and wife executed a joint will but no additional document as evidence of a contract between them. The trial court found, and this Court agreed, that since there was no contract between the husband and wife, disposition of property recited in the joint will could be changed without consent of the other party. *Olive*, 276 N.C. at 453, 173 S.E.2d at 306-07. In reversing, the Supreme Court stated that a joint will itself may be sufficient evidence of the intent of the parties to enter a binding contract. *Id.* at 461, 173 S.E.2d at 312. The will declared that "We, Robert M Olive, Sr., and Ruth Sedberry Olive, husband and wife, . . . *in consideration of each making this OUR LAST WILL AND TESTAMENT*, do hereby MAKE, PUBLISH and DECLARE this instrument to be jointly as well as severally OUR LAST WILL AND TESTAMENT." *Id.* at 462, 173 S.E.2d at 312-13 (capitalization in original). After reciting this provision, the Court concluded: "This is contractual language. It is sufficient, in conjunction with the recipro-

cal devises and bequests, to show the existence of a contract between the husband and wife, pursuant to which the joint will was executed by them." *Id.*

In *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970), the husband and wife executed a joint will which stated that "*we and each of us contract to and with each other that the following is our joint Will and Testament and in every respect binding on both of us.*" *Id.* at 373, 177 S.E.2d at 855 (emphasis in original). The Court held that this was contractual language sufficient to show the existence of a contract between the husband and wife. *Id.* Both *Olive* and *Mansour* dictate that execution of a joint will does not bind a husband and wife to the devises and bequests of property set out therein unless the will or another document contains contractual language evidencing the intent to enter into a binding contract. We are mindful that the type of will at issue in these cases was a joint will, as opposed to mutual wills. Nonetheless, we see no reason to apply a different analysis to the burden of establishing a contract within the four corners of a mutual will.

Plaintiffs fail to point to any contractual language contained within the mutual wills in the instant case.[2] There is no statement in the wills of Helen and William expressing the clear intent of the parties that the wills are made pursuant to a contract. *Cf. Robinson v. Graham*, 799 P.2d 610 (Okla. 1990) (joint will of husband and wife expressly stated that it was the result of a contract and that neither party to the agreement would revoke, alter, or amend the will). The mere fact that the provisions of the wills are reciprocal and identical in language, except for the name of the maker, is not sufficient to create a binding contract. *See Godwin*, 259 N.C. at 530, 131 S.E.2d at 463. In accordance with the reasons stated above, we determine that plaintiffs failed to prove a binding contract between Helen and William to dispose of their property in the manner specified in their respective wills. We, therefore, hold that the trial court erred in grant-

2. To the extent that plaintiffs assert that this Court should look to the circumstances of the execution of the wills, *e.g.*, the fact that the same attorney prepared both wills and the wills contain identical terms, plaintiffs are in effect asking this Court to apply a presumption that a contract is created upon the execution of wills with reciprocal and identical provisions. We reject plaintiffs' assertion that the circumstances surrounding the execution of the will, rather than the language of the will, may create a contract. *See Mansour*, 277 N.C. at 373, 177 S.E.2d at 855 (where no evidence of contract outside will, "the contract, if any, must be determined from the language of the will."); *see also* Uniform Probate Code § 2-701 ("[t]he execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.").

ing plaintiffs' motion for summary judgment and in denying defendants' motion for summary judgment.

Reversed and remanded.

Judges McGEE and CALABRIA concur.

DEBORAH WINDMAN ADMINISTRATRIX OF THE ESTATE OF JAMES PIERCE, DECEASED, PLAINTIFF v. BRITTHAVEN, INC. D/B/A BRITTHAVEN OF LOUISBURG AND HILLCO, LTD, DEFENDANTS

No. COA04-1414

(Filed 4 October 2005)

1. Appeal and Error— appealability—discovery order—statutory privilege—substantial right

The appeal of an interlocutory discovery order was not premature because it fell within an exception for a party asserting a statutory privilege which directly relates to the matter to be disclosed.

2. Discovery— peer review reports—nursing homes—effective dates

The trial court did not abuse its discretion by concluding that nursing home reports were not protected by any peer review privilege and granting a motion to compel production.

Appeal by Defendants from order entered 17 May 2004 by Judge Leon Stanback in Superior Court, Vance County. Heard in the Court of Appeals 13 September 2005.

Ferguson, Stein, Chambers, Gresham & Sumter, P.A., by Adam Stein, and Henson Fuerst, P.A., by Thomas W. Henson, Jr., for plaintiff-appellee.

Yates, McLamb & Weyher, LLP, by Michael C. Hurley and Erin D. McNeil, for defendant-appellants.

WYNN, Judge.

In North Carolina, orders regarding discovery matters will not be upset on appeal absent a showing of abuse of discretion. *Velez v. Dick*

Keffer Pontiac-GMC Truck, Inc., 144 N.C. App. 589, 595, 551 S.E.2d 873, 877 (2001). Here, Defendants (who operate a nursing home) assert the trial court erred by compelling the production of statutory peer review documents that were privileged under N.C. Gen. Stat. § 90-21.22A(c) (2003). Because nursing home privileges are covered under N.C. Gen. Stat. § 131E-107 which at the time of the trial court's order contained no protection from discovery of materials produced by nursing home peer review committees, we uphold the trial court's order compelling discovery.

In August 2003, Plaintiff Deborah Windman brought actions against Defendants Britthaven, Inc. d/b/a Britthaven of Louisburg and Hillco, Ltd., seeking damages for the death of her father, James Pierce, while he resided at Defendants' nursing home facility. She alleged that Mr. Pierce suffered damages including a broken hip, pain and suffering, and wrongful death as a result of Britthaven's negligence.

In October 2003, Ms. Windman served Britthaven with Requests for Production of Documents seeking, *inter alia*, "[a]ny and all incident/accident reports, unusual occurrence reports, or various reports in your control which relate or pertain in any way to James L. Pierce, including, but not limited to, any incident reports submitted to the N.C. Department of Human Resources as required by NCAC T10 :03H.0317(c)." In response, Britthaven asserted the documents were protected from discovery under the statutory peer review privileges of N.C. Gen. Stat. § 90-21.22A(c) (2003). Thereafter, Ms. Windman filed a Motion to Compel production of the documents and Britthaven filed a Motion for Protective Order.

After reviewing the incident report documents *in camera*, the trial judge granted Ms. Windman's Motion to Compel and denied Britthaven's Motion for Protective Order. From this Order, Britthaven appeals.

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[1] Preliminarily, we observe that the trial court's order compelling discovery is interlocutory from which there is generally no right to appeal. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2003); *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (An order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all parties involved in the controversy.).

Here, Britthaven claims a right to appeal based upon the established exception that delaying this appeal would prejudice a substantial right. *See N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995); *Liggett Group Inc. v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993). Indeed, although discovery orders do not generally affect substantial rights, we find merit in Britthaven's assertion that this appeal falls under one of the recognized narrow exceptions to that rule—where a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial. *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999). Because Britthaven asserts that the ordered documents were protected from discovery under section 90-21.22A of the North Carolina General Statutes and we find that that assertion is not frivolous or insubstantial, we hold that the discovery order affects a substantial right. *Id.* Accordingly, we deny Ms. Windman's motion to dismiss this appeal as interlocutory.

[2] On appeal, Britthaven argues that the trial court abused its discretion in concluding that the documents produced for *in camera* inspection were not protected by any peer review privilege. We disagree.

"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.' " *Velez*, 144 N.C. App. at 595, 551 S.E.2d at 877 (quoting *Evans v. United Servs. Auto Ass'n*, 142 N.C. App. 18, 27, 541 S.E.2d 782, 788, *disc. review denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)). Therefore, we review the trial court's order granting Ms. Windman's Motion to Compel for abuse of discretion.

Britthaven contends that the incident/accident reports are protected by section 90-21.22A(c) of the North Carolina General Statutes which, in part, states:

> The proceedings of a medical review committee, the records and materials it produces, and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, 131E-309, or 58-2-100; and shall not be subject to discovery or introduction into evidence in any civil action against a provider of health care services who directly provides services and is licensed under this Chapter, a PSO licensed under Article

> 17 of Chapter 131E of the General Statutes, an ambulatory surgical facility licensed under Chapter 131E of the General Statutes, or a hospital licensed under Chapter 122C or Chapter 131E of the General Statutes or that is owned or operated by the State[.]

N.C. Gen. Stat. § 90-21.22A(c) (2003). However, for this section to protect the documents at issue from discovery, Britthaven must fit into one of the following four categories: (1) a provider of health care services who directly provides services and is licensed under Chapter 90; (2) a PSO licensed under Article 17 of Chapter 131E of the General Statutes; (3) an ambulatory surgical facility licensed under Chapter 131E of the General Statutes, or (4) a hospital licensed under Chapter 122C or Chapter 131E of the General Statutes or that is owned or operated by the State. N.C. Gen. Stat. § 90-21.22A(c). Nursing homes are licensed under the Nursing Home Licensure Act which is located in Article 6, Chapter 131E of the North Carolina General Statutes. Nursing homes do not fit into any of the four categories of health care providers whose records and materials from medical review committees are protected from discovery. Therefore, section 90-21.22A does not protect Britthaven's incident/accident reports from discovery.

Instead, Section 131E-107 of the North Carolina General Statutes addresses peer review committees for nursing homes. At the time of the trial court's order, section 131E-107 contained no protection from discovery for any materials produced by the peer review committees. N.C. Gen. Stat. § 131E-107 (2003). However, section 131E-107 was recently amended to protect records and materials produced by peer review committees from discovery. N.C. Gen. Stat. § 131E-107(b) (2005). The amendment became effective 2 August 2004, several months after the 17 May 2004 order compelling discovery and therefore does not apply to this case. 2004 N.C. Sess. Laws 149, s.2.2.

As neither section 90-21.22A nor section 131E-107 protect the incident/accident reports from discovery, the trial court did not err in concluding that "[t]he reports requested by the plaintiff are not protected by any peer review privilege of state and federal law." Accordingly, the trial court did not abuse its discretion in granting Ms. Windman's Motion to Compel the *in camera* documents.

Affirmed.

Judges CALABRIA and LEVINSON concur.

IN THE MATTER OF S.B.M.

No. COA05-71

(Filed 4 October 2005)

1. Termination of Parental Rights— delay between hearing and order—no prejudice

There was no prejudice from a five-month delay between a termination hearing and the order terminating respondent's parental rights where he argued that the delay interfered with his relationship with his daughter in light of a potentially long incarceration on a pending criminal charge, but he was continuously incarcerated awaiting trial since before the termination hearing.

2. Termination of Parental Rights— findings—unappealed finding sufficient

Although respondent contends that two of the three grounds for termination of his parental rights were not supported by the evidence, the conclusion of law to which he did not assign error was sufficient to terminate his parental rights. Arguments concerning the other findings were not considered.

3. Termination of Parental Rights— termination in best interest of child—no abuse of discretion

The trial court did not abuse its discretion by concluding that termination of respondent's parental rights was in the best interests of the child based on its findings.

Appeals by respondent-father from an order filed 27 July 2004 by Judge Richard G. Chaney in Durham County District Court. Heard in the Court of Appeals 24 August 2005.

Cathy L. Moore for petitioner-appellee Durham County Department of Social Services.

Wendy C. Sotolongo, for the juvenile.

Carol Ann Bauer, for respondent-appellant/father.

STEELMAN, Judge.

Respondent is the father of minor child S.B.M., who was adjudicated to be a neglected child on 21 February 2000 and placed in the custody of the Department of Social Services. Respondent is a con-

victed child sex offender, and was in and out of prison between the adjudication of neglect on 21 February 2000 and the filing of the order terminating his parental rights filed 27 July 2004. Respondent has been continuously incarcerated since November of 2003. Between February of 2000 and July of 2004, during the times when he was not incarcerated, respondent failed to attend certain hearings related to this action though he had the opportunity to attend; he failed to attend court-ordered sex offender treatment; he failed to retain stable housing; although he was working various jobs for much of the time he was not incarcerated, he provided almost no support to the child; he failed to keep appointments concerning the child; and his last contact with the child was in December of 2002, nearly a full year before he was last incarcerated.

On 18 February 2004 the trial court announced in open court its order terminating respondent's parental rights, but did not sign and file the written order until 22 July 2004. From this written order terminating his parental rights, respondent appeals.

[1] In his first argument, respondent contends that because of the trial court's failure to file its order terminating his parental rights within the thirty day period established by N.C. Gen. Stat. § 7B-1110(a), we should reverse that order and remand to the trial court for a new proceeding. We disagree.

N.C. Gen. Stat. § 7B-1110(a) states:

> Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated. *Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.*

(emphasis added). In order for respondent to obtain a new trial based on the trial court's failure to file the order terminating his parental rights in a timely fashion, he must show prejudice. *In re P.L.P.*, 173 N.C. App. 1, 7, 618 S.E.2d 241, 245 (2005) (filed 6 September 2005); *In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391 (2004), *rev. denied*, 359 N.C. 68, 604 S.E.2d 314 (2004). This Court has been more likely to find prejudice as the length of the delay increases, *In re*

L.E.B., 169 N.C. App. 375, 610 S.E.2d 424 (2005); *In re T.L.T.*, 170 N.C. App. 430, 612 S.E.2d 436 (2005), but this Court has consistently declined to adopt a *per se* standard even when long delays are involved. *In re P.L.P.*, 173 N.C. App. at 7, 618 S.E.2d at 245; *In re L.E.B.*, 169 N.C. App. at 378-79, 610 S.E.2d at 426.

In the instant case, the trial court filed the order terminating respondent's parental rights five months after the termination hearing. Respondent's sole argument is that this delay prejudiced him "by the delay of his right to appeal and to achieve finality in the relationship with his daughter before he faces a potentially long incarceration [from November of 2003 until the time this record on appeal was filed in January of 2005, respondent remained incarcerated in the Durham County Jail awaiting trial on charges of first-degree sex offence]." In light of respondent's continuous incarceration since before the termination hearing, we fail to find sufficient prejudice by the delay to either his right of appeal or his desire for a sense of finality to warrant a new trial. We hold that respondent has not met his burden of proving prejudice. This argument is without merit.

[2] In his fourth and fifth arguments, respondent contends that two of the three grounds found by the trial court as a basis for terminating his parental rights were not supported by the evidence. Respondent did not assign as error the trial court's eighth conclusion of law, which states: "The father has willfully left the child in foster care for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the child." This conclusion of law is a sufficient basis to terminate respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). Because respondent has not assigned this conclusion of law as error in the record, he has abandoned it. *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991). A finding of any one of the grounds enumerated in N.C. Gen. Stat. § 7B-1111 is sufficient to terminate respondent's parental rights. *In re Yocum*, 158 N.C. App. 198, 204, 580 S.E.2d 399, 403-04 (2003), *aff'd*, 357 N.C. 568, 597 S.E.2d 674 (2003). Thus, we need not address defendant's arguments pertaining to the other two grounds for termination found by the trial court.

[3] In his sixth argument, respondent contends that the trial court abused its discretion in concluding that termination of respondent's parental rights was in the best interests of S.B.M. We disagree.

> Once a petitioner meets its burden of proof at the adjudicatory stage, the court's decision to terminate the parental rights is discretionary. . . . At the dispositional stage a court is *required* to issue an order of termination unless it "determine[s] that the best interests of the child require that the parental rights of such parent not be terminated." N.C.G.S. Sec. 7A-289.31(a). In determining the best interests of the child, the trial court should consider the parents' right to maintain their family unit, but if the interest of the parent conflicts with the welfare of the child, the latter should prevail.

In re Parker, 90 N.C. App. 423, 430-31, 368 S.E.2d 879, 884 (1988) (emphasis added). The trial court's findings of fact state, *inter alia*, the following: Respondent is a convicted sex offender, who violated his parole and was returned to prison while S.B.M. was in the custody of Department of Social Services. Respondent was permitted only supervised visits with the child, was forbidden to reside in the same house with the child, and was ordered to complete sex offender treatment, which he failed to do. Respondent's mother called 911 to report respondent's violent behavior towards her, and Department of Social Services removed the child from her care fearing that she could not protect the child from respondent. Respondent was required to maintain stable housing and employment, which he failed to do. S.B.M.'s therapist recommended against visitations between the child and respondent, and opined that respondent would need to successfully engage in individual therapy, then a minimum of six months of joint therapy with the child, before reunification could be considered. Respondent did not engage in the necessary therapy. Respondent did little to support S.B.M. while she was in the custody of Department of Social Services. Respondent's last contact with the child was in December of 2002. Finally, in the trial court's 28th finding of fact, it states: "The Department's plan is adoption by the family members who also have custody of [the child's] half-sibling twin sisters and with whom she has been placed since June 28, 2002. [S.B.M.] is doing well in this placement which is stable and she no longer requires individual or family therapy. The child wishes to be adopted by the caretakers."

Based on these findings, we cannot say that the trial court abused its discretion by refusing to conclude that termination was not in the best interests of the child. This argument is without merit.

Because we hold that respondent's parental rights were properly terminated, we do not address respondent's additional argu-

ments. Because defendant has not argued his other assignments of error in his brief, they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2003).

AFFIRMED.

Judges HUNTER and TYSON concur.

AMY GATTIS, PLAINTIFF v. SCOTLAND COUNTY BOARD OF EDUCATION AND JAMES M. TAPP, DEFENDANTS

No. COA05-54

(Filed 4 October 2005)

1. **Schools and Education— teacher's contract—appeal of nonrenewal—timeliness**

   A teacher's appeal of the nonrenewal of her contract was not timely when it came more than six months after notification, and summary judgment was properly granted for defendants. N.C.G.S. § 115(c)-325(n).

2. **Appeal and Error— constitutional claim—not raised below—not heard**

   A constitutional claim not raised in the court below was not heard on appeal.

Appeal by Plaintiff from judgment entered 27 September 2004 by Judge B. Craig Ellis in Superior Court, Scotland County. Heard in the Court of Appeals 23 August 2005.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for plaintiff-appellant.

Hogue, Hill, Jones, Nash & Lynch, by Wayne A. Bullard, for defendant-appellees.

Tharrington Smith L.L.P., by Ann L. Majestic & Lisa Lukasik, and North Carolina School Boards Association, by Allison B. Schafer, for North Carolina School Boards Association, amicus curiae.

WYNN, Judge.

Section 115C-325(n) of the North Carolina General Statutes mandates that a probationary teacher must appeal a school board's decision to not renew her contract within thirty days of notification. In this case, because Plaintiff did not appeal from the school board's nonrenewal decision until some six months after she received the notification, we must uphold the trial court's grant of summary judgment in favor of Defendants.

The underlying facts tend to show that Plaintiff Amy Gattis was hired as a probationary teacher at Carver Middle School for the 2002-2003 school year. At the end of the school year, the Scotland County School Board voted not to renew her contract as a probationary teacher. Thereafter, Freddie Williamson, Head of Personnel for Scotland County Schools, orally informed Ms. Gattis of the decision and on 4 June 2003, mailed a letter to her notifying her of the Board's decision not to renew her contract.

On 28 January 2004, Ms. Gattis filed a Complaint alleging that Defendant James M. Tapp's recommendation and the Board's decision to not renew her contract was arbitrary and capricious and in violation of section 115C-325(m) of the North Carolina General Statutes. In August 2004, Defendants filed a Motion for Summary Judgment along with supporting affidavits. From the trial court's grant of summary judgment in favor of Defendants, Ms. Gattis appeals.

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[1] "[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). The court should grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2004).

Section 115C-325(n) of the North Carolina General Statutes provides in pertinent part:

> [A]ny probationary teacher whose contract is not renewed under G.S. 115C-325(m)(2) shall have the right to appeal from the decision of the board to the superior court for the superior court district or set of districts as defined in G.S. 7A-41.1 in which the career employee is employed. This appeal shall be filed within a period of 30 days after notification of the decision of the board.

N.C. Gen. Stat. § 115C-325(n) (2004). Thus, the statute mandates that a probationary teacher must appeal a school board's decision within thirty days of notification. *See State v. Brown*, 357 N.C. 382, 390, 584 S.E.2d 278, 283 (2003) ("language of Rule 609(a) ('shall be admitted') is mandatory, leaving no room for the trial court's discretion."), *cert. denied*, 540 U.S. 1194, 158 L. Ed. 2d 106 (2004).

In this case, on 4 June 2003, Mr. Williamson mailed a letter to Ms. Gattis notifying her of the Board's decision to not renew her contract. Before mailing the letter, he personally notified her of the decision. Ms. Gattis did not appeal from the decision until 28 January 2004. Since she did not appeal within the time required by section 115C-325(n) of the North Carolina General Statutes, her suit is barred. N.C. Gen. Stat. § 115C-325(n).

Nonetheless, Ms. Gattis cites to *Spry v. Winston-Salem/Forsyth County Bd. of Educ.*, 105 N.C. App. 269, 412 S.E.2d 687, *aff'd per curiam*, 332 N.C. 661, 422 S.E.2d 575 (1992), arguing that the three-year statute of limitations under section 1-52(n) of the North Carolina General Statutes applies because there is no statutory right to appeal the non-renewal of her contract. But *Spry* was decided before the 1997 amendments to section 115C-325(n) which created a statutory right for a probationary teacher to appeal the non-renewal of a contract. *See* 1997 N.C. Sess. Laws 221. Accordingly, *Spry* no longer applies.

[2] Ms. Gattis also argues that section 115C-325(n) of the North Carolina General Statutes violated her Constitutional due process rights because it "would be impossible for her to have established a record from which she could even present an appeal to the Superior Court judge for review." But Ms. Gattis did not argue her constitutional claim to the trial court. "It is a well settled rule of this Court that we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *Powe v. Odell*, 312 N.C. 410, 416, 322 S.E.2d 762, 765 (1984); *see also State v. Woods*, 307 N.C. 213, 219-20, 297 S.E.2d 574, 578 (1982); *City of Durham v. Manson*, 285 N.C. 741, 743, 208 S.E.2d 662, 664 (1974). Since Ms. Gattis failed to make the constitutional argument to the trial court, we do not address it.

Affirmed.

Judges CALABRIA and LEVINSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 OCTOBER 2005

BIO MED. APPLICATIONS OF N.C., INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 04-1644	Dep't of Health & Human Servs. (03DHR1553)	Affirmed
BRUNING & FEDERLINE MFG. CO. v. MILLS No. 04-999	Iredell (02CVS2239)	Affirmed
CUNNINGHAM v. ROWELL No. 04-1728	Buncombe (04CVD2746)	Dismissed
ELKINS v. GREENSBORO BD. OF ADJUST. No. 04-918	Guilford (03CVS13096)	Reversed and remanded
IN RE D.B.B. No. 04-1692	New Hanover (04J231)	Reversed and remanded
IN RE J.B., A.B. No. 04-1325	Rockingham (03J88) (03J89)	Affirmed
IN RE M.B. & E.W. No. 04-1709	Mecklenburg (03J952) (03J953)	Affirmed
IN RE T.A.T. No. 05-116	Rowan (04J1)	Affirmed
JOHNSON v. MAGNETTI-MARELLI USA, INC. No. 04-1676	Ind. Comm. (I.C. # 162623)	Affirmed
KINCHELOE v. LEEDS GRP., L.L.C. No. 04-337	Wake (97CVS11839)	Affirmed
MUNFORD v. NEUSE SENIOR HOUSING, INC. No. 04-1431	Ind. Comm. (I.C. # 228995) (I.C. # 264682)	Remanded
STATE v. BELLAMY No. 05-35	Gaston (01CRS60246) (02CRS8653)	No error
STATE v. BOULWARE No. 04-1609	Union (02CRS55688) (03CRS50328) (03CRS3226)	No error

STATE v. BOYD No. 05-223	New Hanover (03CRS1598) (03CRS1601)	Affirmed
STATE v. DAVIS No. 04-1672	Richmond (03CRS54170)	No error in the trial. Remanded for corrections
STATE v. EBRON No. 04-917	Pitt (03CRS9847) (03CRS57799)	No error in part; remanded for a new sentencing hearing in part
STATE v. HENRY No. 05-90	Guilford (03CRS105658) (03CRS105733) (03CRS105734) (03CRS105735)	No error
STATE v. JARRELL No. 04-1593	Halifax (03CRS57650) (03CRS57651)	No error in part; dismissed without prejudice in part
STATE v. JOHNSON No. 05-29	Lee (03CRS50661) (03CRS775)	No error
STATE v. LEY No. 04-267	Johnston (00CRS56845) (00CRS56846) (00CRS56847) (00CRS56848) (00CRS56851) (01CRS8383)	No error
STATE v. MCNEILL No. 04-340	Wake (03CRS44481) (03CRS44523)	No error in part; remanded for a new sentencing hearing in part
STATE v. MOSS No. 05-30	Person (00CRS6799) (00CRS6800) (01CRS4790) (01CRS50629)	Remanded
STATE v. MURPHY No. 05-145	Rockingham (04CRS50356)	No error
STATE v. NICKERSON No. 04-1640	Granville (02CRS54672)	No error
STATE v. PEGUSE No. 04-1231	Union (01CRS13665) (01CRS51901)	No error in part; reversed in part

	(01CRS51923) (01CRS51926) (01CRS51927) (01CRS51928) (01CRS52390) (01CRS51898) (01CRS51902) (01CRS51905) (01CRS51906) (01CRS51907) (01CRS51900) (01CRS51916) (01CRS51919) (01CRS51920) (01CRS51921) (01CRS52328) (01CRS52391)	
STATE v. RAINES No. 04-1708	Buncombe (03CRS58279) (03CRS58280) (03CRS18023) (03CRS18024) (03CRS57664)	Affirmed
STATE v. ROYSTER No. 04-70	Vance (99CRS7744) (99CRS7745) (99CRS7746)	Reversed in part; remanded for resentencing
STATE v. TEASTER No. 04-1476	Avery (03CRS753)	Affirmed
STATE v. VERRETT No. 04-1713	Gaston (02CRS66696) (02CRS66716) (02CRS66717)	No error
STATE v. WRIGHT No. 05-86	Forsyth (04CRS51647)	No error

RAYMOND CLIFTON PARKER, PLAINTIFF v. NEW HANOVER COUNTY, DEFENDANT

No. COA04-1093

(Filed 18 October 2005)

1. Counties; Taxation— special assessment—inlet relocation—public purpose

A county's special assessment imposed upon landowners to pay for the relocation of an inlet was for a public purpose and thus did not violate the power of taxation clause set forth in N.C. Const. art. V, § 2, cl. 1 where the inlet was a navigable body of water subject to the public trust doctrine; our constitution, the public trust doctrine, and the State's public policy and legislation have long recognized the key role of the State and its political subdivision, including counties, in preserving beaches, ensuring the navigability and quality of waters, and taking proactive steps to protect property from hurricanes and other storms; and the public advantages of the relocation project, including increased navigability for vessels passing through the inlet, increased sand beaches for public recreation, better flushing of the tidal creeks, and increased ability of the coastline to survive the ravages of the annual hurricane season, are directly aimed at furthering the general welfare of the citizens of the county.

2. Counties— special assessment—landowner appeal

A landowner whose property was subject to a county's special assessment could properly challenge on appeal to the superior court whether the special assessment was authorized by statute, whether the method chosen was one permitted by the statute and, if so, whether the board of commissioners improperly abrogated its responsibilities under N.C.G.S. § 153A-186(d) in selecting that method.

3. Counties— special assessment—beach renourishment—statutory authority

A county's special assessment for an inlet relocation project was authorized by N.C.G.S. § 153A-185 where benefits of the project included hurricane protection, improvement of the watershed, and stopping erosion of the beaches in the county. Furthermore, beach renourishment was a proper method of countering beach erosion, one of the purposes permitted by the statute.

4. Counties— special assessment—inlet relocation—methods of assessment

A county board of commissioners complied with N.C.G.S. § 153A-186 in using different methods of assessment or a combination of methods for different geographical areas related to an inlet relocation project. To the extent that a benefitted landowner is contending that the board improperly designated benefit zones, erred in determining the benefit of the project to certain areas, and should have employed different methods within the zones, the board's decisions as to those issues are final and not subject to further review or challenge.

5. Counties— special assessment—no improper delegation of statutory responsibilities

A county board of commissioners did not improperly delegate to private homeowners associations its responsibilities under N.C.G.S. § 153A-186(d) for the determination of the special assessment method for an inlet relocation project where the board held a public hearing prior to the adoption of the final assessment resolution; the board held three other meetings at which the assessment was discussed by the board, its attorneys, and outside attorneys; and the special assessment method was discussed in meetings between county representatives and attorneys for the homeowners associations. While the board may not simply rubber stamp a private party's suggestions regarding a special assessment, the board may request input from outside parties, including the assessed landowners, as to which of the assessment methods provided by the statute the board should employ.

6. Appeal and Error— preservation of issues—failure to cite authority

Since plaintiff has cited no authority supporting his claims that a county's special assessment for an inlet relocation project violated his constitutional rights of equal protection, due process, and free speech, he has not properly presented those issues for appellate review.

Appeal by plaintiff from order entered 7 April 2004 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 24 March 2005.

Johnson and Johnson, P.A., by Rebecca J. Davidson for plaintiff-appellant.

Marshall, Williams & Gorham, L.L.P., by William Robert Cherry, Jr., for defendant-appellee.

GEER, Judge.

This appeal arises out of plaintiff Raymond Clifton Parker's objection to a special assessment imposed by defendant New Hanover County to pay for the relocation of Mason Inlet. Plaintiff appeals from an order granting the County's motion for summary judgment and denying his motion for partial summary judgment. In challenging the assessment, plaintiff contends (1) that the inlet project violated article V, § 2, clause 1 of the North Carolina Constitution because it did not have a public purpose; and (2) that the County violated N.C. Gen. Stat. §§ 153A-185 and 153A-186 (2003) in making the assessment. Because the record establishes that the public benefit from the relocation of Mason Inlet predominates over any private benefit and that the County properly fulfilled its responsibilities under N.C. Gen. Stat. §§ 153A-185 and 153A-186, we affirm.

Facts and Procedural History

Figure Eight Island is a barrier island off the southeastern coast of the North Carolina mainland. It is bounded on its western shore by the Atlantic Intracoastal Waterway, on its eastern shore by the Atlantic Ocean, and on its southern shore by Mason Inlet, a body of water that connects the Intracoastal Waterway to the ocean. Another barrier island, Wrightsville Beach, lies to the south of Figure Eight Island, on the opposite side of Mason Inlet.

Mason Inlet has been migrating southward for several years, decreasing navigability for vessels passing through the inlet and blocking Mason Creek with a sand bar. The migration of the inlet has also caused the northern end of the Wrightsville Beach barrier island to erode, with the loss of a public beach and parking area, while the southern end of Figure Eight Island has experienced a corresponding accretion of sand. Wrightsville Beach is a public municipality; Figure Eight Island is a private island that is governed by the non-profit corporation Figure Eight Beach Homeowners' Association ("FEBHA"). Plaintiff is an owner of non-oceanfront property at the north end of Figure Eight Island and is a member of FEBHA.

