NORTH CAROLINA COURT OF APPEALS REPORTS

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175 N.C. APP.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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	First Division	
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4A	Russell J. Lanier, Jr.	Kenansville
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5	W. Allen Cobb, Jr.	Wilmington
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	Christopher Collier	Mooresville
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29B	Mark E. Powell	Rutherfordton
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30B	Janet Marlene Hyatt	Waynesville

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THOMAS W. SEAY	Spencer

1. Appointed and sworn in 17 May 2007 to replace Ernest B. Fullwood who retired 31 December 2006.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
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	Rebecca W. Blackmore	Wilmington
	James H. Faison III	Wilmington
	Sandra Criner	Wilmington
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	Pell C. Cooper	Tarboro
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	SAMUEL M. TATE	Morganton
	JOHN L. WHITLEY	Wilson

1. Appointed and sworn in 3 April 2007 to replace James B. Etheridge who resigned 16 January 2007.
2. Appointed and sworn in 14 February 2007.

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

GENERAL STATUTES CITED

UNITED STATES CONSTITUTION CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE 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

PRESTON FIX AND WIFE, CARMEN J. FIX, CARL E. GROHS AND WIFE, BETTY R. GROHS, JAMES H. KENDRICK AND WIFE, JUDITH MARIE KENDRICK, AND RAYMOND C. SHARROW AND WIFE, VIRGINIA K. SHARROW, PETITIONERS v. CITY OF EDEN, RESPONDENT

No. COA04-1642

(Filed 20 December 2005)

1. Cities and Towns— annexation—fire and water services—trial court findings—supported by evidence

The evidence in an annexation case supported the trial court's findings about fire suppression services, maintenance of the insurance rating, and the need for booster pumps in water lines in the annexed area.

2. Cities and Towns— annexation—extension of services—illusory statements—assumption that agreements would be reached

The trial court properly concluded that an annexing city's statements about its commitment to extending waterlines were illusory. The city's master plan assumed (without providing a basis) that the city would be able to negotiate an agreement with the current water provider (Dan River).

3. Cities and Towns— annexation—plan for extension of fire and water services—contingent—abstract—not sufficient

The trial court did not err by concluding that an annexing city did not meet statutory requirements concerning the exten-

sion of municipal services where the city's plan for providing water and fire protection depended upon the doubtful contingency of reaching agreements with the current provider. Moreover, the city did not meet minimum statutory requirements in the information provided; a statement of intent alone is not sufficient. N.C.G.S. § 160A-47.

4. Cities and Towns— annexation—noncompliance with statutory requirements—remand

Where petitioners show that the degree of noncompliance with statutory requirements for annexation is so great as to eviscerate the protections provided in N.C.G.S. § 160A-47, a trial court does not err in declaring the ordinance null and void. However, the court must specifically find that the ordinance cannot be corrected on remand. The court here found only that the ordinance is not likely to be corrected on remand.

5. Cities and Towns— annexation—actual use evidence—relevance—reliability

The evidence supported the trial court's finding in an annexation case that petitioners' evidence about use and subdivision tests was of questionable relevance and that the city had used reasonably reliable methods in its calculation.

6. Cities and Towns— annexation—use tests—split parcel—flawed data

The question of whether a city had satisfied the use tests for annexation was remanded where the data relied on in compiling a table was flawed and a parcel was inappropriately split.

7. Cities and Towns— annexation—recorded property lines not used—gap in annexed area avoided

The trial court correctly determined that a city had substantially complied with N.C.G.S. § 160A-48(e) in an annexation where it used boundary lines along a river and creek rather than recorded property lines. There was evidence that the property lines would have left a gap between the city's current boundaries and the area to be annexed; the Legislature would not have intended a literal compliance with the statute that would leave such a gap.

8. Cities and Towns— annexation—split parcel—degree of irregularity—remand

An annexation was remanded for appropriate conclusions, including the court's determination of whether the inappropriate splitting of a parcel amounted to a "slight irregularity."

9. Cities and Towns— annexation—plans for extending water and sewer lines—engineer's seal

An annexing city substantially complied with the statutory requirement that maps showing the extension of water and sewer lines bear the seal of a professional engineer where the maps were both prepared by an engineering firm and were attached to a report to which an engineer affixed his or her seal, even though the maps themselves were not sealed.

Appeal by respondent from judgment entered 9 June 2004 by Judge Lindsay R. Davis, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 17 August 2005.

Eldridge Law Firm, P.C., by James E. Eldridge, for petitioners-appellees.