In order to address the problems caused by the migrating inlet, FEBHA joined in a coalition with seven private homeowner associa-

tions in Wrightsville Beach to form the Mason Inlet Preservation Group ("MIPG"). MIPG represents 497 homeowners on North Wrightsville Beach and 563 homeowners on Figure Eight Island. These 1,060 homeowners represent a collective real estate property value of over $600 million. MIPG formulated a plan to achieve the goal of stabilizing Mason Inlet and relocating it to its 1970-1985 location. The plan entailed the excavation of a new channel across 1,000 feet of the new sand that had accrued on the southern end of Figure Eight Island. Sand removed in the course of this excavation would be used to plug the more southerly flow of the inlet on the Wrightsville Beach side. In addition, the excavated sand would be used to renourish beaches on Figure Eight Island and Wrightsville Beach.

At a meeting of the County's Board of Commissioners on 8 September 1998, MIPG reported to the Board its belief that "the only viable and environmentally sound solution to the southerly migration of Mason Inlet is to relocate and stabilize the inlet at its original 1970-1985 location. This location would provide additional beachfront, flush the tidal creeks, reopen the inlet to navigational use, and protect a significant amount of real estate property." At that meeting, MIPG requested that the County Board adopt a resolution supporting the relocation plan, but indicated that the project would be privately financed.

As stated in the minutes of the September 1998 meeting, Karen Erickson, an environmental and coastal engineer, advised the County Board that the following events had occurred as a result of the southern migration of Mason Inlet:

(1) A large public beach, county access and parking area at the North end of Wrightsville Beach have been lost.

(2) Shell Island Resort is in immediate danger of destruction and loss.

(3) Figure Eight Island has experienced severe erosion and property losses.

(4) Beach property values south of the resort have depreciated significantly.

(5) Sand deposits are covering and negatively impacting the living biological resources in the estuary.

(6) Mason's Creek has in-filled with sand reducing flushing and water exchange from Howe Creek.

She also predicted that if the inlet was not relocated, removal of sand tubes—due to occur the following year—would result in large scale damage and beach debris; the inlet would continue to migrate south at the rate of one foot per day; there would be large scale loss of beaches for public use; and $600 million of real estate would be threatened by the inlet. She suggested that the relocation project would result in the following benefits:

(1) [Provide] [a]dditional beach for public beach use and fishing.

(2) Provide sand and protection to threatened properties on Wrightsville Beach and Figure Eight Island valued at $600,000,000.

(3) Open Mason's Creek for navigational use and improve flushing at Howe Creek.

(4) Prevent further sand coverage of living biological resources.

(5) Provide [an] environmentally sound solution to a major problem.

Following discussion, the Board unanimously adopted a resolution supporting the development of "an inlet management plan to relocate or stabilize Mason Inlet to protect and preserve the sand resources and beaches of Figure Eight Island and the Town of Wrightsville Beach," which beaches were all located within the County. As a basis for this resolution, the Board cited its "long recogni[tion] that the Atlantic Coast beaches of the County are an important natural resource which serves as an important recreational asset and provides storm protection for the adjoining towns;" its belief that oceanfront residential properties and businesses were enhanced by the existence of healthy, non-eroding beaches in the Town of Wrightsville Beach; the erosion and depreciated property values resulting from the instability of Mason Inlet; the effect of the southerly movement of the inlet in decreasing the supply of oceanfront land within the County; the Board's determination "that it is critical to the best interests of property and land owners within the County to provide for long-range erosion control and property protection to revitalize the decaying beaches;" and the Board's view that "the beaches of New Hanover County are a County-wide asset and a direct benefit to all property owners and residents as well as the general public."

In February 1999, MIPG returned to the Board to request public financing for the project because it had concluded that the venture

was too risky to be financed solely by the private homeowner associations. MIPG proposed instead that New Hanover County fund the project through a special assessment of those property owners affected by the relocation of the inlet. The Board responded that "the Commissioners want to be assured that the members of the Homeowner Associations are in favor of the inlet relocation project, and they are willing to pay the special assessment. Once this is understood, the Board will be able to render a decision [on whether to publicly fund the project]. The Commissioners are not comfortable with telling the public that [the affected] property owners are willing to be assessed when these residents may not agree with the proposal." The Board then approved a motion to request that MIPG go back to its constituent homeowner associations to obtain express approval for the project, including the imposition of the special assessment.

At the Board's 19 April 1999 meeting, MIPG reported that it had surveyed the property owners comprising the homeowner associations making up MIPG and that 91% of those responding and 63% of the total homeowner association membership had approved of a special assessment for the inlet relocation project. Plaintiff was one of 53 landowners on Figure Eight who voted against the special assessment.

At that time, the estimated overall cost of the project was $4,221,387. MIPG's recommendation allocated $1.4 million of this cost to the 563 property owners in FEBHA, and the remaining $2,821,387 to the 481 Wrightsville Beach property owners and their seven homeowner associations. According to the Board's minutes, MIPG's representative stated that the proposed allocation was calculated according to a formula using property values and distance from the inlet to allocate a fair share assessment to the homeowners in these associations. MIPG's representative also stated that certain homeowner associations, including FEBHA, would develop their own proposed cost allocation formula. By a unanimous vote, the County Board voted to become the lead sponsor of the Mason Inlet relocation project. In a separate vote of three to two, the County Board agreed to use the Room Occupancy Tax Fund to initially finance the relocation project with reimbursement of the County through the special assessment of each benefitted property owner.

At a 17 May 1999 meeting, the Board issued a Preliminary Assessment Resolution for the Mason Inlet relocation project. The resolution provided:

1. It is intended that a beach erosion control project be constructed by relocation of Mason Inlet to a point approximately 3,000 feet north of its present location. The sand excavated from the newly dredged channel will be used to close the existing inlet and to provide beach nourishment to the beaches of Figure Eight Island. . . .

2. One hundred percent of the net cost of the project shall be assessed against the benefitted properties.

The resolution stated that the basis for the assessment would be different for Figure Eight properties than for Wrightsville Beach properties because of the differing nature of the benefits on each side of Mason Inlet, but expressed "the intention of the Board of Commissioners to assess each lot or parcel of land according to the benefit conferred upon it by the project."

With respect to Figure Eight Island, the resolution found all the residential lots to be benefitted properties, but provided for a different assessment based on the location of a lot on the island. One classification of lots (ocean/inlet front lots) was to be assessed 56.6% of the Figure Eight allocation at an equal rate per foot of shoreline frontage and a second classification of lots (the remaining non-oceanfront lots) was to be assessed 43.4% of the allocation at an equal rate based on area of land in each lot.

At the 21 June 1999 Board meeting, the County Board adopted, at the suggestion of the attorney for FEBHA, a revised preliminary assessment resolution. The revised assessment changed the methodology for calculating the amount that the non-oceanfront lots on Figure Eight would be assessed: While the first resolution proposed using land area of the lots as the basis for calculating the assessment, the revision used the tax value of the land not counting improvements. The FEBHA attorney explained to the Board that using land area as the assessment basis had turned out to be unfair because "some of the largest lots further away from the project were being assessed at unusually high values compared to lots that were close to the project." The revised resolution stated that the Board would conduct a public hearing on the matters covered by the resolution on 12 July 1999.

At the 12 July 1999 hearing, the FEBHA attorney and the Chairman of MIPG explained MIPG's efforts to work with the County's legal staff to "develop[] assessment allocations that would be close to the amounts provided to the benefitted property owners

and still comply to the North Carolina General Statutes." An opportunity followed for the public to offer comments on the resolution. Plaintiff Parker, who was present at the meeting, voiced his objections to the resolution because of what he argued was the Board's unlawful delegation to MIPG and FEBHA of the Board's own task of establishing an assessment method under N.C. Gen. Stat. § 153A-186. The County Attorney responded to plaintiff's concern by noting that "all three attorneys involved in the process held meetings for several days when the resolution was drafted. Consultation was made with Mr. Jake Wicker, author of Assessment Statute at the Institute of Government, to be sure the document was in compliance with NCGS 153A-186, Bases for Making Assessments. Mr. Parker has a right to go to court, but all three attorneys involved in the process have done everything possible to comply [with] State Law." Following the public hearing, the County Board, in a vote of three to two, adopted the revised resolution approved in June as the Board's Final Assessment Resolution for the Mason Inlet relocation project.

Following completion of the project, the County Board held a public hearing, on 2 December 2002, regarding confirmation of the final assessment roll. Plaintiff spoke in opposition to the roll, arguing that properties at the north end of Figure Eight Island should not be assessed and that the assessment methodology subsidized oceanfront properties at the expense of non-oceanfront properties. Following the hearing, the Board unanimously confirmed the final assessment roll. The final assessment roll listed plaintiff's total assessment at $4,414.00.

On 9 December 2002, plaintiff filed suit against New Hanover County, seeking a declaratory judgment that the County's actions in connection with the Mason Inlet relocation project assessment were "unconstitutional, *ultra vires* and void." Plaintiff also asserted a claim under 42 U.S.C. § 1983 for violation of his rights under the first, fifth, and fourteenth amendments to the Constitution.[1] On 12 March 2004, the County moved for summary judgment as to all claims. Plaintiff moved for partial summary judgment on 25 March 2004 on the issue whether the special assessment was unconstitutional, ultra vires, and void. The trial court entered its order on 7 April 2004 grant-

1. Plaintiff earlier filed a separate lawsuit against FEBHA and the County, challenging an agreement between FEBHA and the County regarding maintenance of the relocated inlet. The trial court's grant of summary judgment to defendants was affirmed by this Court in *Parker v. Figure "8" Beach Homeowners' Ass'n*, 170 N.C. App. 145, 611 S.E.2d 874 (2005).

ing defendant's motion for summary judgment and denying plaintiff's motion for partial summary judgment. Plaintiff timely appealed from that order.

Discussion

I. The Constitutionality of the Assessment under the North Carolina Constitution

[1] Plaintiff first argues that the special assessment levied on his property by the County was imposed for a private purpose rather than a public one, and, therefore, the assessment violated the state constitution's Power of Taxation Clause. Our state constitution provides that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V., § 2, cl. 1. Our Supreme Court has held that "[t]he determination of whether a particular function or activity constitutes a public purpose is a legal issue to be decided by the court." *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 653, 386 S.E.2d 200, 211 (1989).

Although the Supreme Court has been required to address what constitutes a public purpose on a number of occasions, it has not specifically defined "public purpose," but rather has left the issue to be decided on a case-by-case basis. *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996). The Court has, however, set out "[t]wo guiding principles . . . for determining that a particular undertaking by a municipality is for a public purpose," *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207: "(1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons." *Id.* (internal citations omitted).

In *Maready*, the Supreme Court explained, with respect to the first prong of the test, that "whether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action." *Maready*, 342 N.C. at 722, 467 S.E.2d at 624. We hold that the relocation of an inlet "is within the appropriate scope of governmental involvement" and is a "proper governmental function." *Id.* at 722-23, 467 S.E.2d at 624.

Mason Inlet is a navigable body of water subject to the public trust doctrine. *Gwathmey v. State*, 342 N.C. 287, 298, 464 S.E.2d 674,

681 (1995). Under the public trust doctrine, the lands under navigable waters "are held in trust by the State for the benefit of the public" and "the benefit and enjoyment of North Carolina's submerged lands is available to all its citizens, subject to reasonable legislative regulation, for navigation, fishing and commerce." *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988). As the United States Supreme Court has stated, in discussing the public trust doctrine, "navigable waters uniquely implicate [a state's] sovereign interests." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284, 138 L. Ed. 2d 438, 457, 117 S. Ct. 2028, 2041 (1997).

Recognizing the importance of the State's lands and waters, our constitution provides:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end *it shall be a proper function of the State of North Carolina and its political subdivisions* to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and *in every other appropriate way to preserve as a part of the common heritage of this State its forests*, *wetlands*, *estuaries*, *beaches*, historical sites, openlands, and places of beauty.

N.C. Const. art. XIV, § 5 (emphases added). Consistent with this provision, our General Assembly enacted the Coastal Area Management Act, finding:

> [A]mong North Carolina's most valuable resources are its coastal lands and waters. The coastal area, and in particular the estuaries, are among the most biologically productive regions of this State and of this nation. . . . North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced.

N.C. Gen. Stat. § 113A-102(a) (2003). Further, our General Assembly has specifically stated: "It is declared to be a necessary governmental responsibility to properly manage and protect North Carolina's beaches from erosion . . . ." 2000 N.C. Sess. Laws ch. 67, § 13.9(a)(17).[2]

2. In conjunction with this declaration, the General Assembly further found that North Carolina's beaches are vital to the State's tourism industry; that North Carolina's beaches belong to all the State's citizens and provide recreational and economic benefits to our residents state-wide; that beach erosion can threaten the economic viability of coastal communities and significantly affect State tax revenues; that beach nourishment provides hurricane flood protection, enhances the attractiveness of beaches to

With respect to the role of counties, the General Assembly has specifically provided: "A county may appropriate revenues not otherwise limited as to use by law to finance the acquisition, construction, reconstruction, extension, maintenance, improvement, or enlargement of groins, jetties, dikes, moles, walls, sand dunes, vegetation, *or other types of works or improvements that are designed for controlling beach erosion, for protection from hurricane floods, or for preserving or restoring facilities and natural features that afford protection to the beaches* and other land areas of the county and to the life and property of the county." N.C. Gen. Stat. § 153A-438 (2003) (emphasis added). A county is also authorized to make special assessments against benefitted property for such projects. N.C. Gen. Stat. § 153A-185.

Thus, our constitution, the public trust doctrine, and the State's public policy and legislation have long recognized the key role of the State and its political subdivisions, including counties, in preserving beaches, in ensuring the navigability and quality of waters, and in taking proactive steps to protect property from hurricanes and other storms. We hold that the activity of relocation of an inlet for such purposes meets the first prong of *Madison Cablevision*. The importance of governmental involvement in activities designed to meet these concerns has been brought home particularly keenly by recent hurricanes and their devastating impact along the Gulf Coast of the United States.

The second prong of *Madison Cablevision* may be met "so long as [activities] primarily benefit the public and not a private party." *Maready*, 342 N.C. at 724, 467 S.E.2d at 625. It is not, however, "necessary that a particular use benefit every citizen in the community to be labeled a public purpose." *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207. Moreover, an activity "does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose." *Maready*, 342 N.C. at 724, 467 S.E.2d at 625. The *Maready* Court held that a public purpose exists if "[t]he public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected." *Id.* at 725, 467 S.E.2d at 625.

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tourists, restores habitat for wildlife, and provides additional public access to beaches; and a program of beach management and restoration should not be accomplished without a commitment of local funds because local beach communities derive the primary benefits from the presence of adequate beaches. 2000 N.C. Sess. Laws ch. 67, § 13.9(a).

Plaintiff argues that the public benefit was incidental to the private benefit achieved by relocation of the inlet. We disagree. The Board's resolutions supporting the project and providing for an assessment identified the project as "an inlet management plan" and "beach erosion control project" designed to protect and preserve County sand resources and beaches, which "serve[] as an important recreational asset and provide[] storm protection of the adjoining towns." The resolutions also point to the project's goals of (1) stopping the decrease of oceanfront land within the County (resulting from the inlet's migration south), (2) maximizing property values and the County's tax base, and (3) unblocking Mason Creek and most of the other tidal creeks in the area, the blockage of which had been "adversely affecting overall water circulation, covering wetland habitat and living biological resources, [and] interfering with navigation and recreational use of the estuary." According to Board minutes it is expected that the relocated inlet, with ongoing maintenance, will continuously facilitate coastal marsh flushing and recreational navigation.

In addition, the record identifies more specifically that a large public beach, county access, and a parking area had been lost at the north end of Wrightsville Beach because of the inlet's migration. By moving the inlet back to its prior location, that public beach area could be restored. Further, without relocation, the County could anticipate additional large scale loss of public beaches.

Although plaintiff points to other benefits from the relocation project that he contends are private, such as the protection of Shell Island Resort from destruction and the enhancement of beaches on Figure Eight Island, the record contains information suggesting that even those effects will benefit the public to a degree. According to Board minutes, with the collapse of Shell Island Resort, the County would be confronted with the cost of cleaning the resulting debris from public beaches. In addition, the minutes indicate that healthy beaches on Figure Eight Island, a barrier island, help provide storm protection to other parts of the County.

In any event, even if those benefits were purely private, the public advantages from the relocation project—including increased navigability for vessels passing through the inlet between the Intracoastal Waterway and the ocean, increased sand beaches for public recreation and fishing purposes, better flushing of the tidal creeks, and increased ability of the coastline to survive the ravages of the annual hurricane season—"are not indirect, remote, or incidental." *Id.*

Rather, they are directly aimed at furthering the general welfare of the citizens of New Hanover County. Accordingly, because we are satisfied that both prongs of *Maready* are met, we hold that the County's special assessment did not violate the public purpose requirement of N.C. Const. art. V., § 2, cl. 1.

II. Compliance with N.C. Gen. Stat. § 153A-185 and N.C. Gen. Stat. § 153A-186

Plaintiff next argues that the Board's imposition of the special assessment did not comply with N.C. Gen. Stat. §§ 153A-185 and 153A-186. Specifically, plaintiff argues that N.C. Gen. Stat. § 153A-185 does not authorize a special assessment for a project such as the inlet relocation. With respect to N.C. Gen. Stat. § 153A-186, plaintiff contends that the County (1) improperly delegated determination of the method for the assessment to private parties and (2) used an improper method of assessment. The County argues in response that plaintiff is precluded from asserting these arguments by N.C. Gen. Stat. § 153A-186(d). We address each argument separately.

A. Plaintiff's Ability to Challenge the Assessment

[2] Article 9 of Chapter 153A of the General Statutes sets out North Carolina's statutory scheme regarding special assessments by counties. N.C. Gen. Stat. § 153A-197 (2003), a part of Article 9, provides for appeal of an assessment:

> If the owner of, or any person having an interest in, a lot, parcel, or tract of land against which an assessment is made is dissatisfied with the amount of the assessment, he may, within 10 days after the day the assessment roll is confirmed, file a notice of appeal to the appropriate division of the General Court of Justice. He shall then have 20 days after the day the roll is confirmed to serve on the board of commissioners or the clerk a statement of facts upon which the appeal is based. The appeal shall be tried like other actions at law.

N.C. Gen. Stat. § 153A-186, which sets out the different methods by which a board of commissioners may calculate special assessments provides, however: "The board's decision as to the method of assessment is final and not subject to further review or challenge." N.C. Gen. Stat. § 153A-186(d).

Reading §§ 153A-186(d) and 153A-197 together, the plain language of each statute suggests that while a landowner may appeal a special

assessment, he may not challenge the board of commissioners' choice of which method or methods provided for in the statute should be used in calculating the assessment. Nothing, however, in N.C. Gen. Stat. § 153A-186(d) precludes a property owner from arguing that the special assessment was for a purpose not authorized by statute, that the board of commissioners improperly abrogated its responsibilities under § 153A-186(d) in choosing a method of calculation, or that the method chosen was not one permitted by the statute.

This view of § 153A-186(d) is consistent with *In re Dunn*, 73 N.C. App. 243, 326 S.E.2d 309, *disc. review denied*, 313 N.C. 602, 332, S.E.2d 180 (1985), in which this Court construed the identically worded statute applying to cities. The *Dunn* Court held "that the decisions of the city council as to the method of assessment and the total cost of an improvement are final and conclusive and not subject to further review or challenge." *Id.* at 247, 326 S.E.2d at 312. On appeal to a superior court and this Court, "the owner of assessed property has no right to be heard there on the question of whether the lands are benefitted or not, but only on the validity of the assessment, its proper apportionment and other questions of law." *Id.* (internal citations omitted).

Based on the plain language of N.C. Gen. Stat. § 153A-186(d) and on *Dunn*, we hold that plaintiff may properly challenge on appeal whether the special assessment was authorized by statute, whether the method chosen was one permitted by the statute, and, if so, whether the board of commissioners improperly abrogated its responsibilities under § 153A-186(d) in selecting that method. Questions such as these deal solely with the validity of the assessment and whether the County followed proper procedure in adopting it. *See Dunn*, 73 N.C. App. at 245, 326 S.E.2d at 311 (in holding that the plaintiff could not appeal the issues he had raised, noting that the plaintiff "does not contend that the City failed to follow proper procedure in making the assessment").

B. Compliance with N.C. Gen. Stat. § 153A-185

[3] N.C. Gen. Stat. § 153A-185 grants counties authority to make special assessments against benefitted properties for all or part of the costs of:

> (3) Acquiring, constructing, reconstructing, extending, renovating, enlarging, maintaining, operating, or otherwise building or improving

a. Beach erosion control or flood and hurricane protection works; and

b. Watershed improvement projects, drainage projects and water resources development projects (as those projects are defined in G.S. 153A-301).

Plaintiff argues that the County was not authorized to impose a special assessment for the inlet relocation project because it was not a "beach erosion control" project.

We first note that the record indicates that the benefits of the project included hurricane protection and improvement of the watershed. Further, it is undisputed that moving the inlet was intended to stop the erosion of the beaches in the City of Wrightsville Beach. These purposes for the project all fall within the permissible bases for a special assessment.

Plaintiff, however, contends that the beach renourishment on Figure Eight does not constitute one of the purposes permitted by the statute. To the contrary, it is well-established that beach renourishment is one of the methods of countering beach erosion. As the North Carolina Department of Environment and Natural Resources has stated in its general policy guidelines for the coastal area:

> (a) Pursuant to Section 5, Article 14 of the North Carolina Constitution, proposals for shoreline erosion response projects shall avoid losses to North Carolina's natural heritage. . . .
>
> (b) Erosion response measures designed to minimize the loss of private and public resources to erosion should be economically, socially, and environmentally justified. . . .
>
> (c) The replenishment of sand on ocean beaches can provide storm protection and a viable alternative to allowing the ocean shoreline to migrate landward threatening to degrade public beaches and cause the loss of public facilities and private property. Experience in North Carolina and other states has shown that beach restoration projects can present a feasible alternative to loss or massive relocation of oceanfront development. In light of this experience, beach restoration and sand nourishment and disposal projects may be allowed when:
>
> (1) Erosion threatens to degrade public beaches and to damage public and private properties;

(2) Beach restoration, renourishment or sand disposal projects are determined to be socially and economically feasible and cause no significant adverse environmental impacts;

(3) The project is determined to be consistent with state policies for shoreline erosion response and state use standards for Ocean and Hazard and Public Trust Waters Areas of Environmental Concern and the relevant rules and guidelines of state and federal review agencies.

15A N.C. Admin. Code 7M.0202 (2005). *See also* 33 C.F.R. § 263.26 (providing with respect to small beach erosion control projects that "periodic nourishment may be recommended"); Barbara Affeldt, *Beach Erosion and Hurricane Protection in the Second Circuit: The Statute of Limitations as a Government Nemesis*, 2 N.Y. City L. Rev. 29, 30 n.4 (1998) ("Beachfill or nourishment is the process by which beach-compatible sand is dredged from the bed of a waterbody and pumped onto the beach to provide hurricane protection and beach erosion-control.").

In short, the record establishes that the Mason Inlet project was one for which a special assessment is authorized. Plaintiff's contention that the County violated N.C. Gen. Stat. § 153A-185 is without merit.

C. Compliance with N.C. Gen. Stat. § 153A-186

[4] Plaintiff next contends that the assessment method adopted by the Board was not one permitted by N.C. Gen. Stat. § 153A-186 in that the Board used different methods of assessment for different geographical areas related to the project. N.C. Gen. Stat. § 153A-186(b) provides:

(b) For beach erosion control or flood and hurricane protection works, watershed improvement projects, drainage projects and water resources development projects, assessments may be made on the basis of:

(1) The frontage abutting on the project, at an equal rate per foot of frontage; or

(2) The frontage abutting on a beach or shoreline or watercourse protected or benefited by the project, at an equal rate per foot of frontage;

(3) The area of land benefited by the project, at an equal rate per unit of area; or

(4) The valuation of land benefited by the project, being the value of the land without improvements as shown on the tax records of the county, at an equal rate per dollar of valuation; or

(5) *A combination of two or more of these bases.*

(Emphasis added.) The statute further provides that when the basis selected for assessment is either area or valuation, the Board is required for assessments under N.C. Gen. Stat. § 153A-185(3) to "provide for the laying out of one or more benefit zones according . . . to the distance from the shoreline or watercourse, the distance from the project, the elevation of the land, *or other relevant factors.* If more than one benefit zone is established, the board shall establish differing rates of assessment *to apply uniformly throughout each benefit zone.*" N.C. Gen. Stat. § 153A-186(c) (emphases added).

Thus, contrary to plaintiff's contentions, the statute specifically anticipates that a project may require different methods for different geographical areas involved in the project and that a combination of methods may be used. To the extent that plaintiff is contending that the Board improperly designated benefit zones, erred in determining the benefit of the project to certain areas, and should have employed different methods within the zones, the Board's decision as to those issues "is final and not subject to further review or challenge." N.C. Gen. Stat. § 153A-186(d). *See also Dunn*, 73 N.C. App. at 247, 326 S.E.2d at 312 (holding that city council's decisions regarding whether the street improvements abutted the plaintiff's property and whether they benefitted his property were questions with respect to which the city council's determination was final and conclusive).[3]

[5] Plaintiff also contends that the Board in this case improperly delegated its responsibilities under § 153A-186(d) for the determination of the assessment method to FEBHA and/or MIPG. As a basis for this contention, plaintiff points to two remarks—one by the County Attorney and the other by the Chair of the Board—at a single board meeting regarding the preliminary assessment resolution. The record, however, also evidences a public hearing before the Board prior to adoption of the final assessment resolution with numerous individ-

3. The Board's compliance with the pertinent statutes also disposes of plaintiff's contention that the assessment was not imposed in a just and equitable manner in violation of N.C. Const. art. V, § 2(1). Plaintiff does not cite any authority to support this contention. Without the citation of any authority by plaintiff, we will not hold that a method deemed appropriate by the General Assembly is unjust and inequitable under the state constitution. *See* N.C.R. App. P. 28(b)(6).

uals speaking in favor of and against the resolution (including plaintiff); three other board meetings at which the assessment for the inlet relocation was discussed by the Board, its attorneys, and outside attorneys; and other meetings between county representatives and attorneys for MIPG and FEBHA at which the details of the special assessment method were discussed. We hold that the record, taken in full, indicates that the Board did, in fact, perform its responsibility under § 153A-186(d) to "endeavor to establish an assessment method from among the bases set out in this section." While the Board may not simply "rubber stamp" a private party's suggestions regarding a special assessment, the Board may request input from outside parties, including the assessed landowners themselves, as to which of the assessment methods the Board should employ. Indeed, plaintiff took advantage of this opportunity by speaking against the proposed assessment.

For these reasons, we conclude that the Board's special assessment did not violate N.C. Gen. Stat. § 153A-186(d). Further, the record does not indicate that the Board improperly delegated its statutory responsibilities regarding that assessment.

III. Due Process and Equal Protection Claims

[6] Plaintiff also contends that issues of fact remain as to whether the imposition of the special assessment violates his equal protection, due process, and free speech rights under the federal and state constitutions. Since the plaintiff has cited no authority supporting his claim that his constitutional rights were violated, he has not properly presented these issues for appellate review. N.C.R. App. P. 28(b)(6) (providing that "[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

With respect to equal protection, plaintiff does cite generally *Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 471 S.E.2d 342 (1996), *cert. denied*, 519 U.S. 1112, 136 L. Ed. 2d 839, 117 S. Ct. 952 (1997). In that case, however, the North Carolina Supreme Court expressly declined to address the question whether the County tax at issue violated equal protection and held only that the taxpayer was not limited to his state law statutory remedy, but could also sue under 42 U.S.C. § 1983. The Court never addressed the merits of the plaintiff's claims. Plaintiff does not reference or discuss the underlying Court of Appeals opinion, *Edward Valves, Inc. v. Wake County*, 117 N.C. App. 484, 451 S.E.2d 641 (1995), *aff'd as modified in part and*

disc. review improvidently allowed in part, 343 N.C. 426, 471 S.E.2d 342 (1996), which did address the merits of the equal protection claim. That opinion, however, involved a county taxing a class of property in some situations and not at all in other situations. *Id.* at 491, 451 S.E.2d at 646. The opinion provides no insight regarding the proper analysis when a plaintiff, as in this case, argues that a different methodology should have been used in calculating his tax. In the absence of citation of any authority on this point by either party, we decline to address the equal protection issue.

With respect to due process and free speech, plaintiff argues only that the notice regarding the public hearing pursuant to N.C. Gen. Stat. § 153A-194 (2003) mailed to affected property owners stated that the property owner "will be assessed" in the amount set forth in the proposed preliminary assessment roll, that the Board "shall confirm" the amount after the public hearing, and that "[t]he purpose of the hearing is not to receive comments regarding the basis of the assessments, but rather to consider the clerical and mathematical accuracy of individual assessments." Plaintiff argues that the notice suggested that the result of the hearing was predetermined, denying him notice and an opportunity to be heard and chilling his right to free speech. Plaintiff has again cited no authority supporting his contentions and we deem them abandoned.

We note, in addition, however, that the Board had previously conducted a public hearing prior to adopting the final assessment resolution setting forth the methodology for the assessment. At that hearing, interested parties, including plaintiff, were allowed to voice their objections to the assessment methodology. Further, the notice to which plaintiff objects notified the property owners that they would be heard regarding the clerical and mathematical accuracy of individual assessments. Plaintiff had multiple opportunities to voice his objections to the propriety of the assessment and its methodology. Plaintiff has set forth no reason why the Board was constitutionally obligated to give him another opportunity.

Conclusion

Accordingly, we hold that the trial court was correct in entering summary judgment in favor of New Hanover County and in denying plaintiff's motion for partial summary judgment.

Affirmed.

Judges TIMMONS-GOODSON and CALABRIA concur.

KELLY K. SUGGS JACOBS AND PERSONS SIMILARLY SITUATED, PLAINTIFF v. PHYSICIANS WEIGHT LOSS CENTER OF AMERICA, INC., CHARLES E. SEKERES, CECILE HOLDEN, JOHN D. SIDERIS, PAUL C. HUNT, JEAN THOMAS, COOKIE PARKER, G.A. PARKER, HEALTHY WEIGH, INC., P.C.H. TODAY, INC., AND VIRGINIA EVELYN DOREMUS, DEFENDANTS

No. COA04-644

(Filed 18 October 2005)

1. Fiduciary Relationship— weight loss center—retained physicians—weight loss drug prescriptions—customer's choice of pharmacy rights—breach of fiduciary duty

A fiduciary relationship existed between customers of a weight loss center and physicians retained by the center to examine its customers and to prescribe weight loss drugs for them, and this relationship could give rise to liability by the center for breach of fiduciary duty based upon the failure of the retained physicians to disclose to the customer-patients that they had a right to obtain and fill their prescriptions at an outside pharmacy rather than through the center's designated pharmacy whether or not they had requested that they be given their prescriptions so that they could be filled at an outside pharmacy.

2. Wrongful Interference— physician-patient relationship

North Carolina does not recognize a cause of action for tortious interference with a physician-patient relationship.

3. Fraud; Unfair Trade Practices— right to obtain prescriptions—failure to disclose—partial summary judgment

Genuine issues of material fact existed in actions for constructive fraud and unfair trade practices as to whether plaintiff weight loss center customers would have exercised their right to obtain their weight loss drug prescriptions and have them filled at outside pharmacies if they had been informed of their right to do so, and the trial court erred by entering partial summary judgment for defendant as to plaintiffs who did not request their prescriptions.

4. Pharmacists— pharmacy of choice statute—inapplicability to weight loss contracts

The pharmacy of choice statute, N.C.G.S. § 58-51-37, governs accident and health insurance policies and similar contracts and does not apply to contracts for medical and other services such

as the contracts between defendant weight loss center and its clients which provided that the center would fill prescriptions for weight loss drugs through a pharmacy with which the center had contracted.

5. Physicians and Surgeons— statute prohibiting referrals to certain entities—no private right of action

The statute that prohibits health care providers from referring patients to entities in which the health care provider is an investor, N.C.G.S. § 90-406, does not provide a private right of action for clients of a weight loss center whose contracts require them to have drug prescriptions written by the center's retained physicians filled by a pharmacy with which the center has contracted.

6. Drugs— RICO claim—weight loss center—prescription drug agreement—not sale of controlled substances

A customer of defendant weight loss center failed to establish a RICO claim with regard to a contract requiring customers of the center to have weight loss drug prescriptions written by the center's retained physicians filled through a specific Ohio pharmacy where the evidence showed that local weight loss center franchises were paid by customers for the service of forwarding prescriptions to the Ohio pharmacy to be processed, and this evidence does not support a conclusion that defendant violated N.C.G.S. § 89-95(a)(1) by engaging in the sale of controlled substances or that defendant engaged in mail fraud or wire fraud involving the distribution of controlled substances.

7. Class Actions— decertification of class—numerosity

The trial court erred by decertifying the class of plaintiffs based upon the lack of numerosity where several of the trial court's summary judgment rulings as to certain of the plaintiffs have been reversed and the class remains as previously defined by another judge's order certifying the class.

8. Appeal and Error— preservation of issues—arguments not presented to trial court

Arguments raised for the first time on appeal regarding whether the class of plaintiffs should be decertified will not be considered by the appellate court.

Appeal by plaintiff and defendants from judgment entered 5 March 2004 by Judge Ben F. Tennille in Guilford County Superior Court. Heard in the Court of Appeals 12 January 2005.

Barron & Berry, L.L.P., by Frederick L. Berry, and Clark Bloss & Wall, PLLC, by John F. Bloss, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Harvey L. Cosper, Jr., and Lori R. Keeton, for defendants-appellees.

TIMMONS-GOODSON, Judge.

Kelly Suggs Jacobs ("plaintiff") appeals an order of the trial court granting summary judgment for Physicians Weight Loss Center ("PWLC"), et al., (hereinafter referred to collectively as "defendants"), and denying her motion for summary judgment. Defendants appeal the trial court's grounds for decertifying the class of plaintiffs. For the reasons stated herein, we affirm in part and reverse in part the trial court's order.

The factual and procedural history of this case is as follows: PWLC provides services that enable weight loss, including dietary and prescription drug therapy. PWLC has North Carolina franchise operations located in Asheville, Greensboro, Jacksonville, Wilmington, and Winston-Salem. PWLC franchises contracted with physicians to examine and treat customers enrolled in its weight loss programs. Physicians under contract with PWLC prescribed drugs for PWLC customers. Pursuant to their contract with PWLC, the physicians were prohibited from providing the prescriptions directly to the patients. Instead, the prescriptions were faxed to Colonial Pharmacy in Ohio for processing. Colonial Pharmacy filled the prescriptions and mailed the drugs to the patient's residence. Customers paid the local PWLC franchise for the drug. The franchisee paid the corporate office for the cost of the drug. The corporate office paid Colonial Pharmacy for filling the prescriptions and mailing the drugs to the customers. The local franchise received the difference between what the customer paid for the prescription and the cost to the corporate office as profit.

In March 1998, plaintiff executed a contract for the purchase of a weight loss plan from defendants. The plan included prescription drug therapy. After purchasing a two-week supply of the prescription drug Merida through defendants, plaintiff learned she could reap substantial cost savings by purchasing the drug from a local pharmacy.

Plaintiff requested her prescription from the PWLC contract doctor but her request was denied pursuant to PWLC policy.

Plaintiff filed the underlying action because PWLC refused to provide her a prescription to take to an outside pharmacy. In its amended form, the complaint alleges that defendants engaged in (1) unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1; (2) violation of state insurance laws, specifically N.C. Gen. Stat. § 58-51-37; (3) intentional interference with fiduciary relationships; (4) constructive fraud, violation of fiduciary duty, and conversion; (5) actual fraud; (6) two violations of the Controlled Substances Act, N.C. Gen. Stat. § 90-95 and 90-108; (7) violation of the Pharmacy Practice Act; (8) violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act; (9) illegal self referrals; (10) illegal exclusive arrangements for transmission of prescriptions; and (11) unjust enrichment. Plaintiff also filed a motion to certify the lawsuit as a class action. The trial court granted plaintiff's motion to certify the class. Subsequently, defendants filed motions for summary judgment and a motion to decertify the class of plaintiffs. Plaintiff also filed a motion for partial summary judgment.

The trial court granted partial summary judgment on the claims of constructive fraud, breach of fiduciary duty, unfair and deceptive trade practices, and intentional interference with fiduciary relationship, against plaintiff on behalf of the PWLC patients who did not ask to take their prescription to an outside pharmacy. The trial court granted full summary judgment on the claims of violation of state insurance laws, conversion, violation of the RICO Act, illegal self-referral, and unjust enrichment against the entire class of plaintiffs. The trial court granted defendants' uncontested motion to dismiss the claims pertaining to the Controlled Substances Act and actual fraud. The trial court denied plaintiff's motion for partial summary judgment and defendants' motion to decertify the class. The trial court certified this interlocutory appeal of the summary judgment order pursuant to Rule 54 of the Rules of Civil Procedure, stating "[t]here is no just reason to delay appeal of this Order, as an immediate appeal will promote judicial economy. The appeal should take place before a ruling on the claims of the remaining class members to prevent this matter from being litigated twice." Thus, the parties appeal the trial court's order.

The issues presented by plaintiff on appeal are whether the trial court erred by (I) granting partial summary judgment for defendant

against all customers who did not ask to take their prescription to an outside pharmacy; (II) granting full summary judgment for defendant against all plaintiffs on issues pertaining to insurance laws, the RICO Act, and illegal self-referrals; and (III) modifying the definition of the class. Defendants' assignments of error are discussed *infra*.

Partial Summary Judgment

[1] Plaintiff first argues that the trial court erred by granting defendants partial summary judgment with regard to customers who did not ask to take their prescription to an outside pharmacy. We agree.

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citing *Wilmington Star News, Inc. v. New Hanover Regional Medical Center, Inc.* 125 N.C. App. 174, 178, 480 S.E.2d 53, 55, *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997)). *See also* N.C.R. Civ. P. 56(c). "A summary judgment movant bears the burden of establishing the lack of any triable issue[.]" *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999). "A defendant who moves for summary judgment may meet this burden by showing either that (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim." *Lyles v. City of Charlotte*, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996). "[T]he evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix*, 130 N.C. App. at 733, 504 S.E.2d at 577. Since summary judgment is a somewhat drastic remedy, the court must cautiously observe its requirements so that no party is "deprived of a trial on a genuine disputed factual issue." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

Breach of Fiduciary Duty

First, we review the trial court's grant of partial summary judgment on the issue of breach of fiduciary duty. Plaintiff contends the trial court erred in granting partial summary judgment of this issue. We agree.

A fiduciary relationship must exist for there to be a breach of fiduciary duty. *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). A fiduciary relationship

> exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. [I]t extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Tin Originals, Inc. v. Colonial Tin Works, Inc., 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). "[T]his Court has recognized that the relationship of patient and physician is considered to be a fiduciary one, 'imposing upon the physician the duty of good faith and fair dealing.' " *Watts v. Cumberland County Hosp. System, Inc.*, 317 N.C. 110, 116, 548 S.E.2d 879, 884 (1986) (quoting *Black v. Littlejohn*, 312 N.C. 626, 646, 325 S.E.2d 469, 482 (1985)).

In the instant case, the parties stipulated "a physician/patient relationship existed between the class members and the doctor at each PWLC franchise office who examined them and prescribed weight loss drugs for them." The trial court found, however, "[d]efendants did not owe a fiduciary duty to those plaintiffs [who did not request the prescription] because no resulting superiority occurred if a plaintiff did not request a prescription." We disagree. Plaintiff and those on whose behalf she is proceeding provided medical background and submitted to medical testing by PWLC employees and the doctors providing medical services under contract with defendants. The fiduciary relationship existed whether the customer requested a prescription or not. We conclude the relationship was a fiduciary relationship. A fiduciary has a duty to disclose all facts material to a transaction. *Stamm v. Salomon*, 144 N.C. App. 672, 680-81, 551 S.E.2d 152, 158 (2001). The evidence, viewed in the light most favorable to the nonmovant, tends to show physicians under contract with defendants failed to disclose to the patients that the patients had a right to their prescriptions. Therefore, we conclude the trial court erred in granting partial summary judgment on the issue of breach of fiduciary duty.

Intentional Interference With A Fiduciary Relationship

[2] Next, we review the decision of the trial court to grant partial summary judgment for defendants on the issue of intentional interference with a fiduciary relationship. Plaintiff specifically argues that PWLC interfered with the relationship between physicians employed

by PWLC and their patients by not allowing the physicians to give patients a copy of their prescription to take to an outside pharmacy. Plaintiff contends the trial court erred in granting partial summary judgment on this issue. We affirm in part and reverse in part.

North Carolina does not recognize a cause of action for the tort of intentional interference with a fiduciary relationship. *Burgess v. Busby*, 142 N.C. App. 393, 405, 554 S.E.2d 4, 10 (2001). Plaintiff cites to *Cameron v. New Hanover Memorial Hospital, Inc.*, 58 N.C. App. 414, 293 S.E.2d 901 (1982) in asserting her claim against PWLC for tortious interference with a fiduciary relationship. In *Cameron*, the plaintiffs were podiatrists who filed an action against a hospital for denying plaintiffs hospital staff privileges. Among the claims alleged in the complaint was wrongful interference with the *business* relationship between plaintiffs and their patients. 58 N.C. App. at 439-40, 293 S.E.2d at 916-17. Plaintiff's reliance on *Cameron* is misplaced because the issue plaintiff raises before this Court is intentional interference with the *fiduciary* relationship between PWLC physicians and their patients. Plaintiff has not cited any case law that establishes a cause of action for interference with a fiduciary physician-patient relationship. Thus, we affirm the trial court's dismissal of the claim for intentional interference with a fiduciary relationship as to those plaintiffs who did not request their prescription. We reverse the trial court's denial of summary judgment as to the plaintiffs who requested their prescriptions.

Constructive Fraud

[3] Plaintiff argues the trial court erred in granting partial summary judgment on the issue of constructive fraud. We agree.

To sustain a cause of action for constructive fraud, plaintiff must allege facts and circumstances (1) which created a relationship of trust and confidence, and (2) which led up to and surrounded a transaction in which defendant allegedly took advantage of his position of trust to injure the plaintiff. *Watts*, 317 N.C. at 116, 343 S.E.2d at 880 (1986). "When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit." *Id.* (citing 37 Am. Jur. 2d *Fraud and Deceit* § 442, at 602 (1968). "Our court has held that whether plaintiff's damages were the proximate result of defendant's actions is almost always a question of fact for the jury." *Barber v. Woodmen of the World Life Ins. Society*, 95 N.C. App. 340, 345, 382 S.E.2d 830, 834 (1989) (citing *Winston Realty Co. v. G.H.G., Inc.*, 70 N.C.

App. 374, 320 S.E.2d 286 (1984), *affirmed*, 314 N.C. 90, 331 S.E.2d 677 (1985)).

> In the instant case, the trial court concluded:
>
> The elements of constructive fraud require the Court to again turn to the issue of injury to plaintiff caused by PWLC. . . . A plaintiff did not incur an actual injury unless the patient requested, and a PWLC physician refused to provide, a prescription. A patient that entered into a contract to receive medicine at a higher price, not availing himself of cost savings of an outside pharmacy, assented to the terms offered by PWLC. The patient had the right to procure the medicine and the physician services at any cost that he chose so long as a disparity in bargaining power did not coerce his assent.

(citations omitted). The trial court's reasoning assumes those who did not request their prescription knew of their entitlement to their prescriptions—a fact defendants failed to disclose—and waived their right to their prescriptions. There is no evidence to support that assumption. The evidence of record indicates the physicians failed to disclose the fact that the patients had a right to their prescriptions. If the clients did not know they were entitled to their prescriptions under the law and would have sought to take their prescriptions to another pharmacy had they known of their entitlement, they suffered actual injury. Clients who did not know of their entitlement to their prescription but who would have used the pharmacy services provided through defendants anyway did not suffer injury. These are facts to be determined by the jury. Therefore, we reverse the trial court's grant of partial summary judgment on the claim of constructive fraud.

Unfair and Deceptive Trade Practice

Next, we consider whether the trial court erred in granting partial summary judgment against those clients who did not request their prescriptions as to the claim under the Unfair and Deceptive Trade Practice Act ("UDTPA").

"To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff[.]" *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476 482 (1991) (citing N.C. Gen. Stat. § 75-1.1 and 75-16). Actual injury includes "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." *Belcher v. Fleetwood Enterprises*, 162 N.C. App. 80, 85, 590 S.E.2d 15, 18-19 (2004) (citing *Poor v. Hill*, 138 N.C. App. 19, 34, 530 S.E.2d 838, 848 (2000)).

In the instant case, the trial court found:

> The withholding of prescriptions by PWLC amounted to unethical conduct and contravened public policy, thus overriding the freedom of contract argument. . . . The PWLC policy was that physicians were not to give patients prescriptions to fill at outside pharmacies. The problem with the customer contract and the policy of withholding prescriptions taken together is that such practices mandated a physician practice—the refusal to provide a prescription—that violated medical ethics. The withholding of prescriptions, therefore, is unethical conduct and satisfies the fairness prong, as PWLC encouraged physicians to treat their patients in a manner that amounted to an unfair practice.

The trial court also found the claim was sufficient to satisfy the second essential element of an unfair and deceptive practice claim. The trial court stated:

> The claim against PWLC also meets the second prong requiring an unfair or deceptive act that affects commerce. Courts broadly interpret commerce under the UDTPA as a business activity of any kind limited only by express exemptions within the statute. *Bhatti v. Buckland*, 328 N.C. 240, 245-46, 400 S.E.2d 440, 443-44 (1991). The exchange of money for services to facilitate weight loss constitutes a business activity. No exemption applies, as none of defendants are physicians and are not protected by the learned profession exemption under the statute.

The trial court, however, concluded those clients who did not request their prescriptions were not injured and therefore, plaintiff failed to meet the third essential element of a claim for unfair and deceptive trade practices. Plaintiff contends the trial court erred in its analysis related to damages. We agree.

At a minimum, a jury question exists as to damages. Our analysis of the issue of damages with regard to plaintiff's claim for constructive fraud, *supra*, is also applicable to the issue of damages related to plaintiff's claim under the Unfair and Deceptive Trade Practices Act. For the reasons stated therein, we reverse the order granting

partial summary judgment as to the plaintiffs who did not request their prescriptions.

Full Summary Judgment

Plaintiff next argues that the trial court erred by granting defendants full summary judgment on plaintiff's claims based on the pharmacy of choice statute, the RICO Act, and illegal self-referrals.

N.C. Gen. Stat. § 58-51-37

[4] Plaintiff assigns error to the trial court's grant of summary judgment for defendants on plaintiff's claim that defendants violated N.C. Gen. Stat. § 58-51-37. We disagree.

Chapter 58 of the General Statutes governs the insurance industry. Article 51 of chapter 58 specifically governs the provisions of health, accident, and death insurance policies or contracts in this State. N.C. Gen. Stat. § 58-51-37(a) (2003) provides:

> This section shall apply to all health benefit plans providing pharmaceutical services benefits, including prescription drugs, to any resident of North Carolina. . . . This section shall not apply to any entity that has its own facility, employs or contracts with physicians, pharmacists, nurses, and other health care personnel, and that dispenses prescription drugs from its own pharmacy to its employees and to enrollees of its health benefit plan; provided, however, this section shall apply to an entity otherwise excluded that contracts with an outside pharmacy or group of pharmacies to provide prescription drugs and services.

A "health benefit plan" is defined in N.C. Gen. Stat. § 58-50-110(11) as "any accident and health insurance policy or certificate; nonprofit hospital or medical service corporation contract; health, hospital, or medical service corporation plan contract; HMO subscriber contract; plan provided by a MEWA or plan provided by another benefit arrangement, to the extent permitted by ERISA, subject to G.S. 58-50-115."

N.C. Gen. Stat. § 58-51-37(c)(4) provides that:

> The terms of a health benefit shall not: . . . impose a monetary advantage or penalty under a health benefit plan that would affect a beneficiary's choice of pharmacy. Monetary advantage or penalty includes higher copayment, a reduction in reimbursement for services, or promotion of one participating pharmacy over another by these methods.

In the instant case, plaintiff contends defendants' contract with class members to provide medical services was a "health benefit plan" governed by N.C. Gen. Stat. § 58-51-37. We disagree.

N.C. Gen. Stat. § 58-51-37, the pharmacy of choice statute, governs accident and health insurance policies and similar contracts. The statute does not apply to contracts for medical and other services such as the contracts between defendants and their clients. Thus, we affirm the trial court's grant of summary judgment for defendants on plaintiff's claim for a violation of N.C. Gen. Stat. § 58-51-37.

Illegal Self-Referrals

[5] Plaintiff also argues that the trial court erred in holding there is no private cause of action under N.C. Gen. Stat. § 90-406. We disagree.

N.C. Gen. Stat. § 90-406 prohibits health care providers from referring patients to entities in which the health care provider is an investor. The statute further provides:

> (b) No invoice or claim for payment shall be presented by any entity or health care provider to any individual, third-party payer, or other entity for designated health care services furnished pursuant to a referral prohibited under this Article.
>
> (c) If any entity collects any amount pursuant to an invoice or claim presented in violation of this section, the entity shall refund such amount to the payor or individual, whichever is applicable, within 10 working days of receipt.

N.C. Gen. Stat. § 90-406 (2003).

> "Health care provider" is any person who, pursuant to Chapter 90 of the General Statutes, is licensed, or is otherwise registered or certified to engage in the practice of any of the following: medicine, dentistry, optometry, osteopathy, chiropractic, nursing, podiatry, psychology, physical therapy, occupational therapy or speech and language pathology and audiology.

N.C. Gen. Stat. § 90-405(7). The penalties for violation of the statute are outlined in N.C. Gen. Stat. § 90-407. The statute provides for disciplinary action by the applicable board that licenses, registers or certifies the professional practice of the health care provider. The statute also provides for civil penalties as follows:

> (b) Any health care provider who refers a patient in violation of G.S. 90-406(a), or any health care provider or entity who

> (1) Presents or causes to be presented a bill or claim for service that the health care provider or entity knows or should know is prohibited by G.S. 90-406(b), or
>
> (2) Fails to make a refund as required by G.S. 90-406(c),
>
> shall be subject to a civil penalty of not more than twenty thousand dollars ($20,000) for each such bill or claim, to be recovered in an action instituted either in Wake County Superior Court, or any other county, by the Attorney General for the use of the State of North Carolina.

N.C. Gen. Stat. § 90-407 (2003).

We note initially that plaintiff concedes "defendants are not licensed within the meaning of § 90-405(7)[.]" Plaintiff argues defendants "hold themselves out to the public as health care providers and . . . deliver health care services to their patients. . . . Accordingly, the defendants were acting as health care providers under § 90-405(7)." The statute governs "health care providers" as defined within the statute. Because plaintiff concedes the defendants are not health care providers as defined in the statute, summary judgment was appropriate. In addition, "our case law generally holds that a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute." *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 339 n.2, 511 S.E.2d 41, 44 n.2 (1999). The legislature did not provide for a private right of action with regard to violations of § 90-406. Instead, the legislature provided for disciplinary action by the applicable licensing board and civil penalties in actions initiated by the Attorney General. We hold there is no private right of action for violations of § 90-406. Therefore, we affirm the order granting summary judgment on plaintiff's claim for violations of N.C. Gen. Stat. § 90-406.

Racketeer Influenced and Corrupt Organizations Act

[6] Plaintiff next argues that the trial court erred by concluding that plaintiff failed to establish a claim under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, N.C. Gen. Stat. § 75D-1, et seq. We disagree.

RICO generally prohibits any "pattern of racketeering activity." N.C. Gen. Stat. § 75D-4(a)(1) (2003). Racketeering activity is defined in pertinent part as follows:

(1) "Racketeering activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under the following laws of this State:

a. Article 5 of Chapter 90 of the General Statutes of North Carolina relating to controlled substances and counterfeit controlled substances;

. . . .

(2) "Racketeering activity" also includes the description in Title 18, United States Code, Section 1961(1).

N.C. Gen. Stat. § 75D-3(c) (2003).

Plaintiff argues that

the summary judgment evidence establishes that defendants, that [sic] throughout the class period, engaged in and/or participated in an enterprise that engaged in multiple acts of racketeering activity including:

(1) sales of controlled substances, proscribed by G.S. § 90-95(a)(1);

(2) mail fraud, in violation of 18 U.S.C. § 1341, using the U.S. mail illegally to distribute controlled substances to plaintiffs; and

(3) wire fraud, in violation of 18 U.S.C. § 1343, in using fax machines and electronic credit card transmissions to accomplish their illegal purposes.

In support of the allegations of a violation of the RICO statute, plaintiff tendered evidence of the following facts: The PWLC customers who contracted for weight loss services that included prescription drugs paid the local franchise for the drugs. The prescriptions were faxed to Colonial Pharmacy in Ohio for processing. Colonial Pharmacy filled the prescriptions and mailed the drugs to the patient's residence. The local franchise paid the corporate office for the costs of the drug. The corporate office paid Colonial Pharmacy for filling the prescriptions and mailing the drugs to patients in North Carolina. The local franchise received the difference between what the customer paid for the prescription and the cost to the corporate office. Plaintiff's tender of evidence on defendants' violation of N.C. Gen. Stat. § 90-95(a)(1) is not sufficient to sup-

port the claim. The evidence viewed in the light most favorable to plaintiff supports the conclusion the local franchisees were paid by customers for the service of forwarding prescriptions to Colonial Pharmacy to be processed. The facts do not support the conclusion defendants violated N.C. Gen. Stat. § 90-95(a)(1) by engaging in the sale of a controlled substance. Additionally, we note the trial court dismissed plaintiff's claim under N.C. Gen. Stat. § 90-95(a)(1) without objection by plaintiff. Thus, plaintiff's argument that defendants engaged in the sales of controlled substances, mail fraud by using the United States mail illegally to distribute controlled substances, and wire fraud in using fax machines and electronic credit card transmissions to accomplish their purposes fails. Because plaintiff's controlled substances argument fails, plaintiff "has failed to allege conduct sufficient to support a finding that these . . . [d]efendants were 'engaged in a pattern of racketeering activity.' " *Delk v. Arvinmeritor, Inc.*, 179 F. Supp. 2d 615, 627-28 (W.D. N.C. 2002). For these reasons, we conclude that the trial court did not err by granting summary judgment for defendants on this issue.

Decertifying the class based on lack of numerosity

[7] Next, plaintiff argues that the trial court erred by decertifying the class of plaintiffs based on the lack of numerosity. We agree.

It is well settled that "ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E.2d 484 (1972). "However, in an appropriate context a superior court judge has the power to modify an interlocutory order entered by another . . . ." *Dublin v. UCR, Inc.*, 115 N.C. App. 209, 219, 444 S.E.2d 455, 461 (1994). Therefore, interlocutory orders may be modified due to changed circumstances.

In the instant case, Judge Morgan entered an order in which he made the following findings:

> 3. There are common issues of law which include whether any of the defendants' drug practices constitute an impermissible interference with an individual's right to buy prescription drugs at a lower available price and/or otherwise constitute violations of law as alleged in the Complaint. The Court makes no ruling on the validity and sufficiency of plaintiff's claims and has not ruled on defendants' dispositive motions, which were pending at the time of the hearing on plaintiff's motion for class certification.

> 4. Common issues of fact and law predominate over individual issues asserted by defendants, such as the nature of any alleged oral fraudulent or other misrepresentations made by a defendant concerning drug prices and the means by which Kelly Suggs or prospective class members could obtain their prescription drugs, whether and to what extent Kelly Suggs or prospective class members relied upon any alleged fraudulent or other misrepresentation, or the extent to which, if any, Kelly Suggs or prospective class members may have been damaged.
>
> 5. The plaintiff will fairly and adequately represent the Class.
>
> 6. The members of the Class are so numerous that it would be impractical to join them all and thus, the numerosity requirement has been met.
>
> 7. The Class action is superior to any other available method of resolving this dispute.

Based on the findings, Judge Morgan entered an order certifying a class "defined as all persons who purchased prescription drugs from the defendants in North Carolina from June 20, 1995 to the date of this Order."

"The order entered by Judge [Morgan] was interlocutory. . . . Thus, a subsequent judge could modify the order for circumstances which changed the legal foundation for the prior order." *Dublin*, 115 N.C. App. at 220, 444 S.E.2d at 461. The changed circumstance relied upon by Judge Tennille was the modification of the class based on a new definition of the class as a result of his summary judgment order.

The trial court concluded

> [t]he summary judgment order alters the class by limiting it to those plaintiffs who did request prescriptions for use at other pharmacies. Plaintiffs that did not request prescriptions for use elsewhere and to whom PWLC did not refuse such requests do not have claims as a matter of law. . . . Thus, the class definition has been modified to consist of a class of plaintiffs who were denied their written prescriptions when requested. The modification results from the summary judgment ruling.

The trial court then ordered: "The class definition is modified to consist only of plaintiffs who were denied their written prescriptions when requested[.]" After redefining the class, the trial court issued an order decertifying the class because "[t]he Order granting summary

judgment leaves only the class representative with a claim pending against defendants. The existence of only one plaintiff clearly does not create an impractical situation under Rule 23."

Because we have reversed several of the trial court's summary judgment rulings as to those plaintiffs who did not request their prescriptions, the class remains as previously defined. Therefore, we reverse the trial court order decertifying the class.

Defendant's Cross Appeal

[8] Defendants have filed a cross-appeal asking this Court to affirm the trial court's order decertifying the class asserting alternative bases for the trial court's action. Specifically, defendants argue the trial court's order decertifying the class can be supported in law by the following bases: (I) plaintiff is not a suitable representative of the class; (II) individual issues of law or fact predominate over common issues of law or fact among the plaintiffs; and (III) a class action is not the superior method for adjudicating this controversy.

Defendants raise these arguments for the first time on appeal. On 17 April 2003, defendants filed a motion to decertify the class and in the motion, stated the following: "Defendants request such decertification based on the change in legal circumstances that has occurred since the class certification order was originally entered." The trial court denied defendants' motion in the same order granting summary judgment to defendant and decertifying the class entered 3 March 2004. There is nothing in the record to indicate defendant presented the alternative grounds for decertifying the class to the trial court. "It is axiomatic with us that a litigant must be heard here on the theory of the trial below and he will not be permitted to switch horses on his appeal. Nor may he ride two horses going different routes to the same destination." *Graham v. Wall*, 220 N.C. 84, 94, 16 S.E.2d 691, 697 (1941). Therefore, defendants' assignments of error are overruled.

Affirmed in part and reversed in part.

Judges HUDSON and STEELMAN concur.

IN RE D.M.W.

[173 N.C. App. 679 (2005)]

IN THE MATTER OF: D.M.W., A MINOR CHILD

No. COA05-70

(Filed 18 October 2005)

1. Termination of Parental Rights— grounds—neglect

The trial court erred in a termination of parental rights case by concluding that respondent mother neglected the minor child at the time of the hearing, because: (1) respondent completed substance abuse treatment, domestic violence counseling, and parenting classes required by her case plan, although not through DSS's recommended sources, and respondent is not bound by a single source provider for recommended services while seeking to overcome the issues that led to the minor child's removal; and (2) the case plan required respondent to obtain legal employment and stable housing, she obtained employment while in prison working seven days a week in the kitchen while also taking steps to help her obtain employment upon her release such as attempting to obtain her GED, and she testified that she would live with her mother upon her release.

2. Termination of Parental Rights— grounds—willfully failed to pay reasonable portion of cost of care for six months preceding filing of petition

The trial court erred in a termination of parental rights case by concluding that respondent mother willfully failed to pay a reasonable portion of the cost of care for a period of six months preceding the filing of the petition although she was physically and financially able to do so, because: (1) respondent testified that she had just got her job with the Department of Correction at the time of the hearing; and (2) no evidence was presented that respondent was employed or had the ability to pay support during the six month period preceding the filing of the petition.

Judge HUNTER dissenting.

Appeal by respondent mother from order entered 26 August 2004 by Judge Avril U. Sisk in Mecklenburg County District Court. Heard in the Court of Appeals 24 August 2005.

Mecklenburg County Attorney's Office, by J. Edward Yeager, Jr., for petitioner-appellee Mecklenburg County Department of Social Services.

Matt McKay, for petitioner-appellee Guardian ad Litem.

Richard Croutharmel, for respondent-appellant.

TYSON, Judge.

Denise M. ("respondent") appeals from order terminating her parental rights to her minor child, D.M.W. We reverse.

I. Background

D.M.W. was born to respondent in September 1999. On or about 2 June 2003, respondent left D.M.W. with her maternal grandmother while respondent served time in jail. D.M.W.'s maternal grandmother later left D.M.W. with her aunt, respondent's sister. Respondent did not retrieve D.M.W. on her expected release date.

The Mecklenburg County Department of Social Services ("DSS") became involved in July 2003. Respondent's sister contacted DSS because she could no longer care for D.M.W. DSS searched for respondent, but was unable to locate her. DSS filed a juvenile petition on 9 July 2003 alleging D.M.W. was neglected and dependant. The court ordered non-secure custody of D.M.W. with DSS pending the adjudication hearing.