Medlin Law Office, by Thomas E. Medlin, Jr., for respondent-appellant.

CALABRIA, Judge.

The City of Eden (the "City") appeals from a judgment of the trial court declaring an annexation ordinance null and void. We remand to the trial court for proceedings not inconsistent with this opinion.

On 28 April 2003, the City of Eden adopted a resolution stating an intention to consider annexation of the Indian Hills area. The City adopted an annexation report on 14 May 2003 and an annexation ordinance on 22 September 2003. Fix, *et al.* ("petitioners") own real property in the Indian Hills area. Petitioners filed a petition in Rockingham County Superior Court on 8 September 2003 for review of the City's adoption of the annexation ordinance at issue. On 9 June 2004, Judge Davis entered findings of fact, conclusions of law, and judgment in favor of petitioners, declaring the City's annexation ordinance null and void. Respondent appeals.

I. The City's Assignments of Error

A. Findings Regarding the Necessity of the City having an Agreement with Dan River Water, Inc. ("Dan River")

[1] The City first challenges finding of fact 28, which states, "The undertaking to extend fire suppression services assumes the ability to negotiate with [Dan River] to install additional hydrants on existing [Dan River] lines." In annexation cases, "the findings of fact made below are binding on the Court of Appeals if supported by the evidence, even when there may be evidence to the contrary." *Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 217, 447 S.E.2d 471, 473 (1994).

We initially note that the trial court's finding of fact 23, which is not challenged on appeal, conclusively establishes that the current Indian Hill water service provider, Dan River, is federally protected. The following statute applies:

> (b) Curtailment or limitation of service prohibited
>
> The service provided or made available through any such association [federally indebted water associations] shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b) (2005).

Petitioners reference the following provision of the Comprehensive Water and Wastewater Master Plan ("Master Plan"), which assumes Dan River is federally protected, in order to show that the trial court's finding of fact 28 is supported by evidence:

> If the City opts to pursue annexation of the areas that Dan River is serving and the two parties cannot come to an agreement on a purchase plan, then the City will face a difficult problem. The City would be required to let Dan River continue to serve these areas but the City would be responsible for providing fire suppression. The City is obligated to provide fire suppression with its water system while Dan River Water System was not designed and is

not required to provide fire suppression. Therefore, the City would have very little choice but to bolster the portion of Dan River Water System within its then incorporated boundaries or install an extension of the City's system within these areas that is dedicated solely to fighting fires. Either option will require investment that would have to be offset with the benefits of revenues received from an increased tax base and wastewater service area.

The City argues that "[a]t most, [this] Court could find that the installation of additional hydrants assumes the ability to negotiate with [Dan River], but no evidence supports the finding that the entire 'undertaking to extend fire suppression services' requires such negotiation." We agree with the City that petitioners presented no evidence that the *only* way to go about extending fire suppression services was by adding additional hydrants. Indeed, the aforementioned provision of the Master Plan shows that fire suppression services could also have been maintained through a purchase agreement with Dan River, by "bolster[ing] the portion of Dan River Water System within its then incorporated boundaries[,] or [by installing] an extension of the City's system within these areas that is dedicated solely to fighting fires." Petitioners respond, however, that "[s]ince the City cannot compete with [Dan River], and did not address the feasibility of installing a dedicated suppression line, it elected to 'bolster' the existing lines within the annexation area through the installation of additional fire hydrants as shown on the City's water lines extension map." After reviewing the Annexation Utilities Study, stating "[f]ire hydrants are required at 600 foot intervals and must be connected to a minimum 6-inch water main" along with the Water System Improvements Annexation Area Map that included the proposed fire hydrants, we agree with the petitioners. We uphold the trial court's finding 28 because it conforms to the evidence that the particular method through which the City proposed to provide fire suppression services did indeed assume the ability to negotiate with Dan River.

The City next challenges finding of fact 29, which states, "The installation of the additional hydrants is necessary to obtain the same insurance rating (Class 4) for the Indian Hills Area as is applicable in the City." Finding 29 likewise is supported by the evidence. The record shows that the Indian Hills area is currently located in the Leaksville District, which has an insurance rating of class 9 and significantly higher insurance premium levels than in the City. Kelly Stultz ("Stultz"), planning director for the City, testified that the

Indian Hills Area would drop to a class 4 rating with the installation of the additional hydrants:

> Q. So the addition of those hydrants would bring the level of fire protection into this area on a level that was equal to what the rest of the city is receiving from the city fire department; is that correct?
>
> A. Yes.
>
> Q. And is that the basis for the anticipated lower ISO rating?
>
> A. No. My understanding of the ISO rating is that it is much more than fire hydrants . . . .
>
> Q. The fire hydrants are certainly part of that; is that correct?
>
> A. Yes.