On 11 August 2003, DSS learned that respondent was incarcerated. DSS and respondent subsequently agreed to a case plan to address the following concerns: (1) substance abuse; (2) domestic violence; (3) parenting skills; (4) housing; and (5) employment. The trial court conducted the adjudication and dispositional hearings on 13 August 2003. Respondent was present with her attorney and stipulated to the facts alleged in the petition. The court adjudicated D.M.W. neglected and dependent as to respondent. The court adopted the 12 August 2003 case plan prepared by DSS.

Respondent was released from jail on or about 22 August 2003 and first met with a DSS social worker on 25 August 2003. On 23 September 2003, the Families in Recovery Stay Together ("FIRST") program screened respondent for substance abuse, mental health, and domestic violence problems. FIRST recommended respondent undergo substance abuse treatment through the CASCADE program and participate in domestic violence counseling through the Women's Commission. Respondent agreed to undergo substance abuse treatment, but refused to participate in domestic violence counseling.

Respondent initiated treatment at the CASCADE program but failed to complete it. She never began the domestic violence counsel-

ing through the Women's Commission. DSS made a referral for respondent to attend parenting classes. Respondent agreed, but never attended the parenting classes through DSS's recommended source. She was incarcerated at the time of the hearing to terminate her parental rights. Respondent has been incarcerated at least six times during the time in which DSS had custody of D.M.W. and never visited with D.M.W. due to her frequent incarcerations.

Since respondent has been incarcerated, she has worked toward completing the requirements of her case plan. She completed: (1) a substance abuse treatment program; (2) three parenting classes; and (3) a domestic violence treatment program. Respondent expected to be released from prison fourteen days following the hearing to terminate her parental rights.

The court conducted a review hearing of its 13 August 2003 order on 15 January 2004 and ordered reunification efforts with respondent to cease and for DSS to pursue termination of respondent's parental rights. DSS filed a petition to terminate respondent's parental rights on 24 February 2004.

As grounds for termination, the petition alleged respondent: (1) had neglected D.M.W.; and (2) willfully left D.M.W. in the custody of DSS for a continuous period of more than six months preceding the filing of the petition without paying a reasonable portion of the cost of care for D.M.W. although physically and financially able to do so. DSS alleged it was in the best interest of D.M.W. that respondent's parental rights be terminated. On 25 August 2004, the trial court entered an order finding facts to terminate respondent's parental rights on both grounds and concluded it was in D.M.W.'s best interest to terminate respondent's parental rights. Respondent appeals.

II. Issues

The issues on appeal are whether the trial court erred by: (1) concluding that grounds existed to terminate respondent's parental rights based on neglect; (2) concluding that grounds existed to terminate respondent's parental rights based on willfully leaving D.M.W. in foster care for more than six continuous months without paying a reasonable portion of D.M.W.'s cost of care; (3) concluding that it was in D.M.W.'s best interest to terminate respondent's parental rights; and (4) abusing its discretion and violating respondent's substantial rights by terminating her parental rights.

III. Standard of Review

A termination of parental rights proceeding involves two separate analytical phases: an adjudication stage and a dispositional stage. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). A different standard of review applies to each phase.

"At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. rev. denied*, 353 N.C. 374, 547 S.E.2d 9 (2001) (citation omitted). "Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985).

If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), then the trial court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interest of the child. N.C. Gen. Stat. § 7B-1110(a) (2003). We review the trial court's "best interests" decision under an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

IV. Conclusions of Law

A. Neglect

[1] N.C. Gen. Stat. § 7B-1111(a) (2003) provides nine separate enumerated grounds upon which a court may terminate parental rights. A finding of any one of those grounds will authorize a court to terminate parental rights. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). Respondent argues that DSS presented insufficient evidence to support the trial court's findings of fact to support its conclusion that grounds existed to terminate her parental rights based on neglect. We agree.

A trial court may terminate parental rights upon a finding that "the parent has abused or neglected the juvenile." N.C. Gen. Stat. § 7B-1111(a)(1) (2003). A neglected juvenile is defined as follows:

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

N.C. Gen. Stat. § 7B-101(15) (2003).

It is well established that "[a] finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. at 248, 485 S.E.2d at 615 (citation omitted). If the child is removed from the parent before the termination hearing, as in this case, then "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). "[P]arental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his] parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000).

DSS did not present sufficient evidence at the time of the termination hearing to serve as a basis to terminate respondent's parental rights. DSS argued respondent failed to complete portions of her case plan. Pursuant to the case plan, respondent was to complete a substance abuse assessment with the FIRST program, follow all recommendations made by the FIRST program, and refrain from using any substances. With regard to the domestic violence concerns under the case plan, respondent was to complete an assessment for domestic violence counseling through the FIRST program and follow all recommendations. The case plan also required respondent to complete parenting classes through the Family Center and follow all recommendations made by professionals. Respondent was also to obtain and maintain employment sufficient to provide for D.M.W. and stable housing.

Respondent completed substance abuse treatment, domestic violence counseling, and parenting classes required by her case plan, although not through DSS's recommended sources. She completed a substance abuse and domestic violence assessment through the FIRST program on 23 September 2003. FIRST recommended substance abuse treatment through the CASCADE program and

domestic violence counseling through the Women's Commission. Respondent never began domestic violence counseling through the Women's Commission. However, while in custody of the Mecklenburg County Sheriff, she completed a two week domestic violence class. Respondent also began a week long parenting class while in the custody of the Mecklenburg County Sheriff, but was only able to finish three classes because she was transferred to the Department of Correction. Respondent began substance abuse treatment through the CASCADE program, attended approximately six sessions, but was unable to complete the program because she was subsequently incarcerated. While in custody of the Department of Correction, she completed intensive chemical dependency treatment through a two month Drug Awareness Resistance Treatment Program ("DART").

Respondent did not complete substance abuse treatment, domestic violence counseling, and parenting classes recommended by DSS, but sought and completed alternative treatment and counseling programs. Respondent is not bound by a single source provider for recommended services while seeking to overcome the issues that led to D.M.W.'s removal.

The case plan also required respondent to obtain legal employment and stable housing. She obtained employment while in prison working seven days a week in the kitchen. There was no evidence presented at the hearing concerning the wage respondent earned while working in prison. Respondent also completed a cognitive behavior intervention program and completed some of the required courses to obtain her GED. At the time of the termination hearing, respondent anticipated completing her GED prior to release from custody of the Department of Correction. Respondent has taken steps while incarcerated to help her obtain employment upon her release. No finding of fact shows respondent did not have stable housing. Respondent testified that she will live with her mother upon her release.

The 12 August 2003 case plan addresses five areas of concern: (1) substance abuse; (2) domestic violence; (3) parenting skills; (4) employment; and (5) housing. Upon our review of the evidence presented at the termination hearing, we find that DSS did not meet its statutory burden of proving by clear, cogent, and convincing evidence that respondent, at the time of the termination hearing, had not taken substantial steps and made reasonable progress to resolve these issues. The trial court erred in concluding as a matter of law that

respondent neglected D.M.W. *See In re Young*, 346 N.C. at 248, 485 S.E.2d at 615.

B. Failure to Pay a Reasonable Portion of the Cost of Care

[2] Respondent next argues that the trial court erred in concluding as a matter of law that D.M.W. has been placed in the custody of DSS for a continuous period of more than six months preceding the filing of the petition and respondent willfully failed to pay a reasonable portion of the cost of care for D.M.W. although physically and financially able to do so pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). We agree.

"[C]ost of care refers to the amount it costs the Department of Social Services to care for the child, namely, foster care. Specific findings of fact as to the reasonable needs of the child are not required." *In re Montgomery*, 311 N.C. 101, 113, 316 S.E.2d 246, 254 (1984) (quotation omitted).

> A parent's ability to pay is the controlling characteristic of what is a reasonable portion of cost of foster care for the child which the parent must pay. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay. What is within a parent's ability to pay or what is within the means of a parent to pay is a difficult standard which requires great flexibility in its application.

In re Clark, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981) (quotation omitted). "[N]onpayment constitutes a failure to pay a reasonable portion 'if and only if respondent [is] able to pay some amount greater than zero.' " *In re Clark*, 151 N.C. App. 286, 289, 565 S.E.2d 245, 247 (2002) (quoting *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802 (1982)).

The trial court found respondent has paid nothing toward the cost of caring for D.M.W. despite having employment with the Department of Correction while in prison. At the termination hearing, respondent testified that she had "just got" the job with the Department of Correction. No evidence was presented that respondent was employed or had the ability to pay support during the six month period preceding the filing of the petition. The trial court made no findings regarding respondent's ability or means to pay. *In re Clark*, 151 N.C. App. at 289, 565 S.E.2d at 247. Without such findings to support the conclusions of law, the trial court erred in terminating respondent's parental rights on this ground.

IV. Conclusion

DSS failed to provide clear, cogent, and convincing evidence to support the trial court's conclusion that respondent neglected D.M.W. at the time of the hearing and willfully failed to pay a reasonable portion of the cost of care for a period of six months preceding the filing of the petition although she was physically and financially able to do so. In light of our decision, we do not address respondent's remaining assignments of error. The trial court's order is reversed.

Reversed.

Judge STEELMAN concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

Because I conclude there was clear, cogent, and convincing evidence in the record to support the trial court's termination of respondent's parental rights, I respectfully dissent from the majority.

Respondent's case plan with DSS indicated respondent had an extensive substance abuse history, including various criminal drug charges, and limited parenting skills. Respondent was also a victim of domestic violence and had not provided a stable living environment for her family. The case plan contained the following objectives: (1) Successful treatment for respondent's substance abuse issues; (2) appropriate treatment for respondent's domestic violence issues; (3) effective demonstration by respondent of appropriate parenting skills; and (4) maintenance of a stable, appropriate home. To meet these objectives, respondent agreed to (1) complete a substance abuse assessment through FIRST, follow all recommendations, submit to random drug screens, and refrain from drug use; (2) complete a domestic violence assessment through FIRST and follow any recommended counseling; (3) successfully complete a parenting skills class through the Family Center and follow all recommendations; and (4) obtain and maintain appropriate employment and appropriate and stable housing, with all household bills to be paid monthly.

Ms. Hoop-Lightner, a social worker, testified respondent failed to complete her substance abuse treatment with the CASCADE program and had not provided proof of completing any other type of substance abuse treatment program. Respondent did not comply with

domestic violence counseling, nor did she provide proof to DSS of alternate treatment. Respondent did not attend parenting classes at the Family Center, and she did not inform DSS of any other parenting classes she attended. Respondent failed to maintain contact with DSS, although Ms. Hoop-Lightner provided respondent with her contact information. Between periods of incarceration, respondent failed to visit her child. At the time of the hearing, respondent was incarcerated, and had no plans for employment upon release and no housing other than her mother's residence. DSS originally became involved with the family after respondent's mother left the minor child with his maternal aunt while respondent was incarcerated.

The trial court concluded that respondent had neglected her child and that termination of respondent's parental rights was in the best interests of the child. The trial court's findings and conclusions are fully supported by clear and convincing evidence. The evidence showed respondent failed to successfully fulfill even one of the requirements of her case plan with DSS. The majority nevertheless asserts that "[r]espondent completed the substance abuse treatment, domestic violence counseling, and parenting classes required by her case plan, although not through DSS's recommended sources." This assertion is unsupported by the evidence of record.

Respondent testified she attended only three parenting classes while in the custody of the Mecklenburg County Sheriff. Ms. Hooper-Lightner testified respondent never attended parenting classes at the Family Center, as required by her case plan, and that respondent failed to inform DSS of her involvement with the three parenting classes she attended while incarcerated. DSS therefore had no opportunity to assess whether respondent's attendance of the three parenting classes had enabled her to develop appropriate parenting skills, which was the ultimate objective of the case plan. Respondent submitted no evidence regarding the parenting program she attended. *See In re D.M.*, 171 N.C. App. 244, 248, 615 S.E.2d 669, 671 (2005) (holding that clear, cogent, and convincing evidence existed to support termination of the respondent-father's parental rights, where the respondent-father failed to complete domestic violence counseling with NOVA as required by his case plan with DSS, and there was no evidence in the record regarding the substance of the alternative private treatment the respondent-father received). As such, the majority's assertion that respondent completed the parenting classes required by her case plan is unsupported by the record.

Next, respondent testified she completed a two-week domestic violence class while in the custody of the Mecklenburg County Sheriff. According to respondent, the classes met "every other day." Thus, respondent attended, at most, seven classes. Ms. Hooper-Lightner testified respondent never provided her with any proof she was engaged in any type of domestic violence treatment. Again, respondent failed to offer any evidence regarding the substance of these classes or their effectiveness towards resolution of her domestic violence issues. *See id.* The majority's conclusion that respondent completed the domestic violence counseling required by her case plan is therefore unsupported by the record.

Finally, respondent testified she completed the DART substance abuse treatment program while incarcerated. Respondent offered no evidence that the DART program was substantially similar to the CASCADE program required by her case plan. Respondent testified that, upon her release from incarceration, she had no employment and no independent housing. Contrary to the majority's assertion, the trial court specifically found that respondent "never provided proof of having obtained appropriate housing or legal employment."

The majority states that "[r]espondent is not bound by a single source provider for recommended services while seeking to overcome the issues that led to D.M.W.'s removal." Respondent is surely responsible, however, for informing DSS of her alternate compliance with the case plan to which she agreed, or for providing the trial court with evidence regarding the substance of the treatment she received. Without information regarding the length and type of treatment respondent received, the trial court and DSS had no ability to assess whether, in fact, respondent substantially complied with her case plan, and, more importantly, whether she met the ultimate objectives the case plan was designed to achieve. The case plan was designed to ensure that respondent could provide proper care and supervision of her son and to avoid the probability of future neglect. To that end, respondent needed to successfully treat her substance abuse and domestic violence issues, demonstrate appropriate parenting skills, and maintain a stable, appropriate home. Respondent provided little evidence that she has achieved any of these objectives. As found by the trial court, respondent's completion of some treatment classes while incarcerated "does not demonstrate a long-term commitment to resolution of the issues which led to placement of the child into foster care." Notably, the evidence tended to show, and the trial court found, that what little progress respondent made

towards achieving the objectives articulated in her case plan occurred while she was incarcerated. While respondent was not incarcerated, she "made absolutely no progress toward resolution of any of the issues on her case plan. During those times she also failed to maintain contact with [DSS] or to visit with the child." There was, therefore, little evidence of changed conditions on the part of respondent, and clear and convincing evidence of the probability of future neglect by respondent.

Because I conclude the trial court properly found grounds for terminating respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), I need not address the remaining ground found by the court. *See In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 132-33 (1982). I further conclude the trial court did not err in determining that termination of respondent's parental rights was in the best interests of the child, and did not abuse its discretion in terminating respondent's parental rights. DSS presented evidence that respondent's son was thriving in foster care, that he had bonded with his foster family and referred to his foster mother as "Mom," and that the family was interested in adopting him. The trial court did not err in terminating respondent's parental rights. I therefore respectfully dissent.

STATE OF NORTH CAROLINA v. BILLY JOE CRUZ

No. COA04-1217

(Filed 18 October 2005)

1. Motor Vehicles— driving while impaired—motion to dismiss—corpus delicti rule—confession—corroborating evidence

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired, because evaluating the evidence under either the traditional or trustworthiness approach to the corpus delicti rule reveals that: (1) the State offered corroborating evidence of the essential facts of defendant's confession through the testimony of various witnesses; and (2) several officers and witnesses testified to defendant's drinking and impairment.

2. Motor Vehicles— driving while license revoked—motion to dismiss

The trial court erred by denying defendant's motion to dismiss the charge of driving while license revoked, because although the evidence supporting defendant's driving was sufficient, there was insufficient evidence that defendant knew his license was revoked when there was no evidence that an official notice was actually mailed to defendant's address as required by N.C.G.S. § 20-48.

3. Sentencing— aggravating factor—failure to submit to jury—*Blakely* error

The trial court committed *Blakely* error in a driving while impaired case by sentencing defendant as a Level II offender on the basis of its finding of the grossly aggravating factor that defendant drove impaired with a child under the age of sixteen in the car, and the case is remanded for resentencing, because the aggravating factor was not submitted to a jury to be determined beyond a reasonable doubt.

Appeal by defendant from judgment entered 12 February 2004 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 18 May 2005.

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

William D. Spence, for defendant-appellant.

ELMORE, Judge.

Billy Joe Cruz (defendant) was indicted for involuntary manslaughter, driving while impaired, driving while license revoked, and aiding and abetting a person under twenty-one to possess alcohol. Following the State's evidence, the trial court dismissed the charge of involuntary manslaughter and the jury found defendant guilty of driving while impaired and driving while license revoked. Defendant appeals his convictions for these offenses on the basis that the trial court erred in denying his motion to dismiss.

Defendant's charges arose from the investigation of his nephew's death that occurred on 31 December 2002. Lee Cruz, defendant's underage nephew, had been drinking beer most of the day at defendant's house with other family members. During the early evening

hours Lee got a phone call from his girlfriend that prompted him to leave defendant's house. Lee drove away from defendant's house and ended up having a fatal car accident not far from his own home. During the investigation of the accident scene, defendant arrived with another person, and police officers noticed defendant creating a disturbance near where other onlookers had gathered. Several of these officers testified at trial that defendant was belligerent and smelled of alcohol.

Defendant was interviewed on 2 January 2003 by an investigator with the Pitt County ABC Board of Inquiry, Calvin Craft (Investigator Craft). On 14 January 2003 defendant was also interviewed by North Carolina Highway Patrol officer David Newbie (Officer Newbie), a collision reconstructionist. Based upon seven interviews with defendant between the incident and 26 March 2003, Investigator Craft and Officer Newbie testified to written and oral statements that defendant made. These confessions,[1] are what the State relies on in proving that defendant drove a car, both while impaired and while his license was revoked.

[1] Defendant accurately points out that to survive a motion to dismiss, the State must provide some evidence in addition to defendant's statements or confession. *See State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986). This is known as the *corpus delicti* rule, and in North Carolina there are two methods of proving the additional evidence requirement. *Id.* at 532, 342 S.E.2d at 880 (discussing both methods of proof). In *State v. Parker*, our Supreme Court "expanded" the *corpus delicti* rule in North Carolina after extensive evaluation of the rule's multiple variations. 315 N.C. 222, 337 S.E.2d 487 (1985). The more traditional application of the rule is "that there be corroborative evidence, independent of the defendant's confession, which tends to prove the commission of the crime charged." *Id.* at 229, 337 S.E.2d at 491. Another, more modern method has been called the " 'trustworthiness' version of corroboration and is generally followed by the federal courts and an increasing number of states.' " *Id.* at 230, 337 S.E.2d at 492. This method was adopted by our Supreme Court in *Parker*. *Id.* at 236, 337 S.E.2d at 495. *Parker* and *Trexler* offer an understanding of each method of corroboration.

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1. "[R]egardless of whether defendant's statements constitute an actual confession or only amount to an admission, our long established rule of *corpus delicti* requires that there be corroborative evidence, independent of the statements, before defendant may be found guilty of the crime." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986).

In *Trexler*, the Court explained that the traditional approach to the *corpus delicti* rule was still applicable in "cases in which there is some *evidence aliunde* the confession which, when considered with the confession, will tend to support a finding that the crime charged occurred." *Trexler*, 316 N.C. at 532, 342 S.E.2d at 880.

> The rule does not require that the *evidence aliunde* the confession prove any element of the crime. The *corpus delicti* rule only requires *evidence aliunde* the confession which, when considered with the confession, supports the confession and permits a reasonable inference that the crime occurred. . . . The independent evidence must touch or be concerned with the *corpus delicti*. . . . The expanded rule enunciated in *Parker* applies in cases in which such independent proof is lacking but where there is substantial independent evidence tending to furnish strong corroboration of essential facts contained in defendant's confession so as to establish trustworthiness of the confession.

Id. at 532, 342 S.E.2d at 880-81 (internal citations omitted). This rule does not require the State to come forward with evidence, absent the defendant's confession, that supports each element of the crime charged. Rather, "[a]pplying the more traditional definition of *corpus delicti*, the requirement for corroborative evidence would be met if that evidence tended to establish the essential harm, and it would not be fatal to the State's case if some elements of the crime were proved solely by the defendant's confession." *Parker*, 315 N.C. at 232, 337 S.E.2d at 493.

In *Parker*, the Court explained the modified approach, or the trustworthiness rule, as follows:

> We adopt a rule in non-capital cases that when the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.
>
> We wish to emphasize, however, that when independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice. We empha-

> size this point because although we have relaxed our corroboration rule somewhat, we remain advertent to the reason for its existence, that is, to protect against convictions for crimes that have not in fact occurred.

Id. at 236, 337 S.E.2d at 495.

Evaluating the record before us, under either the traditional or trustworthiness approach to the *corpus delicti* rule, the State offered corroborating evidence that when considered with defendant's statements is sufficient to survive defendant's motion to dismiss.

Defendant's admissions or confessions regarding driving were numerous. Sergeant Kenneth Pitts, of the North Carolina Highway Patrol, first spoke with defendant at the scene of the accident. Sergeant Pitts testified that defendant told him that he followed Lee after Lee had a phone conversation with his girlfriend. Sergeant Pitts also testified that, in his opinion, defendant was appreciably impaired during their conversation, which occurred within several hours of Lee's accident.

Investigator Craft testified that he first spoke with defendant on 2 January 2003. Defendant told him that he and Lee were first at a local restaurant where they had alcohol, then everyone went back to defendant's house where they all consumed an additional two cases of beer. Investigator Craft further testified that defendant told him he and Lee got in a brief fight on the lawn about the beer money and Lee left. Defendant went inside to get his keys, and his girlfriend "went with him" after Lee. Investigator Craft continued, stating:

> That the defendant traveled toward Lee Cruz, the deceased, house and didn't see his vehicle home. He turned down a farm path and came back home; that his father came to the defendant's house. His father stated that he saw a rescue squad go by the residence that he was at, and he had a feeling that Lee was in an accident. So, they went toward Lee's house to see, and that's when they located the accident.

Investigator Craft testified that defendant told him he would issue a written statement as to what happened, and Investigator Craft received that statement the next day. After being asked by the State to read the statement into evidence, Investigator Craft testified:

> This print is kind of hard to read. It says, "Lee came here after work, and asked me if I wanted to go to Mazatlan and drink and

> eat, and I said 'Okay.' Lee had a girlfriend that worked at Mazatlan. I paid for my bill, and Lee paid for his. Lee had two beers and a shot, and I had the same thing. We got some beer, about two cases. We finished them and had a little argument about some beer money. We hang each other like"—I can't really see it. "We hang each like the"—then he said, "We were arguing, started crying so I let him go, and I hit the window with my fist." It's got, "Lee to his car, and I ran after him. I came in and asked my girlfriend for the keys. She said, no, because I was too drunk, and I followed minutes later. She said, 'I'll go with you,' so we left, went by Lee's house. He won't there, then we come back home and my dad picked me up and said he was leaving Jesus' home"—that's Lee's dad. "My dad was leaving Lee's dad's home. He saw an ambulance go by, so he decided to come by my home. When he got here, he said, 'Lee just' "—"He said he'd just saw an ambulance and decided to come over. I said Lee"—It looks like, "Lee after drank. Then my dad said, 'Let's go to Lee's home,' and then we saw what had happened." It's signed, "Billy Joe Cruz."

Investigator Craft spoke with defendant again on 9 January 2003, and the testimony is consistent with defendant's previous statements. Investigator Craft also testified that he spoke with defendant on 26 March 2003 and, after waiving his *Miranda* rights, defendant issued another written statement. This statement was also read into the record.

> He stated, after he was advised of his Miranda rights, that his girlfriend and child were both with him while he drove his vehicle while impaired in an attempt to locate Jesus Lee Cruz; that he went to Mazatlan resteraunt because Lee wanted to drink there; that the large Hispanic female served the first beers, and the smaller one serve them the other beer, this being Ms. Portella, the smaller one of the two waitresses. He said they went to Food Lion where Juan used Lee's debit card to pay for the beer, four twelve packs. They went back to Joe's house on Green Street in Farmville where the two consumed three twelve packs of Corona beers; that they got in an argument over going to get more beer and who was going. Mr. Cruz stated that he was not going for the beer because he had too much to drink already. I advised if he knew that Lee was going to drive, and the defendant stated, "Yes." They both threw $10 on the ground for someone to go get more beer and got in the argument; that the defendant broke the window to the front door in anger and told Lee to chill out and it was

> stupid to fight. Lee left fussing about his girlfriend, and the defendant went in the house to get his keys to follow Lee; that he, himself, his girlfriend and 14-month-old baby went to see if Lee was okay; that they never saw Lee's vehicle when he went to look for Lee.

Officer Newbie testified that on 14 January 2003 he spoke with defendant and defendant relayed the following:

> After this altercation [with Lee], Mr. Cruz stated he stepped inside and Lee went to his car and took off. Mr. Cruz stated that—stated that Lee's car was parked in front of his house on Green Street facing north. He last saw Lee heading north on Green Street. The defendant stated he went back inside and told his girlfriend to give him the keys. His girlfriend refused to give him the keys because he was drunk. After a few moments, his girlfriend got the baby, and they left in the car heading north on Green Street. The defendant stated when they left that—excuse me. The defendant stated that when Mr. Cruz, the deceased, left—his quote was, "When Lee left here, he was drunk; he was staggering. I know Lee. I followed Lee before home on more than three or four occasions at two or three o'clock in the morning. I get myself in trouble. I follow that man home because he drank. He won't stay the night. He wants to go home to his house." Two or three minutes after Lee left, Mr. Cruz, the defendant, left driving through Farmville at 55 to 60 and stated, "I was going passed the speed limit." The defendant stated the speed limit was 35. He went to Lee's house. The defendant went to Lee's house. He went passed Lee's house . . . . His girlfriend and the baby were in the back seat, and Mr. Cruz, the defendant, admitted he was drunk. He stated that he came through the area of the collision. . . . Mr. Cruz stated that Lee had already wrecked when he went through. Mr. Cruz, the defendant, stated that when he gets to Lee's house, he doesn't see his car, so he proceeds passed the trailer and makes a left turn onto a field path and drives over to US 264 Alternate.

Officer Newbie's testimony as to what statements defendant made are substantially similar to the testimony of Investigator Craft and Sergeant Pitts.

Thus, the essential facts of defendant's confession are that: he and Lee drank beer at a restaurant earlier in the day; the two obtained more beers and drank approximately two cases at defendant's house; Lee had talked with his girlfriend, was upset and got into a fight with

defendant before leaving; defendant, while impaired, got his keys and drove after Lee with his wife and child in the car; after passing by the accident scene close to Lee's house, defendant drove down a dirt farm road and eventually ended up at home.

The State put on evidence tending to support defendant's recitation of the events in his confession and thus lending a substantial amount of trustworthiness to his statement. First, the State called one of defendant's nephews, who testified that defendant and Lee went to the Mazatlan and drank, then purchased more beer and drank at defendant's home. Defendant's nephew testified that defendant and Lee got into an argument, but that he left defendant's house to go to the store. When he came back, approximately thirty minutes later, defendant and Lee were gone, as were both of their cars. Defendant returned to the house later on in the evening. Second, the State called a witness who was traveling on the road in the opposite direction of Lee just before Lee crashed. She stated that she saw Lee's car travel past her at a high rate of speed followed shortly thereafter by a dark colored car, also traveling very fast. After being shown a picture of defendant's car, a black Nissan, she confirmed that it was a similar car to one she saw following Lee's. Third, the State called a resident who lived near the accident site, who testified that he was in his garage and heard a speeding car go by. Then, within a few moments, he heard another car speeding towards him. He got up to look out the window and saw the car slow down, then speed up, then turn down a farm dirt road. The resident testified that the dirt road was a private road that led to 264 Alternate. Fourth, another witness testified that he was walking his dogs near the road where the accident occurred. He heard two cars coming towards the location of the accident at a high rate of speed. He said he then heard the crash, followed by another car slowing down and then speeding off. And fifth, the State called Lee's girlfriend, who testified that she called Lee twice on the day of the accident and had planned to come pick him up from defendant's house.

We determine that the State sufficiently corroborated the essential facts of defendant's confession through the testimony of these other witnesses. Several officers and witnesses testified to defendant's drinking and impairment. A car similar to the one owned and operated by defendant was seen traveling down the road near the accident and turning down a side street, just as defendant confessed to doing. The State also corroborated defendant's account of Lee receiving a phone call from his girlfriend. Absent defendant's con-

fession, the circumstantial evidence of defendant's driving would likely not be enough to support a conviction, however with his confession it is. *See Trexler*, 316 N.C. at 533-34, 342 S.E.2d at 881-82 (corroboration of defendant's admission that he drove while impaired, in conjunction with the admission itself, is enough to survive a motion to dismiss). We cannot sustain defendant's assignment of error on this point.

[2] Next, defendant contends the trial court erred in denying his motion to dismiss the driving while license revoked charge. We agree. Defendant argues the State presented insufficient evidence that he drove a car and that he did so with knowledge his license was revoked. As stated above, we find the evidence supporting defendant's driving to be sufficient; however, we hold there was insufficient evidence presented that defendant knew his license was revoked.

"To convict a defendant under N.C. Gen. Stat. § 20-28(a) of driving while his license is revoked the State must prove beyond a reasonable doubt (1) the defendant's operation of a motor vehicle (2) on a public highway (3) while his operator's license is revoked." *State v. Richardson*, 96 N.C. App. 270, 271, 385 S.E.2d 194, 195 (1989) (citing *State v. Atwood*, 290 N.C. 266, 271, 225 S.E.2d 543, 545 (1976)). The State must also prove "the defendant had 'actual or constructive knowledge of the . . . revocation in order for there to be a conviction under this statute.' " *Id.* This Court has previously held that "[t]he State satisfies its burden of proof of a G.S. 20-28 violation when, 'nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48 because of the presumption that he received notice and had such knowledge.' " *State v. Curtis*, 73 N.C. App. 248, 251, 326 S.E.2d 90, 92 (1985) (quoting *State v. Chester*, 30 N.C. App. 224, 227, 226 S.E.2d 524, 526 (1976)).

Section 20-48 of our General Statutes states that:

> Whenever the Division is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Division. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. *Proof of the giving of notice in either such manner*

> *may be made by the certificate* of any officer or employee of the Division *or affidavit of any person* over 18 years of age, *naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof.*

N.C. Gen. Stat. § 20-48(a) (2003) (emphasis added). Accordingly, if notice of a revocation is sent via the mail, as was done in this case, there is a rebuttable presumption that defendant has received knowledge of the revocation four days after a certificate or affidavit states that a copy of an official notice has been mailed to defendant's address. *See id.*; *Chester*, 30 N.C. App. at 227-28, 226 S.E.2d at 526-27. When mailing notice, evidence of compliance with the statute requires the State to show an official notice explaining the date revocation will begin *and* a certificate or affidavit of a person stating the "time, place, and manner of the giving thereof." *See, e.g.*, *State v. Herald*, 10 N.C. App. 263, 264, 178 S.E.2d 120, 121-22 (1970) (certificate of mailing complied with statutory "proof of notice" requirement); *see also State v. Curtis*, 73 N.C. App. 248, 251-52, 326 S.E.2d 90, 92-93 (1985) (defendant's stipulation of a mailing date was sufficient to show the notice was mailed to defendant).

Here, the State had a police officer testify that defendant's license was revoked as of 29 December 2002, two days before the incident. The State also introduced an official notice from the Department of Motor Vehicles addressed to defendant, stating the revocation would begin on 29 December 2002. The notice is dated 30 October 2002; however, at trial, there was no testimony, certificate, or affidavit introduced that proves the 30 October 2002 notice was ever mailed to defendant. Without any evidence that an official notice was actually mailed to defendant's address, the State falls short of offering even a *prima facie* case of knowledge, and a dismissal is appropriate. *See State v. Richardson*, 96 N.C. App. 270, 271-72, 385 S.E.2d 194, 194-95 (1989) (dismissal appropriate where the only evidence of defendant's knowledge of revocation was a police officer's testimony).

[3] Defendant also argues that the trial court erred in finding a grossly aggravating factor: that he drove impaired with a child under the age of sixteen in the car. Defendant argues this finding by the trial court, and not the jury, is in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). In *State v. Allen*, 359 N.C. 425, 438-39, 615 S.E.2d 256, 265 (2005), our Supreme Court applied *Blakely* and held that N.C. Gen. Stat. § 15A-1340.16 was unconstitutional to the extent that it required the trial court to find aggravating factors by a preponderance of the evidence, rather than presenting them to the

jury for a determination beyond a reasonable doubt. The remedy applied in *Allen* for this "structural error" was remand for resentencing. *Id.* at 449, 615 S.E.2d at 269. In *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005), our Supreme Court determined that "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." *Id.* at 606, 614 S.E.2d at 264. *Speight* involved a defendant convicted of driving while impaired and sentenced as a Level II offender under N.C. Gen. Stat. § 20-179 (2003), without a jury finding the grossly aggravating factor that escalated his level of punishment. *Id.* at 604, 614 S.E.2d at 263. In accord, here we hold that the trial court's sentence of defendant as a Level II offender on the basis of *its* finding of a grossly aggravating factor was also structural error that requires resentencing. *See id.* at 606, 614 S.E.2d at 264-65.

In sum, the trustworthiness of defendant's confessions was adequately corroborated and his conviction for driving while impaired was without error. Defendant's conviction for driving while license revoked is reversed because the State failed to offer sufficient evidence of compliance with N.C. Gen. Stat. § 20-48. Further, defendant is entitled to a new sentencing hearing on the driving while impaired conviction because the grossly aggravating factor was not submitted to a jury to be determined beyond a reasonable doubt.

No error in part, reversed in part, remanded for resentencing.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. TROLANDO RANQUEL SHINE

No. COA04-1388

(Filed 18 October 2005)

1. Evidence— probation officer's testimony—defendant occupied or controlled the premises

The trial court did not err in a trafficking in cocaine, possession with intent to sell or distribute cocaine, and maintaining a dwelling for keeping and selling cocaine case by admitting the testimony of defendant's probation officer even though defendant

contends the testimony indicated that defendant had committed a previous crime, because: (1) the evidence was not admitted to show defendant had the propensity or disposition to commit the crime charged; (2) the State did not ask the officer any questions regarding the reason for which defendant was on probation; (3) the evidence was admitted in order to show that defendant occupied or controlled the premises in question giving him the requisite knowledge and opportunity to commit the crime; (4) the trial court's limiting instruction did not constitute a mandate that the State had actually established the elements of knowledge and opportunity beyond a reasonable doubt; and (5) the probative value of the officer's testimony substantially outweighed its prejudicial effect.

2. Drugs— instructions—constructive possession

The trial court did not commit plain error in a trafficking in cocaine, possession with intent to sell or distribute cocaine, and maintaining a dwelling for keeping and selling cocaine case by failing to instruct the jury with respect to constructive possession of a controlled substance where possession of the premises is nonexclusive, because: (1) the trial court's instruction, coupled with other evidence of incriminating circumstances such as the discovery of defendant's ID card six inches from the cocaine, was sufficient to allow the jury to determine whether defendant constructively possessed the cocaine; and (2) the jury was not likely to have reached a different verdict had a special instruction been given.

3. Drugs— trafficking in cocaine—possession with intent to sell or distribute cocaine—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of trafficking in cocaine and possession with intent to sell or distribute cocaine at the close of the State's evidence, because there was sufficient evidence of defendant's possession of the premises and other incriminating circumstances to allow the jury to determine whether defendant constructively possessed the cocaine.

4. Drugs— maintaining a dwelling for keeping and selling cocaine—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a dwelling for keeping and sell-

ing cocaine at the close of the State's evidence, because: (1) a reasonable jury could conclude that defendant kept or maintained the property based on evidence that defendant occupied the property for a period of time and paid for cable services, and defendant's probation officer visited him at the property five weeks prior to the execution of the search warrant at which time defendant confirmed it was his residence; and (2) although neither a large amount of cash was found in the residence nor did defendant admit to selling cocaine, there was other evidence that indicated controlled substances were being sold from the residence including a set of digital scales found on the same dresser as the two plastic bags of cocaine, defendant's ID card was found six inches away from the two bags of cocaine, and three pieces of scrap paper were found in the bedroom listing initials and corresponding dollar amounts which the jury could infer was a list of customers and their orders or debts.

5. Sentencing— aggravated sentence—probationary status—failure to submit to jury

The trial court erred in a trafficking in cocaine, possession with intent to sell or distribute cocaine, and maintaining a dwelling for keeping and selling cocaine case by adding a point to defendant's prior record level without first submitting the issue of defendant's probationary status to a jury, because his probationary status, which was used to increase his prior record level, was a fact other than a prior conviction that was required to be submitted to a jury and proved beyond a reasonable doubt.

Appeal by defendant from judgment entered 25 February 2004 by Judge Michael E. Beale in Stanly County Superior Court. Heard in the Court of Appeals 20 September 2005.

Roy Cooper, *Attorney General*, *by Richard G. Sowerby*, *Assistant Attorney General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by Matthew D. Wunsche*, *Assistant Appellate Defender*, *for defendant-appellant.*

MARTIN, Chief Judge.

Defendant was convicted by a jury of trafficking in cocaine, possession with intent to sell or distribute cocaine, and maintaining a dwelling for keeping and selling cocaine. The trial court sentenced defendant to a minimum of thirty-five months and a maximum of

forty-two months imprisonment and imposed a fifty thousand dollar fine for trafficking in cocaine. The court consolidated the remaining two charges and sentenced defendant to a minimum of ten months and a maximum of twelve months imprisonment, to begin at the expiration of the previous sentence. The court suspended the second sentence, placing defendant on supervised probation for a term of thirty-six months. Defendant appeals.

The evidence at trial tended to show that on 18 December 2002, Detective John Johnson and other officers of the Stanly County Sheriff's Office executed a search warrant at 10701 Lee Road in Norwood, North Carolina. No one was present at the residence at the time it was searched. Detective Johnson testified a Crown Royal bag was found in the bedroom of the residence which contained two plastic bags of cocaine. One plastic bag held approximately 26.5 grams of cocaine, and the other held approximately 9.1 grams of cocaine. Approximately six inches from the Crown Royal bag, the officers found a North Carolina Identification card with defendant's name, date of birth, picture, and the following address: "Old Road, P.O. Box 9, Norwood, North Carolina." The officers also found defendant's name on a Time Warner Cable receipt dated 25 September 2002, which listed 10701 Lee Road, Norwood, N.C. as the service address.

In addition to these documents, the officers found a set of digital scales, a video camera, scrap paper listing initials with corresponding dollar amounts, and two boxes of ammunition in the bedroom of the residence. No identifying fingerprints were found on any of the items seized during the search. A tape in the video camera depicted approximately ten individuals in the living room of the residence, but defendant was not one of those individuals. Detective Robert Eury of the Albemarle Police Department testified that defendant was nicknamed "Troll" and that the name "Troll" was referred to by those depicted in the videotape between eight and eleven times.

James Stephens, a probation officer with the Stanly County Probation office, testified over objection that defendant was a probationer on his case load. Officer Stephens testified that on 22 October 2002, he explained to defendant that he would have to visit defendant's home to verify the address. Defendant then gave 10701 Lee Road in Norwood as his home address. When Officer Stephens later visited that address, defendant answered the door and verified that it was his residence. Defendant never notified Officer Stephens of a change of address.

At the close of the State's evidence, defendant's motion to dismiss all the charges for insufficiency of the evidence was denied. Defendant offered no evidence.

Defendant presents the following arguments on appeal: (1) the trial court violated Rules 404(b) and 403 of the North Carolina Evidence Code by allowing testimony by defendant's probation officer; (2) the trial court committed plain error by failing to instruct the jury on non-exclusive possession of the premises; (3) the trial court erred by denying defendant's motion to dismiss all the charges against him at the close of the State's evidence for insufficiency of the evidence; and (4) the trial court erred by finding that defendant committed the offense while on probation, thereby enhancing defendant's sentence, without submitting that question to the jury. For the reasons which follow, we find no error in the rulings of the trial court but remand for resentencing.

[1] Defendant contends the trial court's admission of testimony by his probation officer violated N.C. Gen. Stat. § 8C-1, Rule 404(b) because the testimony indicated that defendant had committed a previous crime. Rule 404(b) states, in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). Our Supreme Court has recently stated:

> This rule is 'a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.' The list of permissible purposes for admission of 'other crimes' evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.

State v. Brewington, 170 N.C. 264, 276-77, 612 S.E.2d 648, 656 (2005) (quoting *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995)).

In this case, the testimony of Officer Stephens was not admitted to show defendant had the "propensity or disposition" to commit the crime charged. The State did not ask Officer Stephens any questions regarding the reason for which defendant was on probation; the trial court admitted the evidence in order to show "that the defendant occupied or controlled the premises in question," giving him the requisite knowledge and opportunity to commit the crime. The evidence was relevant and was properly admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b).

The trial court also gave the following limiting instruction regarding the testimony of Officer Stephens:

> Evidence has been received tending to show that the defendant was placed on probation—was on probation at the time of the offense and made statements about his address and was seen at the address by his probation officer. This evidence was received solely for the following purposes: One, of showing the defendant had knowledge, which is a necessary element of the crimes charged in this case; and that the defendant occupied or controlled the premises in question and thus had the opportunity to commit the crime.
>
> If you believe this evidence, you may consider it, but only for the limited purposes for which it was received. You may not convict him on the present charge because he had been placed on probation in the past.

Defendant argues the wording of this instruction constituted "a mandate that the State had actually established these elements [of knowledge and opportunity] beyond a reasonable doubt." We disagree. The trial court clearly indicated that (1) the jurors could decide whether or not they found Officer Stephens' testimony to be credible, (2) their consideration of the testimony was limited to defendant's knowledge and opportunity to commit the crime, and (3) they could not "convict [defendant] on the present charge because he had been placed on probation in the past." This argument is without merit.

Defendant also argues Officer Stephen's testimony should have been excluded under N.C. Gen. Stat. § 8C-1, Rule 403. Rule 403 allows relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2003). Other evidence linking defendant to the residence included a cable receipt for 10701 Lee Road bearing defendant's name, the fact

that defendant's ID card was found in the residence (although the card itself listed a different address), and the possibility that individuals on the video-tape spoke defendant's nickname. Given the relative weakness of such evidence, the trial court correctly concluded that the probative value of Officer Stephen's testimony, which tended to show that defendant occupied the premises in question, substantially outweighed its prejudicial effect. This argument is overruled.

[2] Defendant's next argument is that the trial court committed plain error by failing to instruct the jury with respect to constructive possession of a controlled substance where possession of the premises is non-exclusive. " 'Constructive possession exists when a person,' although not having actual possession of the controlled substance, 'has the intent and capability to maintain control and dominion over [the] controlled substance.' " *State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001) (quoting *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993)). Constructive possession of drugs may be established by evidence the defendant has exclusive possession of the property where the drugs are located. *Id.* However, our Supreme Court has stated that "where possession of the premises is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984). Defendant argues the trial court should have instructed the jury regarding the need to find "other incriminating circumstances" if it concluded defendant did not possess the premises exclusively. Defendant did not object to the instructions as given or request a special instruction. He therefore is entitled to relief only if the court's failure to give such an instruction *sua sponte* constitutes plain error. N.C. R. App. P. 10(c)(4) (2004). Plain error occurs 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. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). Thus, "the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79.

The trial court properly instructed the jury on the elements of each crime charged, and it gave the following pattern jury instruction regarding constructive possession:

> A person has constructive possession of a substance if he does not have it on his person, but is aware of its presence, and has either by himself, or together with others, both the power and the

> intent to control its disposition or use. A person's awareness of the presence of a substance and his power, intent to control its disposition or use may be shown by direct evidence, or may be inferred from the circumstances.
>
> If you find from the evidence beyond a reasonable doubt that a substance was found in or at certain premises, and the defendant exercised control over those premises, whether or not he owned it, this would be a circumstance from which you may infer that the defendant was aware of the presence of the substance, and had the power and the intent to control its disposition or use.

We conclude the trial court's instructions with respect to constructive possession, coupled with other evidence of incriminating circumstances, such as the discovery of defendant's ID card six inches from the cocaine, is sufficient to allow the jury to determine whether defendant constructively possessed the cocaine. We do not believe the jury was likely to have reached a different verdict had a special instruction been given. *See id.* This argument is overruled.

Defendant's next argument is that the trial court erred by denying his motion to dismiss all the charges against him at the close of the State's evidence for insufficiency of the evidence. Upon a motion to dismiss criminal charges for insufficiency of the evidence, 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)).

[3] Defendant argues the trial court should have granted his motion to dismiss the charges of trafficking in cocaine by possession and possession with intent to sell and deliver cocaine due to insufficient evidence of his constructive possession of the cocaine. We disagree. The testimony of defendant's probation officer that he lived at 10701 Lee Road, which we have deemed properly admitted, was sufficient

to allow the jury to determine whether defendant lived at that address. *See State v. James*, 60 N.C. App. 529, 532, 299 S.E.2d 451, 453 (1983) (stating that "[t]he weight and credibility of the testimony are matters for the jury"). Although defendant may not have possessed the premises exclusively, there was evidence of other incriminating circumstances, including (1) defendant's ID card found on the same dresser as the cocaine and the digital scales, and (2) the video of a party at the premises in which people spoke defendant's nickname. We conclude there was sufficient evidence of defendant's possession of the premises and "other incriminating circumstances," *Brown*, 310 N.C. at 569, 313 S.E.2d at 589, to allow the jury to determine whether defendant constructively possessed the cocaine. This argument is overruled.

[4] Defendant also argues the trial court should have granted his motion to dismiss the charge of maintaining a dwelling for the keeping or selling of cocaine.

> To obtain a conviction for knowingly and intentionally maintaining a place used for keeping and/or selling controlled substances under N.C. Gen. Stat. § 90-108(a)(7), the State has the burden of proving the defendant: (1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance.

Frazier, 142 N.C. App. at 365, 542 S.E.2d at 686. According to *Frazier*, to determine whether a person keeps or maintains a place under N.C. Gen. Stat. § 90-108(a)(7), we must consider the following factors, none of which are dispositive: "occupancy of the property; payment of rent; possession over a duration of time; possession of a key used to enter or exit the property; and payment of utility or repair expenses." *Id.* Here, there was evidence that defendant occupied the property for a period of time and paid for cable services. His probation officer visited him at the property five weeks prior to the execution of the search warrant, and defendant confirmed it was his residence. Considering this evidence in the light most favorable to the State, the trial judge properly found that a reasonable jury could conclude that defendant kept or maintained this property.

To determine whether the residence was used for keeping and selling a controlled substance depends on " 'the totality of the circumstances.' " *Id.* at 366, 542 S.E.2d at 686 (quoting *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994)). Factors that might be considered include: "a large amount of cash being found in the place; a

defendant admitting to selling controlled substances; and the place containing numerous amounts of drug paraphernalia." *Id.* Here, although neither a large amount of cash was found in the residence nor did defendant admit to selling cocaine, there was other evidence indicating controlled substances were being sold from the residence. A set of digital scales was found on the same dresser as the two plastic bags of cocaine, which Officer Johnson testified were of the type frequently used to weigh controlled substances for sale. Defendant's ID card was found on the dresser six inches away from the two bags of cocaine. Three pieces of scrap paper were found in the bedroom listing initials and corresponding dollar amounts, which the jury could infer was a list of customers and their orders or debts. These circumstances would allow a reasonable jury to conclude that the residence in question was being used for keeping or selling controlled substances. The trial court therefore properly denied defendant's motion to dismiss the charge of maintaining a dwelling for keeping or selling cocaine.

[5] Finally, defendant argues the trial court erroneously enhanced his sentence based on its finding that he committed the crime while on probation. In *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and in the North Carolina Supreme Court's recent ruling in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), "[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. This Court has recently held that a defendant's probationary status, used to increase a defendant's prior record level, was "a fact other than a prior conviction" and therefore was required to be submitted to a jury and proved beyond a reasonable doubt. *State v. Wissink*, 172 N.C. App. 829, —— S.E.2d —— (2005), *temp. stay allowed*, 360 N.C. 77, —— S.E.2d ——, (2005). While we believe the same "procedural safeguards" which attach to the "fact" of a prior conviction, *see Apprendi v. New Jersey*, 530 U.S. 466, 488-90, 147 L. Ed. 2d 435, 454-55 (2000), also attach to the "fact" of whether a defendant is on supervised probation, we are bound by the decision in *Wissink*, *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and must hold that the trial court erred "by adding a point to defendant's prior record level without first submitting the issue to a jury." *Wissink*, 172 N.C. App. at 837, —— S.E.2d at ——. Therefore, we must remand these cases to the trial court for resentencing.

No error in the trial.

Remanded for resentencing.

Judges BRYANT and GEER concur.

MARK AND BETSEY ELLIOTT, KIM AND LEWIS CARAGANIS, WAYNE THORN AND ROBIN WHITTEN, JOEY HOWELL AND LISA NEAL, PAT WESLEY AND DAVID GREEN, PLAINTIFFS V. JAMES AND MARY MUEHLBACH, DEFENDANTS

No. COA04-1128

(Filed 18 October 2005)

1. Nuisance— per accidens—findings of fact—reasonableness

The trial court erred in a nuisance case by concluding its findings of fact adequately supported its conclusion of law that defendants' racetrack constitutes a nuisance per accidens, and the case is remanded for further findings of fact, because the trial court's findings of fact do not acknowledge the distinction between a reasonable person in plaintiffs' or defendants' position and reasonable persons generally looking at the whole situation impartially and objectively.

2. Nuisance— per accidens—findings of fact—substantiality of injury

The trial court did not err in a nuisance case by its findings of fact regarding the substantiality of the injury, and the findings are supported by competent evidence because: (1) plaintiffs' testimony and exhibits provide ample support for the trial court's findings; and (2) factors including the objective measurement of the sound generated by ATVs operated on the track, the failure of plaintiffs to offer testimony from disinterested or impartial witnesses, and defendants' characterization of plaintiffs' testimony as exaggerated all relate to the credibility and weight to be afforded the testimony which must be resolved by the trial court and are not a basis for overturning a finding of fact.

3. Evidence— acoustics—expert testimony—motion to strike

The trial court did not abuse its discretion in a nuisance case by denying defendants' motion to strike the testimony of plaintiffs' expert witness in acoustics and noise control, because: (1)

defendants' objection based on N.C.G.S. § 8C-1, Rule 602 is without merit; and (2) defendants have made no showing and presented no argument suggesting that the information relied upon by the expert was an inadequate basis under N.C.G.S. § 8C-1, Rule 703 for the expert's opinion.

Appeal by defendants from judgment entered 22 December 2003 by Judge Ronald L. Stephens in Chatham County Superior Court. Heard in the Court of Appeals 24 March 2005.

Poyner & Spruill, LLP, by Keith H. Johnson, for plaintiffs-appellees.

Stark Law Group, PLLC, by Thomas H. Stark and W. Russell Congleton, for defendants-appellants.

GEER, Judge.

Plaintiffs Mark and Betsey Elliott, Kim and Lewis Caraganis, Wayne Thorn and Robin Whitten, Joey Howell and Lisa Neal, and Pat Wesley and David Green, brought suit against defendants James and Mary Muehlbach, alleging that defendants' construction and use of a racetrack for all terrain vehicles ("ATVs") on defendants' property constituted a nuisance. Defendants appeal from the trial court's order granting a permanent injunction prohibiting defendants' operation of the racetrack. Because we hold that the trial court's order failed to make sufficient findings of fact to support its conclusion that the track was a nuisance *per accidens*, we reverse and remand for additional findings of fact.

Facts

The trial court made the following findings of fact that have not been challenged on appeal. The parties to this action all live on multiple-acre tracts of land in an unzoned rural area in Chatham County. As of 2001, each of the plaintiffs had lived in their homes for at least nine years. They were attracted to the area because of the relative peace and quiet, seclusion, and isolation.

Defendants' son rode ATVs in the area for a number of years and, in approximately 1998, began competing in ATV races. At the time of the trial, he had become a professional ATV racer. In late 2001, defendants constructed a dirt racetrack on their property. The track, which took up approximately three cleared acres of defendants' property, had both an outer loop and an inner loop, with the outer

loop measuring approximately 1/5 to 1/4 of a mile in distance. In November 2001, defendants also obtained a building permit to construct a 16 by 20 foot building with restrooms next to the track. The permit was for a business with an "open air arena" for up to 50 spectators, with parking for up to 50 vehicles. Only the foundation for the building had been built at the time of trial and defendants indicated that they had abandoned the building project. The permits, however, remain in effect.

Although the track had not been fully completed, defendants began to run ATVs on the track in early December 2001. Plaintiffs filed suit on 5 November 2002, alleging claims for nuisance and trespass and seeking an injunction against use of the racetrack. The trial court issued a preliminary injunction on 26 January 2003, pending resolution of the lawsuit. On 22 December 2003, following a bench trial, the trial court entered a final judgment concluding "that the Defendant[s'] use of the Track and operation of ATVs and testing of ATVs . . . on the Track constitutes a private nuisance per accidens in fact." The court further concluded "that the only reasonable and sure means for eliminating the nuisance caused by use of the Track is to ban its use entirely by any ATV vehicle, whether 2 wheel, 3 wheel, or 4 wheel." The court, therefore, entered a permanent injunction barring defendants from operating or allowing others to operate any ATV on the track or from constructing a new track or similar facility on their property. Defendants have appealed from the trial court's decision.

Discussion

" 'It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *Keel v. Private Bus., Inc.*, 163 N.C. App. 703, 707, 594 S.E.2d 796, 799 (2004) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). We reject defendants' suggestion that we apply a different standard of review that would permit us to substitute our own view of the facts.

Private nuisances are either nuisances *per se* or nuisances *per accidens*:

> A nuisance *per se* or at law is an act, occupation, or structure which is a nuisance at all times and under any circumstances,

> regardless of location or surroundings. Nuisances *per accidens* or in fact are those which become nuisances by reason of their location, or by reason of the manner in which they are constructed, maintained, or operated.

Morgan v. High Penn Oil Co., 238 N.C. 185, 191, 77 S.E.2d 682, 687 (1953) (internal citations omitted). "A person who intentionally creates or maintains a private nuisance is liable for the resulting injury to others regardless of the degree of care or skill exercised by him to avoid such injury." *Id.* at 194, 77 S.E.2d at 689.

In this case, plaintiffs contended and the trial court concluded that defendants' ATV track was a private nuisance *per accidens*. *See Hooks v. Int'l Speedways, Inc.*, 263 N.C. 686, 690, 140 S.E.2d 387, 390 (1965) ("A race track is not a nuisance *per se*. But its operation may, under certain circumstances, be a nuisance *per accidens*, *i.e.*, a nuisance in fact."). In *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 618, 124 S.E.2d 809, 814 (1962), the Supreme Court held that in order to establish a *prima facie* case of nuisance *per accidens*, a plaintiff must prove: (1) that the defendant's use of its property, under the circumstances, unreasonably invaded or interfered with the plaintiff's use and enjoyment of the plaintiff's property; and (2) because of the unreasonable invasion or interference, the plaintiff suffered substantial injury. *See also Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 456, 553 S.E.2d 431, 437 (2001) ("Once plaintiff establishes that the invasion or intrusion is unreasonable, plaintiff must prove the invasion caused substantial injury to its property interest."), *disc. review denied*, 356 N.C. 315, 571 S.E.2d 220 (2002).

[1] Defendants first contend that the trial court's findings of fact fail to properly address the first element. In *Watts*, our Supreme Court stressed that the proper focus with respect to the reasonableness of the interference is "not whether a reasonable person in plaintiffs' or defendant's position would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable." *Watts*, 256 N.C. at 618, 124 S.E.2d at 814. The Court added: "Regard must be had not only for the interests of the person harmed but also for the interests of the defendant, and for the interests of the community." *Id.* After acknowledging that what is reasonable in one locality and in one set of circumstances may be unreasonable in another, the Court held:

> The circumstances *which are to be considered by [the factfinder]* in determining whether or not defendant's conduct is unreasonable include: the surroundings and conditions under which defendant's conduct is maintained, the character of the neighborhood, the nature, utility and social value of defendant's operation, the nature, utility and social value of plaintiffs' use and enjoyment which have been invaded, the suitability of the locality for defendant's operation, the suitability of the locality for the use plaintiffs make of their property, the extent, nature and frequency of the harm to plaintiffs' interest, priority of occupation as between the parties, and other considerations arising upon the evidence.

Id. (emphasis added). While no single factor is decisive, "all the circumstances in the particular case must be considered." *Id.*

Defendants argue that the trial court's findings of fact do not acknowledge the distinction between "a reasonable person in plaintiffs' or defendant's position" and "reasonable persons generally, looking at the whole situation impartially and objectively," as required by *Watt*s. *Id.* We agree with defendants.

The trial court made only one finding of fact regarding the reasonableness inquiry: "The operation of ATVs on the Track, the Defendant's [sic] operation and testing of Racing ATVs on the Track and any running of any ATV type vehicle on the Track has on multiple occasions, substantially and unreasonably interfered with the plaintiffs us [sic] and enjoyment of their properties . . . ." The trial court never made a finding on the question "whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable." *Id.* The order focused only on the reasonableness from the perspective of the plaintiffs rather than on the broader issue mandated by *Watts*. While the trial court made findings of fact on some of the circumstances identified by the *Watts* Court, other pertinent circumstances were omitted.

We are, therefore, compelled to hold that the trial court's order contains insufficient findings of fact to support its conclusion of law. In light of this holding, we remand this case to the trial court for additional findings on the reasonableness issue as defined by *Watts*, including the circumstances pertinent to that issue set forth in *Watts* or arising out of the evidence.

[2] With respect to the second element of nuisance *per accidens*—the substantiality of the injury—the Court in *Watts* held:

> By substantial invasion is meant an invasion that involves more than slight inconvenience or petty annoyance. The law does not concern itself with trifles. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. Each individual in a community must put up with a certain amount of annoyance, inconvenience or interference, and must take a certain amount of risk in order that all may get on together. But if one makes an unreasonable use of his property and thereby causes another substantial harm in the use and enjoyment of his, the former is liable for the injury inflicted.

Id. at 619, 124 S.E.2d at 815. Defendants do not dispute that the trial court made the necessary findings of fact, but contend that those findings are not supported by competent evidence. We disagree.

Plaintiffs' testimony and exhibits provide ample support for the trial court's findings of fact. Defendants, however, contend that the findings are unsupported because of the lack of any "objective measurement of the sound generated by ATVs operating on the track," the failure of plaintiffs to offer testimony from disinterested or impartial witnesses, and defendants' characterization of plaintiffs' testimony as exaggerated. These factors all relate to the credibility and weight to be afforded the testimony. Such questions must be resolved by the trial court and are not a basis for overturning a finding of fact. *Cartin v. Harrison*, 151 N.C. App. 697, 703, 567 S.E.2d 174, 178, *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). We, therefore, overrule defendants' assignments of error contending that the trial court's findings of fact are not supported by competent evidence.

[3] Finally, defendants assign error to the trial court's denial of their motion to strike the testimony of plaintiffs' expert witness, Dr. Noral Stewart. Dr. Stewart is an expert in acoustics and noise control and in community and environmental noise. He testified about the topography of the plaintiffs' and defendants' rural property and how it might affect the sounds emanating from defendants' track. He also offered opinions that the engine noise from the track would constitute the "dominant" sound in the neighborhood, that the nature of that sound could cause substantial annoyance to neighbors regardless of the decibel level, and that no controls could be implemented that would prevent the track from being the dominant noise source.

A trial court's ruling on the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). "[U]nder North Carolina law, a trial court that is considering whether to admit proffered expert testimony pursuant to North Carolina Rule of Evidence 702 must conduct a three-step inquiry to determine: (1) whether the expert's proffered method of proof is reliable, (2) whether the witness presenting the evidence qualifies as an expert in that area, and (3) whether the evidence is relevant." *State v. Morgan*, 359 N.C. 131, 160, 604 S.E.2d 886, 903-04 (2004) (citing *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 79, 126 S. Ct. 47 (2005).

On appeal, defendants do not address *Howerton* or *Morgan*. Nor do they cite any case law authority to support their contention that Dr. Stewart's testimony was inadmissible. They instead rely only on a general citation to Rules 602 and 703 of the North Carolina Rules of Evidence. Rule 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." As this Court has previously pointed out, "[i]t is well settled that an expert witness need not testify from firsthand personal knowledge, so long as the basis for the expert's opinion is available in the record or on demand." *State v. Purdie*, 93 N.C. App. 269, 276, 377 S.E.2d 789, 793 (1989). *See also State v. McCall*, 162 N.C. App. 64, 72, 589 S.E.2d 896, 901 (2004) ("The fact that Vaughn's expert testimony . . . was based on information related to her by a third party does not affect the admissibility of her opinion, but instead goes to the weight of the evidence."). Defendants' objection based on Rule 602 is, therefore, without merit.

With respect to Rule 703, defendants argue that Dr. Stewart's testimony should have been excluded because Dr. Stewart admitted that he had not personally heard any of the sounds emanating from the track or heard defendants' ATVs in operation and he had not measured their decibel levels. Rule 703 requires only that the facts or data upon which an expert bases his opinion be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." N.C.R. Evid. 703. Dr. Stewart testified that he viewed the racetrack (although not while it was in use); reviewed aerial photos and topographical maps of the area; listened to recordings of the sound generated by the ATVs; and discussed the racetrack noise with several of the plaintiffs. Defendants have made

no showing and presented no argument suggesting that this information was an inadequate basis under Rule 703 for Dr. Stewart's opinions. Without such a showing, defendants' arguments represent only "lingering questions or controversy concerning the quality of the expert's conclusions [and] go to the weight of the testimony rather than its admissibility." *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688. The trial court, therefore, did not err in denying defendants' motion to strike Dr. Stewart's testimony.

Conclusion

We hold that the trial court did not err in admitting Dr. Stewart's testimony and defendants have pointed to no other possible trial error. We further hold that the trial court's findings of fact appealed by defendants are supported by competent evidence, but that the trial court's findings are inadequate to support its conclusion of law that defendants' racetrack constitutes a nuisance *per accidens*. Accordingly, we reverse and remand for further findings of fact.

Reversed and remanded.

Judges TIMMONS-GOODSON and CALABRIA concur.

BARTON v. WHITE

[173 N.C. App. 717 (2005)]

JACK L. BARTON AND RUBY M. BARTON, PLAINTIFFS V. SUE PERRY WHITE AND EARL RAY GODFREY, D/B/A SONNY GODFREY, DEFENDANTS

No. COA04-1604

(Filed 18 October 2005)

Easements— appurtenant—ownership—summary judgment

The trial court did not err by granting summary judgment in favor of defendants in an action regarding ownership of an easement appurtenant in the grassy strip of land along the southwestern edge of plaintiffs' property on Lot 58, because the instant plat cannot, as a matter of law, demonstrate an intent by the grantor to create a road on the sixty-foot-wide strip of land when: (1) the plat merely shows an unmarked oblong space sixty feet wide between lots 57 and 58; and (2) there are no express words or other unambiguous indicia that the strip was intended to depict a road, public or private.

Appeal by plaintiffs from judgment entered 1 September 2004 by Judge J. Richard Parker in Perquimans County Superior Court. Heard in the Court of Appeals 13 September 2005.

Holt York McDarris & High, L.L.P., by Bradford A. Williams, and W. Hackney High, Jr., for plaintiffs-appellants.

Hornthal, Riley, Ellis & Maland, L.L.P., by L. Phillip Hornthal, III for defendant-appellee Sue Perry White.

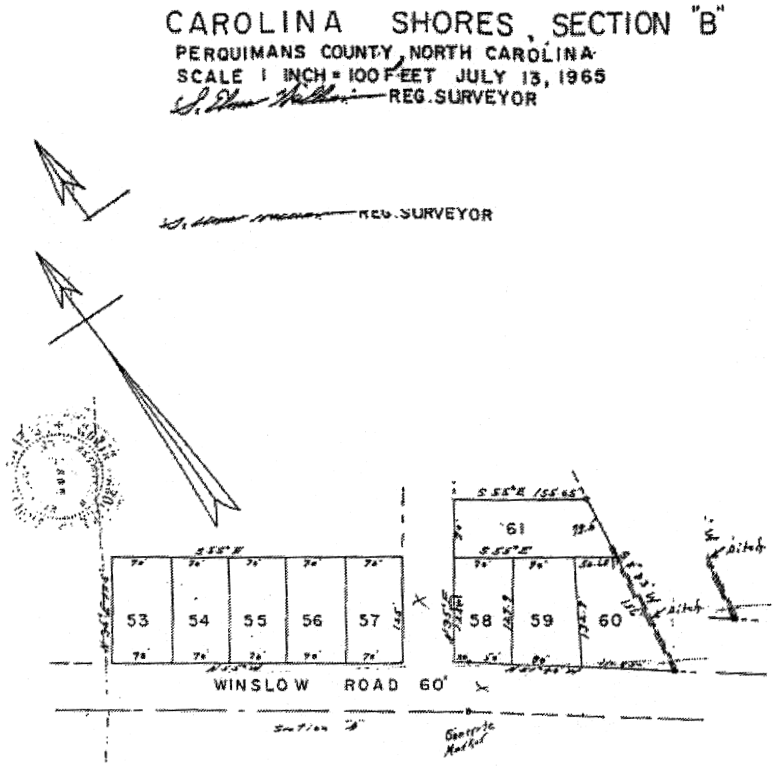
The Twiford Law Firm, P.C., by David R. Pureza, for defendant-appellee Earl Ray Godfrey, d/b/a Sonny Godfrey.

LEVINSON, Judge.

Plaintiffs (Jack L. Barton and Ruby M. Barton, husband and wife) appeal from an order granting summary judgment in favor of defendants. We affirm.

Plaintiffs are the owners of property in the Carolina Shores subdivision in Perquimans County, North Carolina. On 3 October 2003 plaintiffs filed suit against defendants. Their complaint alleged an interest in an easement appurtenant over a sixty-foot wide grassy strip of land adjoining their property. The strip of land was owned by defendant Sue Perry White. Plaintiffs sought damages and injunctive relief. The disputed area is depicted in a plat, recorded in Plat

Book 4, page 43 with the Perquimans County Register of Deeds, and filed 21 October 1965. The plat depicts the layout of Section B of the Carolina Shores subdivision, comprising Lots 53 through 61. This plat is reproduced below in its entirety:



Plaintiffs purchased Lot 58 from Julian White, defendant Sue White's father, in 1995. Plaintiffs' deed to Lot 58 references the recorded plat. As illustrated on the plat, between Lots 57 and 58, there is an unmarked open space sixty feet wide. The unmarked strip of land runs along the southwestern edge of Lot 58. The strip of land was not conveyed with Lot 58, and the deed to Lot 58 does not include an easement or other interest in the unmarked strip running with the land. There is no contention that the unmarked strip was ever sold by Julian White. It is currently owned by defendant Sue White. There is no contention by plaintiffs that their interest in the strip depends, in part, on the right of access that may or may not necessarily arise for the benefit of the Lot 61 owners.

The unmarked strip of land is covered with grass and low-lying vegetation. While the Godfrey defendants, who are tenant-farmers, do not claim any ownership interest in the strip, they use the same to gain access to the White properties. Plaintiffs have also used the grassy strip to access Lot 58. While Julian White was alive, he gave plaintiffs express permission to use the grassy strip and to lay a culvert along a drainage ditch within the strip so that plaintiffs could drive vehicles from the strip onto Lot 58. According to plaintiffs, Julian White told Jack Barton, "[G]o ahead and put your driveway there. And just keep the grass and weeds cut." For seven years plaintiffs mowed the strip and used it to access their driveway. Julian White died in 2000.

In 2002, the Godfrey defendants erected "No Trespassing" signs along the grassy strip and removed plaintiffs' culvert from the drainage ditch. When one of the plaintiffs complained of Godfrey's actions to Sue White, she responded, "Well we have decided to leave things as they are."

Plaintiffs sued to enjoin defendants from hindering their use of their easement in the grassy strip and for damages for the removal of their culvert. Defendants moved for summary judgment. The trial court entered an order granting defendants' motion. From this order, plaintiffs appeal.

On appeal, plaintiffs contend that they own an easement appurtenant in the grassy strip of land along the southwestern edge of their property, Lot 58. Plaintiffs claim the easement affords them ingress and egress to their lot. However, they do not claim that their only access to Lot 58 is over the grassy strip. Lot 58, in fact, fronts Winslow Road. Although the deed to plaintiffs land is silent as to the alleged easement, plaintiffs argue they acquired the easement by purchasing Lot 58 in reliance on the recorded plat to Section B of the Carolina Shores subdivision. Plaintiffs' central contention is that, because the plat itself raises a material issue of fact concerning the existence of a road along the strip, the trial court erred by granting summary judgment in favor of defendants. We disagree.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). "All infer-

ences are to be drawn against the moving party and in favor of the opposing party. Likewise, on appellate review . . . the evidence is considered in the light most favorable to the nonmoving party." *Garner v. Rentenbach Constructors, Inc.* 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999) (internal quotation marks and citations omitted). Summary judgment is proper where "the only issue remaining is purely a legal one[.]" *G.E. Capital Mortg. Servs., Inc. v. Neely*, 135 N.C. App. 187, 190, 519 S.E.2d 553, 555 (1999).

> An easement appurtenant is a right to use the land of another, i.e., the servient estate, granted to one who also holds title to the land benefitted by the easement, i.e., the dominant estate. The easement attaches to the dominant estate and passes with the transfer of the dominant estate as an appurtenance thereof. . . . Once an easement appurtenant is properly created, it runs with the land and is not personal to the landowner.

Brown v. Weaver-Rogers, Assoc., Inc., 131 N.C. App. 120, 123, 505 S.E.2d 322, 324 (1998) (citation omitted).

An easement appurtenant in a road of a subdivision may be created through the purchase of a deed referencing the recorded plat of the subdivision:

> It is well settled in this State that when an owner of land has it subdivided and platted into streets and lots and thereafter sells a lot by reference to the plat, nothing else appearing the purchaser acquires the right to have the streets shown on the plat kept open for his reasonable use.
>
> In a strict sense it is not a dedication, for a dedication must be made to the public and not to part of the public. It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished or diminished except by agreement or estoppel. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots.

Finance Corp. v. Langston, 24 N.C. App. 706, 710-11, 212 S.E.2d 176, 179 (1975) (internal quotation marks and citations omitted). "The basis of this right is *estoppel in pais*, viz.: it would be fraudulent to allow the owner to resume private control over such streets and parks." *Oliver v. Ernul*, 277 N.C. 591, 598, 178 S.E.2d 393, 397 (1971).

In *Harry v. Crescent Resources Inc.*, 136 N.C. App. 71, 80, 523 S.E.2d 118, 124 (1999), where the issue was whether landowners had an easement in certain small parcels, this Court held that, "the fact that the [unmarked] remnant parcels were depicted on the subdivision plat is not sufficient to demonstrate a clear expression of the intent of Crescent to grant an easement appurtenant to the plaintiffs."

Here, the material facts are undisputed. The plat was recorded prior to the purchase of Lot 58 by plaintiffs. The deed to Lot 58 references the plat but not the alleged easement. While the parties vigorously disagree about whether the plat demonstrates an intention on the part of Julian White to dedicate the strip as a public road, it is undisputed that neither the Department of Transportation, nor any other public authority, has ever accepted the same. *See Oliver*, 277 N.C. at 598, 178 S.E.2d at 396 ("A dedication without acceptance is merely a revocable offer and is not complete until accepted . . . . An acceptance must be made by some competent public authority, and cannot be established by permissive use.") (internal quotation marks and citation omitted).

Thus, according to the plaintiffs, the issue is whether the plat shows a "private access street" between Lots 57 and 58 upon which they have a "right of access." Guided by the discussion and holding in *Harry*, we conclude the plat does not raise a justiciable issue on this point, and that the superior court properly entered summary judgment in defendants' favor.

The plat merely shows an unmarked oblong space, sixty feet wide, between Lots 57 and 58. There are no express words or other unambiguous indicia that the strip was intended to depict a road, public or private. *See*, *e.g.*, *Price v. Walker*, 95 N.C. App. 712, 383 S.E.2d 686 (1989) (holding that an easement appurtenant in roadway was created by the sale of lots in reference to a recorded map which clearly showed the path of "Pump Station Road" across the properties). In this case, "Winslow Road" is clearly drawn and marked as the same. And there is no common purpose or use specified on the plat for the strip. While Winslow Road has been used as a road for the property owners abutting the same, there has been no State acceptance and use of the strip at issue as a road. Lot 58 can be accessed by means of Winslow Road and, as defendants correctly observe, it is unclear why Julian White would intend to dedicate the strip for a road that, arguably, "does not go anywhere." We also observe that the northern end of the grassy strip, as illustrated on the plat, is open-

ended. Consequently, the extent to which this "road" would extend is left completely undefined. *See Stines v. Willyng, Inc.*, 81 N.C. App. 98, 344 S.E.2d 546 (1986) ("Park Property" expressly labeled as such on plat lacked boundaries with sufficient certainty to create a valid easement or dedication).

Relying only on the plat, plaintiffs suggest that because the only means of access to Lot 61 is through the grassy strip, Julian White must have intended to dedicate the strip as a road. The plat, however, does not definitively establish whether Lot 61 owners have means of access on the eastern edge of that property line. And, while no line was drawn across the southern edge of the sixty-foot strip, and the property might be an appropriate size and shape for use as a road, the plat does not raise a justiciable issue of whether the grantor intended to dedicate or otherwise transfer an interest in the property. We are, of course, concerned here with the transfer of property rights. "The free use of property is favored in our State. When there are doubts about the use to which property may be put, those doubts should be resolved in favor of such free use." *Harry v. Crescent Resources, Inc.*, 136 N.C. App. 71, 80, 523 S.E.2d 118, 124 (1999) (citing *Hullett v. Grayson*, 265 N.C. 453, 144 S.E.2d 206 (1965)). In short, the Carolina Shores plat at issue illustrates a strip of land lying between Lots 57 and 58 that remains an undivided part of the original, unsubdivided land owned by Julian A. White.

On these facts, the trial court correctly concluded that there is no genuine issue of material fact, and that the instant plat cannot, as a matter of law, demonstrate an intent by the grantor to create a road on the sixty-foot-wide strip of land. This assignment of error is overruled.

Plaintiffs' remaining assignments of error necessarily fail because they are largely based on their first assignment of error.

Affirmed.

Judges WYNN and CALABRIA concur.

RICHARD W. BAILEY, PLAINTIFF v. HANDEE HUGO'S, INC., AND SAMPSON-BLADEN OIL COMPANY, INCORPORATED, DEFENDANTS

No. COA05-13

(Filed 18 October 2005)

1. Parties— motion to amend to add new party—expiration of statute of limitations—no relation back—equitable estoppel inapplicable

The trial court did not abuse its discretion in a slip and fall case by denying plaintiff's motion to amend to add a new party even though the insurance company misrepresented its insured for the pertinent property, because: (1) the trial court properly stated that the amendment to add a new party would be futile and unduly prejudicial; (2) the statute of limitations had run and would not stand against a new party; (3) relation-back does not apply; (4) equitable estoppel was inapplicable when a search of the Register of Deeds records would have revealed the owner of the land on which the incident occurred as well as the lease extended to the operator of the store; and (5) plaintiff failed to present his alternative theories on appeal before the trial court and thus they are waived.

2. Premises Liability— slip and fall—motion to dismiss—failure to name responsible party

The trial court did not err in a slip and fall case by granting defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(7), because: (1) the two named parties in the lawsuit had no responsibility for the premises where the incident at issue occurred; and (2) the party which plaintiff sought to add was the party who operated the premises where the incident occurred, there was no way for the court to cure the defect of failing to join the responsible party where the statute of limitations had expired, and any attempt to add the responsible party would have been futile.

3. Premises Liability— slip and fall—summary judgment

The trial court did not err in a slip and fall case by granting defendants' motion for summary judgment, because: (1) the affidavits, depositions, and discovery responses showed there was no named party in the case which could be held responsible; (2) a sister corporation cannot be held responsible for the acts of another corporation without evidence of complete dominion or

control; and (3) there was no evidence presented by plaintiff under which either named party could be held responsible.

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

Although plaintiff contends the trial court erred by dismissing this slip and fall action with prejudice, this argument is deemed abandoned because this contention was not cited as an assignment of error.

Appeal by plaintiff from order entered 11 August 2004 by Judge Gary L. Locklear in Johnston County Superior Court. Heard in the Court of Appeals 14 September 2005.

Bailey & Dixon, L.L.P., by Gary S. Parsons, Donald T. O'Toole; and Kirk, Kirk, Howell, Cutler & Thomas, L.L.P., by Philip G. Kirk, for plaintiff appellant.

*Maupin Taylor, P.A., by Elizabeth D. Scott and Jonathan R. Bumgarner, for defendant appellee*s.

McCULLOUGH, Judge.

Richard W. Bailey (plaintiff) appeals from order denying his motion to amend to add a new party, dismissing for failure to join a necessary party pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(7) (2003) and pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). We affirm.

Facts

Bailey alleged that he was injured in a slip and fall at the Handee Hugo's, Inc. (Handee Hugo's), convenience store located at 3220 Duraleigh Road in Raleigh, North Carolina. After the fall, Bailey was contacted by an independent adjusting company regarding his fall who indicated that they represented Federated Mutual Insurance Company (Federated) who insured Handee Hugo's. On 20 August 2001, Bailey received a letter from a claims supervisor at Federated which indicated that the correspondence was in regard to "an accident that occurred on April 18, 2001, at Handee Hugo's, 3220 Duraleigh Road, Raleigh, North Carolina" and that it was written on behalf of its insured, Sampson-Bladen Oil Co., Inc. (Sampson-Bladen). The letter further requested documentation regarding the accident and Bailey's signature on a medical release form in order to obtain records on the behalf of its insured. Later, in correspondence between Bailey's attorney and Federated, Mr. Bailey's attorney

requested verification of the insured party and was told once more that Sampson-Bladen Oil Co., Inc. was the insured because they operate the store where the accident occurred.

On 29 March 2004 Bailey filed a complaint against Handee Hugo's, Inc. (Handee Hugo's), and Sampson-Bladen. On 27 May 2004, defendants Handee Hugo's and Sampson-Bladen filed a motion to dismiss and answer. In the answer, Handee Hugo's and Sampson-Bladen raised Rules 12(b)(6) and 12(b)(7) motions to dismiss and alleged that neither Handee Hugo's nor Sampson-Bladen owned, leased, or operated the premises where Bailey's fall was alleged to have occurred. Mr. Bailey conducted discovery of Rogers Howell Clark, President of Sampson-Bladen. Clark testified that Sampson-Bladen and United Energy, Inc. (United) were sister corporations and that in fact United was the entity that leased the premises and operated the store.

On 19 July 2004, after several depositions had been taken, Bailey filed a motion to amend and add a new party, United, pursuant to N.C. Gen. Stat. § 1A-1, Rule 15 (2003). On 20 July 2004, Handee Hugo's and Sampson-Bladen filed a motion to dismiss for failure to join a necessary party under N.C. Gen. Stat. § 1A-1, Rule 12(b)(7) and failure to state a claim upon which relief could be granted under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Along with the motion to dismiss, Handee Hugo's and Sampson-Bladen submitted affidavits and exhibits showing that United was the party who leased and operated the store and that neither of the other two parties had any responsibility. Exhibits A through E contained certified copies of titles and transfers of property interest regarding the convenience store on 3220 Duraleigh Road from the Wake County Register of Deeds Office. The records show that at the time of the accident, Haddon and Irma Clark (the Clarks) owned the property where the store was located, having acquired it in 1995 from Olde Raleigh Shopping Center Associates Limited Partnership (Olde Raleigh). Olde Raleigh, before the transfer of title, had leased the property to Sohio Oil Co. (Sohio), now known as BP Exploration Oil, Inc. (BP). In 1993, Sohio assigned its rights and obligations under the lease to United. When the Clarks purchased the land from Olde Raleigh, they assumed all rights and obligations as lessor under the lease. Each of these transfers of property interest was recorded in the Wake County Register of Deeds.

On 11 August 2004 an order was entered denying Bailey's motion to amend finding that it would be futile and unduly prejudicial to the parties where the statute of limitations had run as to Bailey's action.

The order also stated that Bailey had failed to join a necessary party under Rule 12(b)(7). Further the court considered matters outside of the pleadings in the form of exhibits, depositions, affidavits and discovery responses, converting the Rule 12(b)(6) motion into a motion for summary judgment. The order also granted summary judgment in favor of Handee Hugo's and Sampson-Bladen where there was no genuine issue of material fact. Bailey's claims were thereby dismissed with prejudice.

Bailey now appeals.

I

[1] The trial court disposed of the instant case on two grounds: failure to join a necessary party pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(7) and summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. On appeal, Bailey first contends that the trial court erred in denying its motion to amend to add a new party. We disagree.

A motion to amend is left to the sound discretion of the trial court, and a denial of such motion is reviewable only upon a clear showing of abuse of discretion. *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 247 (2000). The trial court's ruling "is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "If the trial court articulates a clear reason for denying the motion to amend, then our review ends." *Nationsbank of North Carolina v. Baines*, 116 N.C. App. 263, 268, 447 S.E.2d 812, 815 (1994).

In the instant case, the trial judge stated proper reasons in the order for denying the motion to amend: that an amendment to add a new party would be futile and unduly prejudicial. *See id.* (stating that acceptable reasons for which a motion to amend may be denied are "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment"). Moreover, the statute of limitations as to the instant action had run and would not stand against a new party. (If the effect of the amendment is to substitute for the defendant a new party, or add another party, such amendment amounts to a new and independent cause of action and cannot be permitted when the statute of limitations has run. *Callicutt v. Motor Co.*, 37 N.C. App. 210, 245 S.E.2d 558 (1978)). Furthermore, relation-back does not apply. (While Rule 15 of the North Carolina Rules of Civil Procedure permits the relation-back doctrine to extend

periods for pursuing claims, it does not apply to parties. *Estate of Fennell v. Stephenson*, 354 N.C. 327, 554 S.E.2d 629 (2001)). It cannot be said that the decision was not a reasoned one nor that there was an abuse of discretion. A clear reason for denial was stated and therefore our review ends.

Bailey argues on appeal that the principles of equitable estoppel apply in accordance with the decision of this Court in *Hatcher v. Flockhart Foods, Inc.*, 161 N.C. App. 706, 589 S.E.2d 140 (2003), *disc. review denied*, 358 N.C. 234, 595 S.E.2d 150 (2004). However, there are detrimental differences between the *Hatcher* case and the instant case. In the *Hatcher* case the Court applied equitable estoppel where there was active misrepresentation on the part of the insurance company as to whom the insured was and, furthermore, there was no public record of the lease which indicated the responsible party on file in the Register of Deeds. In the instant case a search of the Register of Deeds would have revealed the owner of the land on which the incident occurred as well as the lease extended to the operator of the store.

The policy of this Court is to disallow one from gaining from their own active misrepresentation. *See Hatcher*, 161 N.C. App. 706, 589 S.E.2d 140. We do not condone the actions of the insurance company in this case and in fact find the misrepresentation reprehensible. However, this Court also holds that due diligence must be exercised in litigation. Where all transfers of property interest were a matter of public record, it is not an onerous burden for this Court to impose the task of a title search upon one filing suit. This assignment of error is overruled.

While Bailey asserts alternative theories on appeal for allowing the motion to amend, none of these theories were brought before the trial court. The record before this Court is devoid of any indication of alternative arguments before the trial court. This Court has repeatedly stated that a party "cannot swap horses between courts in order to obtain a better mount on appeal." *King v. Owen*, 166 N.C. App. 246, 250, 601 S.E.2d 326, 328 (2004).

II

[2] Next, Bailey contends that the trial court erred in granting the motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(7). We disagree.

Necessary parties must be joined in an action. *Crosrol Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 183 S.E.2d 834

(1971). A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968). "[D]ismissal under Rule 12(b)(7) is proper only when the defect cannot be cured[.]" *Howell v. Fisher*, 49 N.C. App. 488, 491, 272 S.E.2d 19, 22, *cert. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981).

In the instant case, the two named parties in the lawsuit had no responsibility for the premises where the incident at issue occurred. Moreover, the party which Bailey sought to add, United, was the party who operated the premises where the incident occurred. The court found that the statute of limitations had run as to Bailey's action, and there is no contention on appeal that the statute of limitations had not expired. There was no way for the court to cure the defect of failing to join the responsible party where the statute of limitations had expired and any attempt to add them as a party would have been futile. This assignment of error is also overruled.

III

[3] Lastly, plaintiff contends that the trial court erred in granting defendants' motion for summary judgment. We disagree.

Matters outside the pleadings may be presented to the court and considered by it on a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), in which case the motion will be treated as one for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56. 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). On a motion for summary judgment, "[t]he evidence is to be viewed in the light most favorable to the nonmoving party." *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998). When determining whether the trial court properly ruled on a motion for summary judgment, this Court conducts a *de novo* review. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

The affidavits, depositions and discovery responses clearly showed that there was no party which could be held responsible named in the case. Sampson-Bladen, as a sister corporation of United,

could not be held responsible. (One corporation is not responsible for the acts of another corporation without evidence of complete domination and control. *See Glenn v. Wagner*, 313 N.C. 450, 454-59, 329 S.E.2d 326, 330-33 (1985)). Moreover, there was no evidence presented by Bailey under which either named party could be responsible. Where no recovery could be had by Bailey, it was proper for the court to dismiss the case.

[4] Bailey also attempts to argue on appeal that it was error for the trial judge to dismiss the action with prejudice. However, this contention was not cited as an assignment of error and is therefore abandoned. (All exceptions not set out are deemed abandoned. *See State v. Biggerstaff*, 226 N.C. 603, 39 S.E.2d 619 (1946)).

Accordingly, we affirm the denial of the motion to amend to add a new party and the granting of the motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(7) and 12(b)(6).

Affirmed.

Judges McGEE and JACKSON concur.

STATE OF NORTH CAROLINA v. WAYNE ANTONIO BUNN, DEFENDANT

No. COA04-1683

(Filed 18 October 2005)

1. Constitutional Law— right to confrontation—nontestimonial evidence

The trial court did not commit plain error in a possession with intent to sell and deliver marijuana, sale and delivery of marijuana, and possession of cocaine with intent to sell case by allegedly violating defendant's right to confrontation arising from the use of expert testimony based on chemical analyses conducted by a nontestifying chemist, because: (1) defendant had an opportunity to cross-examine the expert; (2) the analyses on which the expert testimony was based were not hearsay since it was not offered for the truth of the matter asserted, but rather to demonstrate the basis of the expert's testimony; and (3) it is well-established that an expert may base an opinion on tests performed by others in the field.

2. Drugs— possession of cocaine with intent to sell—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of cocaine with intent to sell, because: (1) there was substantial evidence to establish that defendant possessed the controlled substance of cocaine including testimony from undercover officers in conjunction with the video surveillance tape of the drug transaction; and (2) any discrepancy in the State's evidence, such as the color of the baggie containing the cocaine defendant sold to the undercover officers, is properly considered by the jury in weighing the reliability of the evidence.

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

The remaining assignments of error that defendant failed to argue are deemed abandoned under N.C. R. App. P. 28(b).

Appeal by Defendant from judgment entered 11 June 2004 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Court of Appeals 20 September 2005.

Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver, for the State.

Jarvis John Edgerton, IV, for the defendant-appellant.

WYNN, Judge.

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

The State presented evidence tending to show that on 13 November 1999, two undercover Rocky Mount Police Officers approached Defendant Wayne Antonio Bunn and asked if they could "get hooked up" with drugs. Defendant advised the undercover officers that he could get them marijuana or cocaine if they gave him some of the money for the drugs first. The officers gave Defendant thirty or forty dollars, and Defendant returned with two bags of marijuana and one bag of cocaine. Video surveillance equipment in the officers' vehicle recorded the drug transaction with Defendant.

After the drug transaction, the undercover officers secured the drugs in the "bags they came in," and gave them to Officer Greg Brown who testified that he put the drugs into evidence bags and placed them in a secure evidence bin inside the police department. Testing by the State Bureau of Investigation showed the drugs to be cocaine.

At trial, the State presented as an exhibit a green baggie containing cocaine—State's Exhibit Number Two. When asked about the "green thing" in State's Exhibit Number Two, one of the undercover officers testified that "[the green thing is] the baggie that it [the cocaine] was sold in." However, in his earlier testimony, the undercover officer said that he received cocaine from Defendant in a "clear pink type baggie." Moreover, the undercover officer's supplemental police report states that the officers received cocaine from Defendant in a "small pink plastic bag." Defendant did not present any evidence.

Defendant was found guilty of possession with intent to sell and deliver marijuana, sale and delivery of marijuana, and possession with intent to sell and deliver cocaine. The jury deadlocked on the charge of selling cocaine. The trial court consolidated the marijuana convictions and sentenced Defendant to two consecutive sentences of eight to ten months imprisonment. Defendant appealed.

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[1] On appeal, Defendant argues that the trial court committed plain error by allowing the prosecution to introduce evidence of the chemical analyses performed by a non-testifying chemist because the admission of that evidence violated his confrontation rights under the rationale of *Crawford*, 541 U.S. 36, 158 L. Ed. 2d 177. We disagree.

In *Crawford*, the United States Supreme Court held that a recorded out-of-court statement made by the defendant's wife to the police regarding the defendant's alleged stabbing of another, which was introduced as hearsay at trial, was testimonial in nature and thus

inadmissible due to Confrontation Clause requirements. *Id.* Regarding nontestimonial evidence, the Supreme Court stated: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 68, 158 L. Ed. 2d at 203. *Crawford* made explicit that its holding was not applicable to evidence admitted for reasons other than proving the truth of the matter asserted. *Id.* at 60 n.9, 158 L. Ed. 2d at 198 n.9 (stating that the Confrontation "Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted") (citation omitted).

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

Regarding expert testimony and the Confrontation Clause, our Supreme Court has held that "[t]he admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination." *Huffstetler*, 312 N.C. at 108, 322 S.E.2d at 120 (citation omitted).

In the case *sub judice*, after a recitation of his credentials, Special Agent Robert Evans was tendered and accepted, without objection by Defendant, as an expert in forensic drug examination. Special Agent Evans, after a thorough review of the methodology undertaken by his colleague, relied on his colleague's analyses in forming his opinion that the substance sold to the undercover officers was cocaine, and his opinion was based on data reasonably relied upon by others in the field. *See Fair*, 354 N.C. at 162, 557 S.E.2d at 522. We reject Defendant's argument that Special Agent Evans merely read the laboratory report into evidence. It is clear that Special Agent Evans's testimony was expert testimony as to the nature of the seized

substance as cocaine. We hold that the lab analysis was not tendered to prove the truth of the matter asserted therein, but to demonstrate the basis of Agent Evans's opinion.

Since it is well established that an expert may base an opinion on tests performed by others in the field and Defendant was given an opportunity to cross-examine Special Agent Evans on the basis of his opinion, we conclude that *Crawford* does not apply to the circumstances presented in this case. *See Huffstetler*, 312 N.C. at 108, 322 S.E.2d at 120. Thus, we hold that there has been no violation of Defendant's right of confrontation.

[2] Defendant next contends that the trial court committed reversible error in denying his motion to dismiss on the basis of insufficient evidence to support his conviction of possession of cocaine with intent to sell. We disagree.

"When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)), *cert. denied*, —— U.S.——, 161 L. Ed. 2d 122; *see also State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004); *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002).

" 'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (citations omitted); *see also State v. Williams*, 355 N.C. 501, 578-79, 565 S.E.2d 609, 654 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Moreover,

> [a]'substantial evidence' inquiry examines the sufficiency of the evidence presented but not its weight. The reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. Evidentiary '[c]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal.'

Garcia, 358 N.C. at 412-13, 597 S.E.2d at 746 (citations omitted). Additionally, " '[i]f 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.' " *Butler*, 356 N.C. at 145, 567 S.E.2d at 140 (citation omitted).

To convict a defendant of cocaine possession with intent to sell or deliver, the State must prove the following elements: 1) knowing; 2) possession; 3) of cocaine; 4) with the intent to sell or deliver. N.C. Gen. Stat. § 90-95(a)(1) (2004). Defendant asserts on appeal that the State did not establish the proper chain of custody, and that there was no substantial evidence upon which to conclude the substance in the pink baggie allegedly possessed by Defendant was the same substance in the green baggie tested by a State Bureau of Investigation agent. In viewing all evidence in the light most favorable to the State, and giving the State the benefit of every reasonable inference supported by that evidence, we conclude that there is substantial evidence to establish that Defendant possessed the controlled substance of cocaine.

Indeed, the record reveals that one of the undercover officers testified that they approached Defendant and asked if they could "get hooked up" with drugs. Defendant advised the undercover officers that he could get them marijuana or cocaine if they gave him money first. The officers gave Defendant money, and Defendant returned with two bags of marijuana and one bag of cocaine. Special Agent Evans of the State Bureau of Investigation testified that the substance submitted for testing relating to Defendant was, in fact, cocaine.

When the testimony of the undercover officer is considered in conjunction with the video surveillance tape of the drug transaction and the testimony of Special Agent Evans, we find that there is substantial evidence to support Defendant's conviction. Moreover, any conflicting testimony about the color of the baggie containing the cocaine Defendant sold to the undercover officers is a discrepancy in the State's evidence, properly considered by the jury in weighing the reliability of the evidence. *See Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (stating that "contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.") We therefore hold that the trial court did not err in denying Defendant's motion to dismiss.

[3] Since Defendant failed to argue his remaining assignments of error, they are deemed abandoned. N.C. R. App. P. 28(b).

Affirmed.

Judges CALABRIA and LEVINSON concur.

STATE OF NORTH CAROLINA v. LEONARD GROVER HALL

No. COA04-1626

(Filed 18 October 2005)

1. Motor Vehicles— misdemeanor death by vehicle—sufficiency of warrant

The trial court did not err in a misdemeanor death by vehicle case by concluding that the warrant issued in this case was not fatally defective even though it did not allege that the primary towing attachment on defendant's truck was a ball hitch, because: (1) the magistrate's order charging defendant with the offense of misdemeanor death by vehicle provided that the charge was based on defendant's failure to secure the trailer to his vehicle with safety chains or cables as required by N.C.G.S. § 20-123(b); and (2) the order was sufficient to apprise defendant of the charge against him and allow him to prepare a defense against the charge as he was directed to N.C.G.S. § 20-123 which provided the circumstances under which safety chains or cables were required.

2. Motor Vehicles— misdemeanor death by vehicle—requested instruction—locking pins—ball hitch

The trial court did not err in a misdemeanor death by vehicle case by refusing to instruct the jury about the use of locking pins, because: (1) N.C.G.S. § 20-123 provides that the exception that defendant is trying to assert does not apply when a ball hitch is used; and (2) a jury instruction regarding locking pins was not a correct statement of the law as it was undisputed that the primary towing attachment utilized by defendant was a ball hitch.

3. Appeal and Error— preservation of issues—failure to raise issue at trial

Although defendant contends N.C.G.S. § 20-123 is unconstitutionally vague in violation of his state and federal constitutional rights, this assignment of error is dismissed because defendant did not raise this issue before the trial court and thus it will not be considered on appeal.

4. Motor Vehicles— misdemeanor death by vehicle—requested instructions—accident

The trial court did not err in a misdemeanor death by vehicle case by refusing defendant's request to include N.C.P.I. Crim.

307.10 and 307.11 relating to accidents in its instructions to the jury, because the requested jury instructions were not applicable when it is undisputed that defendant failed to use safety chains or cables and the primary towing attachment was a ball hitch.

5. Motor Vehicles— misdemeanor death by vehicle—motion to dismiss—sufficiency of evidence

Although defendant contends the trial court erred by denying defendant's motion to dismiss the charge of misdemeanor death by vehicle, this assignment is dismissed because: (1) defendant's basis for his argument is that N.C.G.S. § 20-123 is unconstitutional; and (2) the Court of Appeals has already concluded that the constitutionality of that statute was not properly before it.

Appeal by defendant from judgment entered 13 July 2004 by Judge James W. Morgan in Caldwell County Superior Court. Heard in the Court of Appeals 24 August 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jeffrey R. Edwards, for the State.

Starnes and Killian, PLLC, by Wesley E. Starnes, for defendant-appellant.

JACKSON, Judge.

Defendant, Leonard Grover Hall, was convicted by jury of the offense of Misdemeanor Death by Vehicle on 13 July 2004 in the Caldwell County Superior Court. Defendant timely appealed from the judgment entered on this verdict.

On 29 November 2001, defendant, with the assistance of Jeff McQuillen ("McQuillen") hitched a trailer to the ball hitch of defendant's truck. McQuillen directed defendant as he backed the truck to the trailer and then placed the hitch over the ball and locked the keeper in place with a pin—no safety chains or cables were used to attach the trailer to the truck. As defendant drove on the road towing the trailer he struck a dip in the road which caused the trailer to come loose from the hitch. The trailer, now free from defendant's truck, crossed into the opposing lanes of travel and struck an oncoming vehicle. The driver of the oncoming vehicle was killed in the collision. After an investigation of the accident by the North Carolina Highway Patrol, defendant was charged with Misdemeanor Death by Vehicle.

On appeal, defendant assigns as error that: (1) the warrant was fatally defective in that it failed to allege that the primary towing attachment on defendant's truck was a ball hitch; (2) the trial court erred in refusing defendant's request for a jury instruction regarding the use of locking pins in lieu of safety chains or cables; (3) North Carolina General Statutes section 20-123 is unconstitutionally vague as applied by the trial court; (4) the trial court erred in refusing to instruct the jury pursuant to North Carolina Pattern Jury Instructions 307.10 or 307.11; and (5) the trial court erred in denying his motion to dismiss at the close of all evidence.

[1] Defendant first argues that the warrant issued in this case was fatally defective in that it failed to allege that the primary towing attachment on defendant's truck was a ball hitch. Defendant made no objection to the sufficiency of the warrant before the trial court. Generally an issue not presented to and ruled upon by the trial court cannot be raised for the first time on appeal. N.C. R. App. P. Rule 10(b)(1) (2005); *State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991). However, because this assignment of error pertains to the sufficiency of a criminal charge, it may properly be raised for the first time on appeal. N.C. R. App. P. Rule 10(a) (2005); *State v. Wortham*, 80 N.C. App. 54, 341 S.E.2d 76 (1986), *rev'd in part on other grounds*, 318 N.C. 669, 351 S.E.2d 294 (1987).

"An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in the event of conviction." *State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984) (citing *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563, *cert. denied*, 434 U.S. 998 (1977)). "If the charge is a statutory offense, the indictment is sufficient 'when it charges the offense in the language of the statute.' " *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 241 (2002) (quoting *State v. Norwood*, 289 N.C. 424, 429, 222 S.E.2d 253, 257 (1976) (citing *State v. Penley*, 277 N.C. 704, 178 S.E.2d 490 (1971)).

In the case *sub judice*, the magistrate's order charging defendant with the offense of misdemeanor death by vehicle clearly provided that the charge was based on defendant's failure to secure the trailer to his vehicle with safety chains or cables as required by North Carolina General Statutes, section 20-123(b). The order clearly was sufficient to apprise defendant of the charge against him and

to allow him to prepare a defense against the charge as he was directed to the requirements of North Carolina General Statutes, section 20-123 which provided the circumstances under which safety chains or cables were required. Accordingly, this assignment of error is overruled.

[2] Defendant next argues that the trial court erred in refusing to instruct the jury about the use of locking pins. A requested jury instruction must be given by the trial court when it "is a correct statement of the law and is supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997) (citing *State v. Moore*, 335 N.C. 567, 606, 440 S.E.2d 797, 819, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174, (1994)).

Defendant contends that his requested instruction regarding locking pins was supported by the evidence as McQuillen testified that he had inserted a pin in the hitch when connecting the trailer. Defendant further contends that his requested instruction regarding locking pins was a correct statement of law based upon North Carolina General Statutes, section 20-123 subsection (c) which provides in relevant part:

> Trailers and semitrailers having locking pins or bolts in the towing attachment to prevent disconnection, and the locking pins or bolts are of sufficient strength and condition to hold the gross weight of the towed vehicle, need not be equipped with safety chains or cables unless their operation is subject to the requirements of the Federal Motor Carrier Safety Regulations.

This language supports the contention that trailers with certain types of towing attachments do not require the use of safety chains and cables if locking pins or bolts are used. However, the plain language of the remainder of the statute clearly indicates that this exception does not apply when a ball hitch is used. The language of section 20-123(c) immediately preceeding the language relied upon by defendant states:

> In addition to the requirements of subsections (a) and (b) of this section, the towed vehicle shall be attached to the towing unit by means of safety chains or cables which shall be of sufficient strength to hold the gross weight of the towed vehicle in the event the primary towing device fails or becomes disconnected while being operated on the highways of this State *if the primary towing attachment is a ball hitch.*

(Emphasis added). This language clearly requires the use of safety chains or cables when a ball hitch is the primary towing attachment. Accordingly, a jury instruction regarding locking pins was not a correct statement of the law as it was undisputed that the primary towing attachment utilized by defendant was a ball hitch. Therefore, this assignment of error is overruled.

[3] Defendant's third assignment of error is that North Carolina General Statutes, section 20-123 is unconstitutionally vague in violation of his State and federal constitutional rights. Defendant did not, however, raise this issue before the trial court. Errors, including constitutional errors, not raised before, and ruled upon by, the trial court generally are waived and will not be considered on appeal. N.C. R. App. P. Rule 10(a) (2005); *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003) (citing *State v. Smith*, 352 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001)). As defendant failed to raise this issue before the trial court, it was not properly preserved for appeal and is, therefore, not properly before us and will not be considered. Accordingly, this assignment of error is dismissed.

[4] Defendant next contends that the trial court erred in refusing to include North Carolina Pattern Jury Instructions (N.C.P.I.) Crim. 307.10—Accident (Defense to homicide) and 307.11—Accident (Defense in cases other than homicide) in its instructions to the jury as requested by defendant. These instructions provide that a killing or injury, respectively, is accidental "if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence." Defendant argues that these instructions apply because his conduct was lawful based upon his interpretation of North Carolina General Statutes, section 20-123(c) that safety chains are not required if a pin is used in the towing attachment. As we have determined *supra*, section 20-123(c) clearly requires the use of safety chains or cables any time the primary towing attachment is a ball hitch. As it is undisputed that defendant failed to use safety chains or cables and the primary towing attachment was a ball hitch, defendant's conduct was unlawful. Accordingly, the requested jury instructions were not applicable and properly were refused. This assignment of error is overruled.

[5] Finally, defendant argues that the trial court erred in denying his motion to dismiss for insufficient evidence. As the basis for this argument is defendant's contention that North Carolina General Statutes, section 20-123 is unconstitutional and we already have held that the

constitutionality of that statute is not properly before this Court, this assignment of error is dismissed.

No error.

Judges McGEE and McCULLOUGH concur.

EDNA JO ROBERTS, Plaintiff-Employee v. WAL-MART STORES, INC. and/or SAM'S CLUB, Defendant-Employer, AMERICAN HOME ASSURANCE COMPANY, Defendant-Carrier

No. COA04-1581

(Filed 18 October 2005)

Workers' Compensation— waiver of Form 44—requirement of setting forth grounds for appeal with particularity

The Industrial Commission erred in a workers' compensation case by issuing an opinion and award after plaintiff failed to file either assignments of error or a brief to the Full Commission, because: (1) even though the Commission may waive the use of Form 44, the rule specifically requires that grounds for appeal be set forth with particularity; and (2) plaintiff did not file a Form 44, brief, or any other document with the Full Commission setting forth grounds for appeal with particularity.

Appeal by defendants from an Opinion and Award entered 1 April 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 September 2005.

The Kilbride Law Firm, PLLC, by Terry M. Kilbride, for plaintiff-appellee.

Young Moore and Henderson P.A., by Michael W. Ballance, for defendant-appellants.

BRYANT, Judge.

Wal-Mart Stores, Inc. and American Home Assurance Company (defendants) appeal from an Opinion and Award of the North Carolina Industrial Commission (Full Commission) awarding Edna Jo Roberts (plaintiff) medical compensation and total disability

compensation from 9 July 2000 through 12 September 2000. For the reasons below we reverse and vacate the Commission's Opinion and Award.

Facts

Plaintiff is a high school graduate and on 8 July 2000 was working for defendant's Sam's Club store in Asheville, North Carolina. Plaintiff had recently become qualified to drive a school bus and had also begun working for the Buncombe County school system. On 8 July 2000, while working in the Sam's Club cafe, plaintiff felt a snap in her lower back as she was lifting a bag-in-a-box of soft drink syrup weighing fifty-five pounds. Plaintiff told her co-workers she could not continue with the stocking activity and had difficulty completing the shift but did not report the injury to defendants. Plaintiff felt she had pulled a muscle and did not have a serious injury. She did not want to report an injury because of a contest between stores to see which could go the longest without a workplace accident.

On 10 July 2000, plaintiff woke up with such severe pain that she was unable to go to work. Plaintiff did not return to work at Sam's Club the following week and by 14 July 2000 informed management at the store that she would be terminating her employment in order to take care of her mother at home. However, plaintiff did continue working for the Buncombe County school system.

Plaintiff first received medical treatment on 14 July 2000 from a Physician's Assistant at Asheville Family Health Center where plaintiff regularly received medical care. On 25 July 2000, plaintiff saw Dr. Andrew Rudins, a physiatrist at Southeastern Sports Medicine, describing pain from her left lower back radiating down her left leg to her knee and indicated that her leg tended to give way. Dr. Rudins examined plaintiff and ordered an MRI.

On 27 July 2000, plaintiff presented to the emergency room of Memorial Mission Hospital screaming in pain, unable to tolerate any position and complaining of spasms in her leg. Plaintiff was examined by Dr. Allen W. Lalor and Dr. Gary A. Curran. Plaintiff told the doctors about the incident at work, although she was not sure when the injury had occurred since the severe pain did not occur until 10 July 2000.

On 28 July 2000, plaintiff had an MRI which showed disc protrusions at multiple levels in her lumbar spine. Dr. Keith M. Maxwell, an

orthopedic surgeon, was consulted and his physician's assistant examined plaintiff on 29 July 2000. Dr. Maxwell felt that plaintiff's symptoms stemmed from a disc herniation at L3-4, and he recommended surgery. Dr. Maxwell performed surgery on plaintiff to decompress the L3-4 interspace on 30 July 2000. Dr. Maxwell stated and the Commission found this first surgery was causally related to the lifting injury on 8 July 2000.

On 12 September 2000, plaintiff returned to Dr. Maxwell with complaints of a new pain in her right hip and leg that was different from her previous pain symptoms. Plaintiff continued working for the Buncombe County school system until the Spring of 2001. From 25 February 2001 through 2 May 2002, plaintiff was seen by several doctors and underwent four additional surgeries to relieve spinal compression and various herniations. On 23 January 2001 plaintiff completed a Form 18 and notified defendants of her injury and claims.

Procedural History

On 8 July 2002, plaintiff's claims were heard before Deputy Commissioner Morgan S. Chapman who filed an Opinion and Award in this matter on 12 February 2003. The Deputy Commissioner held plaintiff had suffered a compensable specific traumatic incident at work in July 2000. However, the Deputy Commissioner concluded plaintiff's claim should be denied for her failure to give timely notice pursuant to N.C. Gen. Stat. § 97-22, which had been prejudicial to defendants because of the intervening surgery.

Plaintiff filed Notice of Appeal to the Full Commission on 14 February 2003. Plaintiff, however, did not file a Form 44 or a brief to the Full Commission. Defendant also did not file a brief or a motion to dismiss to the Full Commission.

On 1 August 2004, the Full Commission issued an order waiving oral argument of the parties and announced it would file a decision based upon the record. Defendants petitioned the Full Commission to allow them to present oral and written arguments on any issues the Full Commission was going to consider on appeal. The Commission never responded to defendants' petition and on 24 February 2004, the Full Commission filed an Opinion and Award in this matter.

The Full Commission found, as a result of the compensable injury by accident, plaintiff was unable to earn the same or greater wages in her regular employment or in any other employment from 9 July 2000

through 12 September 2000. Furthermore, based upon Dr. Maxwell's testimony, the Full Commission found plaintiff's back problems after 12 September 2000 were related to preexisting medical conditions and not causally related to the 8 July 2000 incident.

The Commission awarded plaintiff total disability compensation from 9 July 2000 to 12 September 2000, subject to a deduction for any wages received from the Buncombe County school system during that period of time and instructed defendant to pay for all medical expenses incurred as a result of the compensable injury by accident. Defendants subsequently filed a Motion for Reconsideration which was denied by the Commission on 27 May 2004. Defendants appeal.

The dispositive issue on appeal is whether the Full Commission erred by issuing an Opinion and Award after plaintiff failed to file either assignments of error or a brief to the Full Commission. On 14 February 2003, plaintiff sent a letter to the North Carolina Industrial Commission indicating she wished to appeal the Opinion and Award of Deputy Commissioner Chapman. The letter reads:

> Please consider this letter to be plaintiff's appeal from the Opinion & Award dated February 12, 2003. We file this notice pursuant to G.S. 97-85 and Rule 701 (1) of the Workers' Compensation Rules. Thank you for your consideration.

Phillip Hopkins, Docket Director for the Industrial Commission, acknowledged receipt of plaintiff's letter giving notice of appeal in a letter sent 18 February 2003. Hopkins instructed plaintiff that she must file a Form 44 within 25 days from receipt of the transcript of the hearing before Deputy Commissioner Chapman. Plaintiff did not file a Form 44, nor did she file a brief to the Full Commission. Rule 701(4) of the Workers' Compensation Rules of the North Carolina Industrial Commission states:

> [A]ppellee shall have 25 days from service of appellant's brief within which to file a reply brief . . . . When an appellant fails to file a brief, appellee shall file his brief within 25 days after appellant's time for filing brief has expired.

Workers' Comp. R. of N.C. Indus. Comm'n 701(4), 2005 Ann. R. (N.C.) 919, 943.

Defendants argue they were prejudiced by the Full Commission's sudden declaration on 1 August 2003 that plaintiff's claims would be

decided without briefs or oral arguments and that its decision would be based upon the record. We agree. The rules established by the Industrial Commission governing the procedure by which appeals are taken to the Full Commission provide that "[f]ailure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3)." Workers' Comp. R. of N.C. Indus. Comm'n 701(2), 2005 Ann. R. (N.C.) 919, 943. Rule 701(3) then states, "[p]articular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission." Workers' Comp. R. of N.C. Indus. Comm'n 701(3), 2005 Ann. R. (N.C.) 919, 943. The rules do provide that the Industrial Commission may "in its discretion, waive[] the use of the Form 44." Workers' Comp. R. of N.C. Indus. Comm'n 701(2), 2005 Ann. R. (N.C.) 919, 943. "However, even though the Commission may waive the use of Form 44, the rule specifically requires that grounds for appeal be set forth with particularity." *Adams v. M.A. Hanna Co.*, 166 N.C. App. 619, 623, 603 S.E.2d 402, 405-06 (2004).

Here, plaintiff did not file a Form 44, brief, or any other document with the Full Commission setting forth grounds for appeal with particularity. The Full Commission apparently waived the filing of Form 44 and expressly waived the holding of an oral argument, as permitted by Rule 701. However, the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission. Without notice of the grounds for appeal, an appellee has no notice of what will be addressed by the Full Commission. The Full Commission violated its own rules by failing to require that plaintiff state with particularity the grounds for appeal and thereafter issuing an Opinion and Award based solely on the record. For the foregoing reasons, we reverse the Full Commission and vacate its Opinion and Award.

Vacated and reversed.

Chief Judge MARTIN and Judge GEER concur.

GRANT v. CASS

[173 N.C. App. 745 (2005)]

STEPHEN WILSON GRANT, PLAINTIFF v. GERTRUDE G. CASS, MARY ANN STEVENS, MARLENE G. TURNER, WILLIAM J. GOFORTH, BOBBY RAY GOFORTH, WANDA G. WHITE, GEORGE H. GOFORTH, JR., BARBRA G. BARNEY, MICHAEL BOGER, LINDA S. GREENE, SANDRA K. GAITHER, DAVID BOGER, JERRY BOGER, BESSIE JANE WALL, APRIL S. CAVE, ERIC SAMPSON, KATHY CHAFFIN, KEITH CHAFFIN, AND BRIAN CHAFFIN, DEFENDANTS

No. COA05-18

(Filed 18 October 2005)

Estates; Wills— intestacy—failure of condition precedent—no residuary clause

The trial court did not err by holding that testatrix's estate should pass by intestacy, because: (1) the condition precedent to plaintiff being a beneficiary under the pertinent will, the simultaneous death of testatrix and her husband, did not occur; and (2) the will contained no residuary clause.

Appeal by plaintiff from judgment entered 5 October 2004 by Judge Michael E. Beale in Iredell County Superior Court. Heard in the Court of Appeals 25 August 2005.

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

Lassiter & Lassiter, P.A., by T. Michael Lassiter, for defendant-appellees.

ELMORE, Judge.

Addie Belle Smith Harris (testator) died 23 October 2001 without issue. On 23 October 2001, testator's will, dated November 1970, was admitted to probate in Iredell County Superior Court. The first paragraph of the will provides for burial and payment of debts. The second paragraph provides that all of testator's estate should go to her husband, Spencer Wilson Harris. The third paragraph of the will reads:

> In the event that my beloved said husband, Spencer Wilson Harris, and I should depart from our earthly existence at the same time, then and then only it is my will and desire that our estate shall be divided and paid over to Miss Minnie Mae Smith sister of Addie Smith Harris, and Steve Wilson Grant, residence of Iredell County, N.C. in equal proportion, share and share alike also it is

> my will and desire for Miss Minnie Mae Smith to be executrix of my estate. Now let there be no misunderstanding that this third paragraph shall be used only in the event of double death of myself and said husband, or in the event that he would not regain competency until death.

The will names Spencer Wilson Harris (Harris) as the executor, although Harris died in 1980, some 21 years before testator and 10 years after the execution of testator's will. Also, Minnie Mae Smith, who never married, predeceased testator without issue. As the will did not name a living executor, the court issued letters of administration to Steve Wilson Grant (plaintiff), as the only surviving named beneficiary. On 15 November 2001, the Clerk of the Superior Court revoked the letters of administration issued to plaintiff and advised that her office would proceed no further until there was a determination by the superior court interpreting testator's will.

On 20 August 2002, plaintiff, who is not related to testator, filed the present action seeking a declaratory judgment as to the meaning of testator's will. On 12 January 2004, defendants, who are testator's heirs, moved to remand the matter to the Clerk of Superior Court to determine whether the subject will was in fact the Last Will and Testament of testator. On 24 May 2004, the Clerk entered an order confirming the writing was indeed the Last Will and Testament of testator, and noting an interpretation of the will by declaratory judgment proceedings would still be necessary to determine the administration of the estate. By its 5 October 2004 order, the trial court held that:

> the language of the will of Addie Belle Smith Harris is not ambiguous and that her intentions as set forth therein are clearly and consistently expressed that the third paragraph of her will should take effect, only in the event of simultaneous death of her husband and herself and otherwise she intended no disposition of her estate thereunder.

The trial court ordered that the estate of Addie Belle Smith Harris pass by intestacy and remanded the case to the Clerk of Superior Court for administration of testator's estate. From that order, plaintiff appeals.

I.

Plaintiff first contends that the trial court erred by finding the language of the will was not ambiguous because a literal reading of the third paragraph would result in intestacy. Plaintiff is correct that

"[t]he law does not favor a condition of intestacy, and the courts are, therefore, slow to adopt a construction which would lead to any such result in whole or in part." *Faison v. Middleton*, 171 N.C. 170, 173, 88 S.E. 141, 143 (1916) (internal quotations omitted). And moreover, our Supreme Court has been consistent in stating that the dominant purpose in construing any will is to give effect to the testator's intent. *Bank v. Carpenter*, 280 N.C. 705, 707, 187 S.E.2d 5, 7 (1972). However, the Court will not attempt to discern the testator's intent when the language of the will itself "is too plain, the meaning too obvious, to admit of interpretation." *Id.* at 708, 187 S.E.2d at 8. "If the devise is couched in language which is clear and has a recognized legal meaning, there is no room for construction." *Id.* at 709, 187 S.E.2d at 8; *see also Faison*, 171 N.C. at 174, 88 S.E. at 143 ("We must construe this will not by the intention which existed in the mind of the testator, but according to that which is expressed in the will. We should eschew mere conjecture and gather the meaning only from the words.").

Here, the second paragraph of testator's will clearly and unambiguously states all of her estate should pass to her husband, Harris. According to the strongly worded language of the will's third paragraph, only in the event of the simultaneous death of testator and Harris should any portion of testator's estate pass to testator's sister, Minnie Mae Smith, or to plaintiff. That Harris died some 20 years prior to testator and that Smith, as well, predeceased testator, does not change the clear and unambiguous language of the will. Plaintiff's assignment of error is overruled.

II.

Next, plaintiff contends that the trial court erred in concluding testator's estate should pass by intestacy because an alternate construction of the will would render the instrument valid and preclude intestacy. It is true that the law prefers testacy over intestacy. *Faison*, 171 N.C. at 173, 88 S.E. at 143. Yet, the presumption that the will must be construed to prevent intestacy is generally not employed where the language of a will is clear and definite. *Betts v. Parrish*, 312 N.C. 47, 54, 320 S.E.2d 662, 666 (1984).

Arguing against intestacy, plaintiff directs the Court's attention to *Faison*, but he fails to recognize the distinction between *Faison* and his case. At issue in *Faison* was a will including a paragraph that devised a 648-acre tract of land of the testator. *Faison*, 177 N.C. at 170, 88 S.E. at 141. The identification of the devisee was blank: "Give and devise to my ____ the tract of land on which I now reside, con-

taining 648 acres, for his natural life, and after his death to his heirs." *Id.* at 171, 88 S.E. at 141-42. However, the will at issue in *Faison* did include a residuary clause, and plaintiffs successfully contended the 648 acres should fall into the residue of the testator's estate, rather than falling to intestacy, as advocated by defendants. *Id.* at 171, 88 S.E. at 142. The Court in *Faison* noted the general rule that a *residuary clause* should always be construed to prevent intestacy of any part of the testator's estate, "unless there is an apparent intention to the contrary." *Id.* at 172, 88 S.E. 142.

Here, testator's will includes no residuary clause at all. Testator devised her entire estate to her deceased husband, Harris. Since Harris predeceased testator, the devise to him lapses, and we must apply section 31-42 of our General Statutes to the devise. "Unless the will indicates a contrary intent, if a devisee predeceases the testator . . . and if the devisee is a grandparent of or a descendant of a grandparent of the testator, then the issue of the predeceased devisee shall take in place of the deceased devisee." N.C. Gen. Stat. § 31-42(a) (2003). However, Harris was neither a grandparent of nor a descendant of a grandparent of the testator and had no issue. Therefore, section 31-42(b) controls: "if the provisions of subsection (a) of this section do not apply to a devise to a devisee who predeceases the testator, or if a devise otherwise fails, the property shall pass to the residuary devisee. . . . If there are no residuary devisees, then the property shall pass by intestacy." N.C. Gen. Stat. § 31-42(b) (2003). Although "no particular mode of expression is necessary to constitute a residuary clause," what is necessary is an adequate designation of anything not otherwise disposed of in the instrument. *See Faison*, 171 N.C. at 172, 88 S.E. at 142. The will at issue contains no such designation, but merely contains two alternate devises: one to Harris and one to Smith and plaintiff, the latter occurring only after a condition precedent-the deaths of testator and Harris "at the same time." Because the condition precedent to plaintiff being a beneficiary under the will did not occur and because the will contained no residuary clause, we conclude the trial court did not err in holding that testator's estate should pass by intestacy.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

STATE OF NORTH CAROLINA v. DAVID WYCLIFFE MARSHBURN

No. COA04-1491

(Filed 18 October 2005)

Sentencing— dismissal of habitual felon indictment—double jeopardy

The trial court erred by dismissing a habitual felon indictment, defendant's motion to dismiss the State's appeal is dismissed, and the case is remanded for habitual felon proceedings, because: (1) defendant is not subjected to a second prosecution for the substantive offense when the trial court erroneously determined that N.C.G.S. § 15A-928(c) required the habitual felon indictment to be dismissed due to its belief that defendant had not been properly arraigned regarding the habitual felon charge; (2) the failure to conduct a formal arraignment itself is not reversible error and the failure to arraign is not prejudicial error unless defendant objects and states that he is not properly informed of the charges; (3) the colloquy between defense counsel, the prosecutor, and the trial court after the verdict was rendered indicated that defendant was aware of the allegations of his habitual felon status; (4) there were no flaws in the habitual felon indictment; (5) when a charge is dismissed based solely on a ruling by the trial court on a matter entirely unrelated to the sufficiency of evidence as to any element of the offense or to defendant's guilt or innocence, the State is not barred from appealing; and (6) our legislature has authorized appeal by the State under N.C.G.S. § 15A-1445.

Appeal by the State from judgment entered 25 May 2004 by Judge Franklin F. Lanier in Sampson County Superior Court. Heard in the Court of Appeals 22 August 2005.

Roy A. Cooper, III, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State.

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

MARTIN, Chief Judge.

On 5 January 2004 defendant was indicted for possession of cocaine and being an habitual felon. Defendant waived arraignment

and entered a plea of not guilty on 13 January 2004. At trial the State presented evidence tending to show that on 8 November 2003 defendant was stopped by Officer Dan Worley of the Clinton Police Department because Officer Worley was aware of an outstanding warrant for defendant's arrest. Officer Worley contacted Officer Adam Beushing to serve the warrant. Upon Officer Beushing's arrival at the scene, he conducted a search of defendant and discovered, within defendant's wallet, a small plastic bag with a substance later determined to be cocaine. The officers also searched defendant's vehicle and his passenger, Paul Hicks, but found no other controlled substances.

Defendant testified that he was a confidential police informant gathering information about Hicks at the request of the police. He stated that he had accompanied Hicks to purchase cocaine and marijuana and that Hicks had scraped some of the cocaine into a plastic bag so that later someone could "make sure it [was] real stuff." Defendant testified that Hicks had placed this bag into defendant's wallet without defendant's knowledge and asserted that Hicks must have hidden the other drugs on his person when they were stopped by Officer Worley.

The jury found defendant guilty of possession of a controlled substance. After the verdict and outside the presence of the jury, the trial court heard arguments regarding the habitual felon indictment, which referenced an incorrect statute number. The trial court ruled that this was not a fatal defect, since the body of the indictment alleged the proper elements, and further determined there was no evidence defendant was prejudiced or relied on the improper statute number. Then, applying N.C. Gen. Stat. § 15A-928 (2003), the trial court dismissed, on its own motion, the habitual felon indictment because defendant had not been arraigned upon the habitual felon indictment. The statute provides, in pertinent part:

> (a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction. If a reference to a previous conviction is contained in the statutory name or title of the offense, the name or title may not be used in the indictment or information, but an improvised name or title must be used which labels and distinguishes the offense without reference to a previous conviction.

> (b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count. Except as provided in subsection (c) below, the State may not refer to the special indictment or information during the trial nor adduce any evidence concerning the previous conviction alleged therein.
>
> (c) After commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent.

N.C. Gen. Stat. § 15A-928. Defendant was sentenced to eight to ten months for possession of cocaine on 25 May 2004. The State entered its notice of appeal on 1 June 2004.

On appeal, the State argues the trial court committed reversible error by dismissing the habitual felon indictment because N.C. Gen. Stat. § 15A-928(c) does not apply to habitual felon indictments. We agree.

Habitual felon indictments are governed by N.C. Gen. Stat. § 14-7.3 (2003), and are addressed in a separate proceeding following a defendant's conviction for the substantive felony. *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995) (noting that "only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury"). In contrast, N.C. Gen. Stat. § 15A-928 explicates the requirements for special indictments for habitual offenses. *State v. Burch*, 160 N.C. App. 394, 396, 585 S.E.2d 461, 462 (2003) (explaining that "[t]he criminal law of this State contains two distinct types of 'habitual' classifications": habitual felon, which is a "status" not a substantive offense, and habitual offenses, such as habitual misdemeanor, which are substantive); *State v. Sullivan*, 111 N.C. App. 441, 444, 432 S.E.2d 376, 378 (1993) (holding that "a special indictment alleging that the defendant is an habitual felon cannot serve as a substitute for the special indictment required" by N.C. Gen. Stat. § 15A-928); *State v. Allen*, 292 N.C. 431, 434, 233 S.E.2d 585, 587 (1977) (noting that N.C. Gen. Stat. § 15A-928 is a similar statutory procedure to an habitual felon proceeding).

Defendant has moved to dismiss the State's appeal, arguing that reversal of the trial court's ruling would subject him to double jeopardy because an "habitual felon indictment cannot be the sole charge on which the State proceeds at trial," since it is not a substantive offense. *State v. Blakney*, 156 N.C. App. 671, 674, 577 S.E.2d 387, 390, *disc. review denied*, 357 N.C. 252, 582 S.E.2d 611 (2003). Defendant contends the trial court's dismissal of the habitual felon indictment, after the jury had rendered its verdict on the underlying substantive felony but prior to the beginnings of the habitual felon hearing, subjects him to double jeopardy because judgment was entered on the underlying substantive felony, and he has served that sentence.

Defendant correctly argues that the State is permitted to "appeal the dismissal of criminal charges only when further prosecution would not be barred by the rule against double jeopardy." *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 613, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994). Jeopardy does not attach, however, until "a competent jury has been empaneled and sworn." *Id.* at 550, 445 S.E.2d at 613. When a charge is dismissed based solely on a ruling by the trial court on a matter "entirely unrelated to the sufficiency of evidence as to any element of the offense or to defendant's guilt or innocence," the State is not barred from appealing. *Id.* at 551, 445 S.E.2d at 613.

Furthermore, our Legislature has authorized appeal by the State under N.C. Gen. Stat. § 15A-1445 (2003); therefore, the defendant cannot expect finality when sentenced. *See United States v. DiFrancesco*, 449 U.S. 117, 139, 66 L. Ed. 2d 328, 347 (1980). A sentence is not an implied acquittal of any greater sentence. *Monge v. California*, 524 U.S. 721, 729, 141 L. Ed. 2d 615, 624 (1998). Double jeopardy protections historically do not apply to sentencing proceedings because they are not offenses; instead, "[a]n enhanced sentence imposed on a persistent offender" is not a "new jeopardy," but rather "a stiffened penalty for the latest crime." *Id.* at 728, 141 L. Ed. 2d at 624 (internal citations omitted).

Accordingly, we deny defendant's motion to dismiss the State's appeal. Defendant is not subjected to a second prosecution for the substantive offense, rather the trial court erroneously determined that N.C. Gen. Stat. § 15A-928 required the habitual felon indictment be dismissed due to its belief that defendant had not been properly arraigned regarding the habitual felon charge. "The failure to conduct a formal arraignment itself is not reversible error . . . and the failure

to [arraign] is not prejudicial error unless defendant objects and states that he is not properly informed of the charges." *State v. Brunson*, 120 N.C. App. 571, 578, 463 S.E.2d 417, 421 (1995), *cert. denied*, 346 N.C. 181, 486 S.E.2d 211 (1997) (internal citation omitted). The "notice of the allegation of habitual felon status" is the critical issue. *State v. Oakes*, 113 N.C. App. 332, 339, 438 S.E.2d 477, 481, *disc. review denied*, 336 N.C. 76, 445 S.E.2d 43-44 (1994).

The colloquy between defense counsel, the prosecutor and the trial court after the verdict was rendered indicates that defendant was aware of the allegations of his habitual felon status. Because there were no flaws in the habitual felon indictment, the defendant's status as an habitual felon could have been considered by the jury. It may also be considered by a separate jury on remand. *See Oakes*, 113 N.C. App. at 340, 438 S.E.2d at 481 ("There is no requirement, however, that the same jury hear both issues"). Since the trial court erred in dismissing the habitual felon indictment, we remand for habitual felon proceedings.

Remanded.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. DAVID EDWIN DIERDORF

No. COA04-1685

(Filed 18 October 2005)

Sentencing— aggravating factor—failure to present to jury—stipulation

The trial court did not err in a double indecent liberties with a child and second-degree sex offense case by entering an aggravated sentence after defendant's pleas of guilty even though the factor was not alleged in the indictment or presented and proven to a jury beyond a reasonable doubt, because defendant stipulated to the aggravating factor that defendant took advantage of a position of trust or confidence when he agreed to be sentenced in the aggravated range and did not object to the trial court's finding of the aggravating factor.

Appeal by defendant from judgments entered 10 July 2002 by Judge Claude S. Sitton in Burke County Superior Court. Heard in the Court of Appeals 24 August 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John G. Barnwell, for the State.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for defendant-appellant.

HUNTER, Judge.

David Edwin Dierdorf ("defendant") appeals from his convictions of two counts of indecent liberties with a child and one count of second degree sex offense entered upon defendant's pleas of guilty. Defendant argues the trial court erred in sentencing him in the aggravated range. We affirm the judgment of the trial court.

At his plea hearing, defendant orally stipulated that he would "be sentenced in the aggravated range for each conviction totaling three convictions." Defendant's written plea agreement states that "[u]pon the defendant's guilty pleas the defendant stipulates that he shall be sentenced in the aggravated range for each conviction (total of 3 convictions)[.]" At sentencing, the trial court found as an aggravating factor that defendant "took advantage of a position of trust or confidence to commit the offense." Defendant did not object.

Defendant contends the trial court violated his due process rights by sentencing him in the aggravated range, as the aggravating factor used by the trial court was not alleged in the indictment, and the factor was not presented and proven to a jury beyond a reasonable doubt. We do not agree.

Although findings of fact made by the trial court may not be used to increase the penalty for a crime beyond the statutory maximum, the trial court "may still sentence a defendant in the aggravated range based upon the defendant's admission to an aggravating factor enumerated in N.C.G.S. § 15A-1340.16(d)." *State v. Allen*, 359 N.C. 425, 439, 615 S.E.2d 256, 265 (2005). Moreover, sentencing factors that might lead to a sentencing enhancement do not have to be alleged in the indictment. *Id.* at 438, 615 S.E.2d at 265. Thus, the issue is whether defendant here stipulated to the existence of the aggravating factor.

During a plea hearing, "a defendant need not make an affirmative statement to stipulate to his or her prior record level or to the State's summation of the facts, particularly if defense counsel had an opportunity to object to the stipulation in question but failed to do so." *State v. Alexander*, 359 N.C. 824, 829, 616 S.E.2d 914, 918 (2005); *see also State v. Mullican*, 329 N.C. 683, 685, 406 S.E.2d 854, 855 (1991) (holding that the defendant's failure to object to the State's summation of the evidence equated to a stipulation to the evidence).

In the present case, defendant specifically agreed to be sentenced in the aggravated range. A plea arrangement or bargain is "[a] negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu[ally] a more lenient sentence or a dismissal of the other charges." Black's Law Dictionary 1190 (8th ed. 2004); *Alexander*, 359 N.C. at 830-31, 616 S.E.2d at 919. "The economically sound and expeditious practice of plea bargaining should be encouraged, with both sides receiving the benefit of that bargain." *Alexander*, 359 N.C. at 831, 616 S.E.2d at 919. Moreover, defendant did not object to the State's summation of the facts, nor to the trial court's finding of an aggravating factor. Because defendant agreed to be sentenced in the aggravated range and did not object to the trial court's finding of an aggravating factor, we conclude that defendant stipulated to the existence of the aggravating factor.

As defendant stipulated to the aggravating factor used by the trial court in the imposition of an aggravated sentence, we hold the trial court did not err in entering an aggravated sentence. We therefore affirm the judgments of the trial court.

Affirmed.

Judges TYSON and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 OCTOBER 2005

ARMSTRONG v. KNIGHT No. 05-220	Wilson (03CVS1939)	Appeal dismissed
BARRETT v. MORGAN CORP. No. 04-1324	Ind. Comm. (I.C. #187444)	Affirmed in part, remanded in part
BROWN v. N.C. DEP'T OF CORR. No. 04-1342	Ind. Comm. (I.C. #34333)	Affirmed
DILLON v. CARPENTER No. 04-1395	Richmond (03CVS1018)	Reversed
DINKINS v. PENN VENTILATOR CO. No. 04-1603	Ind. Comm. (I.C. #654108)	Vacated and remanded
ELLEDGE v. AUSTIN No. 04-1003	Iredell (02CVS2468)	Affirmed
GAGNE v. BEST ADVANTAGE MKTG. GRP. No. 04-1724	Catawba (02CVS2584)	Affirmed
GASTONIA VIDEO & NEWS, INC. v. GASTONIA BD. OF ADJUST. No. 04-1421	Gaston (02CVS4700)	Vacated and remanded
IN RE B.R.-D. No. 05-296	Alamance (04J81)	Affirmed
IN RE C.M., J.M., Jr., J.M. No. 04-1070	Buncombe (01J338(A))	Affirmed
IN RE D.K.L. No. 04-1691	Onslow (04J130)	Affirmed
IN RE D.M.H., Jr. 03-31-2	Burke (02J57)	Affirmed in part, remanded in part
IN RE S.N.M., D.G.F., D.C.F. & S.U.M. No. 04-1501	Mecklenburg (03J856) (03J857) (03J858) (03J859)	Affirmed
MCLAWHORN v. CASWELL CTR. No. 05-48	Ind. Comm. (I.C. #368231)	Affirmed
NAIL v. MEMBER SERVS., INC. No. 05-26	Forsyth (04CVS1813)	Affirmed

NEDER v. NEDER No. 04-1433	Wilkes (02CVD1630)	Affirmed
PHILLIPS v. HERTZ CORP. No. 04-1098	Ind. Comm. (I.C. #107286)	Reversed and remanded
ROBINSON v. RAPSCALLION MARINE, INC. No. 04-1001	Dare (00CVS248)	No error
ROOKER v. FOOD LION No. 04-1384	Ind. Comm. (I.C. 37982)	Affirmed
STATE v. ALEXANDER No. 04-259-2	Pasquotank (03CRS50206)	Affirmed
STATE v. BAILEY No. 04-650	Wake (03CRS119948)	No prejudicial error
STATE v. COX No. 04-1629	Richmond (01CRS52721)	No prejudicial error; remanded for resentencing
STATE v. DAVIS No. 04-1566	Wake (03CRS44052) (03CRS44053) (03CRS44054) (03CRS44055) (03CRS44056) (03CRS44057) (03CRS44058) (03CRS44059) (03CRS44060) (03CRS44857) (03CRS44858) (03CRS44859) (03CRS44860) (03CRS46292) (03CRS43749)	Remanded for resentencing
STATE v. DOUGLAS No. 05-141	Scotland (02CRS50524) (02CRS50526) (02CRS53007)	Affirmed
STATE v. EDWARDS No. 04-1659	Alleghany (02CRS50380)	No error
STATE v. FLORA No. 05-258	Mecklenburg (03CRS201020) (03CRS201022)	Affirmed
STATE v. FRANKLIN No. 05-87	Franklin (04CRS50105) (04CRS3461)	No error

STATE v. GREEN No. 04-1116	Halifax (02CRS51103) (02CRS51220) (02CRS51482)	Affirmed
STATE v. LONG No. 03-1712	Ashe (02CRS50661)	No error at trial; remanded for resentencing
STATE v. NGUYEN No. 03-1502	Mitchell (03CRS169) (03CRS50064)	No error at trial; remanded for resentencing
STATE v. SAVAGE No. 04-1694	Beaufort (03CRS51841)	No error
STATE v. SINGLETARY No. 04-1700	Forsyth (01CRS54685)	Affirmed
STATE v. STEPHENS No. 05-93	Wake (03CRS86325) (02CRS104735)	New trial
STATE v. TUTTLE No. 04-1706	Forsyth (03CRS59629)	No error
STATE v. WALDEN No. 05-98	Gaston (03CRS20299) (03CRS64947)	No error
STATE v. WHITESIDES No. 05-67	Gaston (03CRS55888) (03CRS55889) (03CRS11597) (03CRS55948)	Affirmed
STATE v. WILLIAMS No. 05-168	Mecklenburg (03CRS236048) (03CRS236049)	No error
STATE v. WILSON No. 04-1120	Mecklenburg (03CRS239026)	No error
STATE v. WRIGHT No. 05-51	Guilford (03CRS103919)	No error

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WORD AND PHRASE INDEX

HEADNOTE INDEX

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APPEAL AND ERROR—Continued

CRIMINAL LAW—Continued

Control of witness examination—no abuse of discretion—The trial court did not abuse its discretion in a prosecution for murder and assault in its efforts to control the examination of witnesses by defense counsel. Although defendant argued that the court gave the jury a sense of partiality favoring the State, it is clear that the court focused on moving the trial forward. **State v. Bethea, 43.**

Failure to give limiting instruction—prior statement offered for corroborative purposes—The trial court erred in a solicitation of murder, stalking, and carrying a concealed weapon case by denying a limiting instruction as to a prior statement offered for corroborative purposes and the case is remanded for a new trial, because defendant was entitled, upon request, to have the evidence limited to the purpose for which it was competent. **State v. Borkar, 162.**

Impermissible juror contact—requested limiting instruction denied—There was no prejudicial error in the trial court's refusal to give defendant's requested limiting instruction that neither the defense nor the State was connected with an impermissible contact with jurors in an elevator. The court questioned the jurors about their ability to be fair and impartial, and defendant did not show that any jurors were prejudiced by the misconduct or that there would have been a different result with the instruction. **State v. Bethea, 43.**

Instruction—flight—The trial court did not err in a multiple felony breaking and entering, felony larceny, and felony possession of stolen goods case by instructing the jury regarding flight, because: (1) on one occasion when defendant and his coparticipant were at one of the homes that was broken into, the homeowner returned and spoke with the coparticipant first and thereafter spoke with defendant when he came running around the house; and (2) the State introduced evidence that defendant gave officers a false name and date of birth when he was a passenger in a car stopped by police, and the driver indicated that she was taking defendant to the bus station so that he could go to Ohio. **State v. Goblet, 112.**

Motion for mistrial—curative instruction—The trial court did not abuse its discretion in a habitual driving while impaired case by failing to declare a mistrial after the State's comment during closing arguments that defendant says he went to the dentist and went under anesthesia, but he did not provide evidence as such, because: (1) the trial court gave the jury a curative instruction; and (2) defendant did not make a showing that the jury failed to follow the trial court's curative instruction. **State v. Highsmith, 600.**

Prosecutor's argument—failure to give curative instruction after sustaining objection—The trial court did not abuse its discretion in a multiple felony breaking and entering, felony larceny, and felony possession of stolen goods case by failing to give a curative instruction to the jury after sustaining defendant's objection to an argument by the State during closing that the jurors were in court because of defendant's drug problem, nor did it commit plain error in failing to intervene ex mero motu to stop the district attorney from continuing the improper argument after defendant's objection was sustained, because: (1) defendant did not request a curative instruction to the jury regarding the district attorney's statements; and (2) in light of the evidence of defendant's heroin use, these arguments were not so improper as to require the court to issue such an instruction ex mero motu. **State v. Goblet, 112.**

EASEMENTS—Continued

EMINENT DOMAIN

EVIDENCE—Continued

MOTOR VEHICLES—Continued

Driving while license revoked—motion to dismiss—The trial court erred by denying defendant's motion to dismiss the charge of driving while license revoked, because although the evidence supporting defendant's driving was sufficient, there was insufficient evidence that defendant knew his license was revoked when there was no evidence that an official notice was actually mailed to defendant's address as required by N.C.G.S. § 20-48. **State v. Cruz, 689.**

Habitual driving while impaired—involuntary intoxication—no inference based on failure to administer Intoxilyzer or blood test—The trial court did not err in a habitual driving while impaired case by failing to instruct the jury on involuntary intoxication and on the permitted inferences arising from a trooper's failure to administer an Intoxilyzer or blood test to defendant, because: (1) defendant presented no evidence that he was forced to consume the medication he took, but instead that he took the substance voluntarily without knowing it was intoxicating; and (2) there is no legal authority for defendant's assertion that an inference should arise that he was not intoxicated based on the State's failure to administer the Intoxilyzer or to administer a blood test. **State v. Highsmith, 600.**

Habitual driving while impaired—motion to dismiss—sufficiency of evidence—knowing consumption of impairing substance—The trial court did not err in a habitual driving while impaired case by denying defendant's motion to dismiss based on alleged insufficient evidence that defendant knowingly consumed an impairing substance, because: (1) an expert in pharmaceuticals testified that the pain medication Floricet was an impairing substance and that a healthcare professional should have warned defendant of its effects; and (2) defendant knew or should have known that a prescription medication such as Floricet could impair him, and he was on notice that he risked crossing over the line into the territory of proscribed conduct by driving after taking Floricet. **State v. Highsmith, 600.**

Habitual driving while impaired—trial not bifurcated—constitutionality of statute—The trial court did not err by failing to bifurcate defendant's trial for habitual impaired driving because habitual impaired driving is a substantive offense for which predicate convictions are an element which mut be proven at trial. Furthermore, defendant could not challenge the constitutionality on appeal of N.C.G.S. § 15A-928, which permits a defendant to stipulate to prior DWI convictions and thus prevent the State from presenting evidence of those convictions before the jury, where he did not challenge the constitutionality of the statute at trial. **State v. Highsmith, 600.**

Intersection accident—contributory negligence—no evidence—There was no evidence in an automobile accident case that plaintiff failed to keep a proper lookout and exercise reasonable care in entering an intersection pursuant to a green light, and the trial court did not err by not instructing the jury on contributory negligence or by granting a directed verdict of no contributory negligence. **Oakes v. Wooten, 506.**

Intersection accident—failing to stop at red light—peremptory instruction—There was no error in giving a peremptory instruction on defendant's negligence in failing to stop at a red light where the evidence that defendant entered the intersection while the light was red was uncontested and the court also instructed the jury that it must find this negligence to be the proximate cause of plaintiff's injury. **Oakes v. Wooten, 506.**

SENTENCING—Continued

for the underlying offenses. The face of the commitment form shows that defendant was being sentenced for possession of cocaine and drug paraphernalia and that his habitual felon status merely increased his sentence. **State v. McBride, 101.**

Dismissal of habitual felon indictment—double jeopardy—The trial court erred by dismissing a habitual felon indictment, defendant's motion to dismiss the State's appeal is dismissed, and the case is remanded for habitual felon proceedings, because: (1) defendant is not subjected to a second prosecution for the substantive offense when the trial court erroneously determined that N.C.G.S. § 15A-928(c) required the habitual felon indictment to be dismissed due to its belief that defendant had not been properly arraigned regarding the habitual felon charge; (2) the failure to conduct a formal arraignment itself is not reversible error and the failure to arraign is not prejudicial error unless defendant objects and states that he is not properly informed of the charges; (3) the colloquy between defense counsel, the prosecutor, and the trial court after the verdict was rendered indicated that defendant was aware of the allegations of his habitual felon status; (4) there were no flaws in the habitual felon indictment; (5) when a charge is dismissed based solely on a ruling by the trial court on a matter entirely unrelated to the sufficiency of evidence as to any element of the offense or to defendant's guilt or innocence, the State is not barred from appealing; and (6) our legislature has authorized appeal by the State under N.C.G.S. § 15A-1445. **State v. Marshburn, 749.**

Habitual felon—sufficiency of evidence—The essential question in a habitual felon indictment is whether a felony was committed. There was enough evidence here to deny a motion to dismiss a habitual felon charge, although the deputy clerk of court did not testify to the date of the third offense. **State v. McBride, 101.**

Presumptive and mitigated ranges—no error—There was no error in the sentencing of defendant for multiple convictions of armed robbery where defendant received two sentences in the presumptive range and four in the mitigated range. He was not entitled to a sentence in the mitigated range for each conviction solely because his sentences in other convictions were in the mitigated range. **State v. Tuck, 61.**

Prior record level—defendant's stipulation—no prejudice—There was no prejudicial error in the determination of defendant's prior record level for sentencing where defense counsel appeared to stipulate to the State's worksheet. Moreover, defendant's record level is the same even without the conviction defendant now claims was erroneously considered. **State v. Bethea, 43.**

Remand—erroneous use of rape conviction to elevate kidnapping charge—Although defendant neither objected to the sentence he received nor raised his two constitutional arguments in the trial court in a double second-degree rape and first-degree kidnapping case, the Court of Appeals used its inherent authority under N.C. R. App. P. 2 and remanded the case to the trial court for resentencing, because: (1) the State conceded that one of defendant's rape convictions was erroneously utilized to elevate second-degree kidnapping to first-degree kidnapping; and (2) the State acknowledged that this dual use of one of defendant's rapes of the victim is restricted by *State v. Stinson*, 127 N.C. App. 252 (1997). **State v. Moore, 494.**

TERMINATION OF PARENTAL RIGHTS—Continued

up treatment, the child cannot be placed with her father during his incarceration, the child had nightmares after visiting her father in prison, and the father was not significantly involved in the child's life before or after his incarceration in 1998. **In re P.L.P., 1.**

Conclusions of law—neglect—failure to make reasonable progress—The trial court did not err by concluding its findings of fact support the conclusion of law that grounds existed for termination of respondent mother's parental rights based on neglect and failure to make reasonable progress, because: (1) the findings of fact supported the conclusion of a probability of repetition of neglect if the juveniles were returned to respondent; and (2) although respondent has shown sporadic efforts, respondent has failed to make reasonable child support payments, failed to perceive the need for instruction in areas which led to the children's removal, and failed to demonstrate initiative to comply with the trial court's directives to correct the conditions which led to removal. **In re J.W., K.W., 450.**

Delay between hearing and order—no prejudice—There was no prejudice from a five-month delay between a termination hearing and the order terminating respondent's parental rights where he argued that the delay interfered with his relationship with his daughter in light of a potentially long incarceration on a pending criminal charge, but he was continuously incarcerated awaiting trial since before the termination hearing. **In re S.B.M., 634.**

Delay in filing of petition—no prejudice shown—An order terminating parental rights was not reversed, despite reservations about delays in filing the petition to terminate respondent's parental rights, where there was no showing of prejudice to respondent or to the best interests of the children. **In re As.L.G. & Au.R.G., 551.**

Extraordinary delay in entering order—prejudicial error—The trial court erred in a termination of parental rights case by delaying entry of an order until almost one year after completion of the hearing even though N.C.G.S. §§ 7B-1109(e) and 7B-1110(a) set the deadline no later than thirty days following the completion of the hearing, and the case is reversed, because: (1) the Court of Appeals has been apt to find prejudice in delays more than six months or more; (2) the need to show prejudice diminishes as the delay between the termination hearing and the date of entry of the order terminating parental rights increases; and (3) respondent continued to pay child support for her children during the delay yet was deprived of the opportunity to see them or bond with them in any way. **In re T.W., L.W., E.H., 153.**

Failure to appoint guardian ad litem for parent—mental illness—The trial court erred in a termination of parental rights case by failing to appoint respondent mother a guardian ad litem under N.C.G.S. § 7B-1111(6) when she has a diagnosis of bipolar affective disorder with possible psychotic disorder, because: (1) the trial court referenced respondent's mental well-being and its concern that respondent was unable to raise the minor children without assistance repeatedly in its written orders before and after receiving respondent's psychological evaluations; (2) it was the court's repeated findings that respondent was incapable of parenting her minor children based upon her mental illness in addition to respondent's own motion that triggered the requirement for appointment of a guardian ad litem; and (3) while respondent may be competent for

TERMINATION OF PARENTAL RIGHTS—Continued

some purposes, including her ability to assist counsel and maintain employment, it does not necessarily follow that she is not debilitated by her mental illness when it comes to parenting her children. **In re T.W., L.W., E.H., 153.**

Findings of fact—clear, cogent, and convincing evidence—Clear, cogent and convincing evidence supported the trial court's findings that respondent failed to complete required classes and to obtain mental health counseling, failed to maintain a phone, failed to keep a clean and safe home environment for the children, failed to articulate a plan of care for the children, maintained a residence in a neighborhood she considered unsuitable for children and had recently begun living with her boyfriend, and failed to perceive the danger in past conditions which led to the children's removal. **In re J.W., K.W., 450.**

Findings of fact—unappealed finding sufficient—Although respondent contends that two of the three grounds for termination of his parental rights were not supported by the evidence, the conclusion of law to which he did not assign error was sufficient to terminate his parental rights. Arguments concerning the other findings were not considered. **In re S.B.M., 634.**

Grounds—neglect—The trial court erred in a termination of parental rights case by concluding that respondent mother neglected the minor child at the time of the hearing, because: (1) respondent completed substance abuse treatment, domestic violence counseling, and parenting classes required by her case plan, although not through DSS's recommended sources, and respondent is not bound by a single source provider for recommended services while seeking to overcome the issues that led to the minor child's removal; and (2) the case plan required respondent to obtain legal employment and stable housing, she obtained employment while in prison working seven days a week in the kitchen while also taking steps to help her obtain employment upon her release such as attempting to obtain her GED, and she testified that she would live with her mother upon her release. **In re D.M.W., 679.**

Grounds—willfully failed to pay reasonable portion of cost of care for six months preceding filing of petition—The trial court erred in a termination of parental rights case by concluding that respondent mother willfully failed to pay a reasonable portion of the cost of care for a period of six months preceding the filing of the petition although she was physically and financially able to do so, because: (1) respondent testified that she had just got her job with the Department of Correction at the time of the hearing; and (2) no evidence was presented that respondent was employed or had the ability to pay support during the six month period preceding the filing of the petition. **In re D.M.W., 679.**

Grounds for termination proven—best interests of children—no abuse of discretion—The trial court did not abuse its discretion by determining that termination of respondent's parental rights was in the best interest of her children where at least one ground for termination was proven. **In re As.L.G. & Au.R.G., 551.**

Guardian ad litem for parent—not appointed—There was no error in the District Court's failure to appoint a guardian ad litem for the respondent in a termination of parental rights proceeding. References to respondent's need for counseling and drug treatment did not rise to the level of being so intertwined with the neglect of her children as to be virtually inseparable. **In re As.L.G. & Au.R.G., 551.**

WORKERS' COMPENSATION—Continued

Attorney fees—no abuse of discretion—There was no abuse of discretion in the award of attorney fees in a workers' compensation action. **McGhee v. Bank of Am. Corp., 422.**

Incarceration of plaintiff—credit to employer for payments made during incarceration—The Industrial Commission did not err in a workers' compensation case by permitting defendant to take an immediate credit for payments made during plaintiff's incarceration by reducing his ongoing payments by $100.00 per week allegedly in violation of N.C. Gen. Stat. § 97-42, because: (1) where an award of compensation is for an indefinite period of time, it is not possible to shorten the period during which compensation must be paid and therefore the Commission may order the employer to reduce the amount of the employee's payments in order to allow the employer to recoup the amount of the credit; and (2) in the instant case the Commission awarded plaintiff temporary total disability which has no specific ending time, and there is nothing in the record to suggest that plaintiff will or will not ultimately receive a permanent partial disability award. **Easton v. J.D. Denson Mowing, 439.**

Medical care—effectiveness—The Industrial Commission did not err in a workers' compensation case by ordering defendants to pay for medical care which defendants contended was ineffective. There was substantial evidence of record that plaintiff's care was necessary to provide relief. **McGhee v. Bank of Am. Corp., 422.**

Offered part-time employment—make-work—The evidence in a workers' compensation case supported the finding that a part-time position offered to plaintiff was make-work and did not constitute other employment as defined by N.C.G.S. § 97-2(9). **McGhee v. Bank of Am. Corp., 422.**

Professional football player—compensable injury—The findings in a workers' compensation case supported the conclusion that a professional football player sustained a compensable injury by accident and there was competent evidence to support the findings. **Swift v. Richardson Sports, Ltd., 134.**

Professional football player—injury protection payment made under contract—credit—A professional football team was entitled to a dollar-for-dollar credit for an injury protection payment made under contract to an injured player, and the decision of the Industrial Commission was reversed on this issue. **Swift v. Richardson Sports, Ltd., 134.**

Professional football player—number of weeks benefits awarded—There was competent evidence in a workers' compensation case to support the number of weeks of benefits awarded to a professional football player where plaintiff returned to football briefly with another team, but was released because of injuries with defendant. **Swift v. Richardson Sports, Ltd., 134.**

Suspension of benefits—incarceration of plaintiff—The Industrial Commission did not err in a workers' compensation case by authorizing defendant to suspend payment of plaintiff's workers' compensation disability payments as a result of plaintiff's incarceration. **Easton v. J.D. Denson Mowing, 439.**

Timeliness of claim—last medical payment—foreign jurisdiction—A workers' compensation claim was timely filed because it was within two years of the last medical compensation paid by defendants, even though the payment was to

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