The City urges us to consider Fire Chief Ronnie Overby's ("Overby") testimony in reply to the question, "And the increase in hydrants is going to get the city its lower rating in the area?" Overby responded, "We already have a lower rating. The hydrants are not going to make any difference." Although there is some evidence to support contrary findings, the trial court's finding of fact 29 is binding on this Court because it is supported by evidence. *See Barnhardt*, 116 N.C. App. at 217, 447 S.E.2d at 473.

The City also challenges finding of fact 32, which states, "Within the Indian Hills Area, the flow rate in [Dan River's] water lines is less than the flow rate within the City's water lines such that the installation and use of booster pumps is necessary in order for the City to be able to provide the same level of fire suppression service within the annexed area." The City argues that "nothing was stated about booster pumps being needed." However, Brad Corcoran ("Corcoran") the city manager testified about information contained in the Master Plan as follows:

> Q. And in order to provide the operating pressure in your water distribution system as it is in the rest of the town, you are going to be required to have booster pumping in that area, is that correct, in order to get the adequate pressures?
>
> A. That's what this says, yes.

We are, accordingly, bound by the trial court's finding. *See Barnhardt*, 116 N.C. App. at 217, 447 S.E.2d at 473.

B. Conclusions of Law

[2] The City next challenges several of the trial court's conclusions of law. It first challenges conclusion of law 7 which states:

> 7. While the Report contains statements generally committing the City to provide water and fire protection and suppression services to the Indian Hills Area on substantially the same basis and in the same manner as such services are provided within the rest of the City prior to annexation, as required by [N.C. Gen. Stat.] § 160A-47(3)(a), Petitioners have shown that the City's general statements are illusory, for reasons including:
>
> a. The City is prohibited from interfering with [Dan River's] business so long as federally guaranteed loans are in place (see 7 U.S.C. § 1926), thereby foreclosing competition and acquisition by eminent domain.
>
> b. [Dan River] must agree to various proposals that the City could make to acquire supplement or connect to existing [Dan River] facilities, and no such agreement exists.

In regard to water services, the following findings are relevant:

> 13. With respect to extension of water services to the area to be annexed, the Report notes that both the City and [Dan River] provide "limited water services" to the area; that "[t]he extension of water . . . to the entire area will result in new lines being run to properties not already served by the City . . . "; that the extension of such services would be complete within two years of annexation; and that the net cost thereof would be $78,000, half of which would be assessed to residents.
>
> 14. [Dan River's] customers within the Indian Hills Area pay a higher rate for water service than the City charges its water service customers within the municipality.
>
> 15. No agreement exists between the City and [Dan River] that provides for how the City will subsidize [Dan River] for the revenue it will lose as a result of the lower rates the City will charge its water service customers within the Indian Hills Area.
>
> 16. If new City water service lines are constructed in the Indian Hills Area, or an agreement between the City and [Dan River]

concerning the City's acquisition or use of [Dan River's] lines is negotiated, the City will pay [Dan River] a yearly subsidy for the lost revenue resulting from the lower rates the City will charge for its water service. [In a footnote, the trial court notes, "The City also suggests, alternatively, that customers in the Indian Hills Area who continue to receive water services from [Dan River] at its higher rates could be 'reimbursed' by the City for the difference between [Dan River] rates and City rates, to meet the 'same basis' and 'same manner' requirements of N.C. Gen. Stat. § 160A-47(3)a."]

19. [Dan River] provides water service to all of Area 5 except "a small section of NC 770 from Matrimony Creek to Brammer Road," and the only water system improvements contemplated by the City are the addition of fire hydrants throughout the area "to maintain the City's required 600 foot spacing."

20. Among assumptions in the FBS report is that "the [Dan River] system could be modified and extended for the City's purposes."

21. The FBS report further states that "[a]n agreement must be negotiated between the City . . . and [Dan River] to provide water services to these customers."

22. No agreement exists between the City and [Dan River] concerning the City's use of or modifications to [Dan River's] water service lines in the Indian Hills Area, or otherwise to provide for additional water service in that area by the City or by [Dan River] under contract with the City.

23. [Dan River] is a rural water association, and a portion of its operating assets secures payment of a federally guaranteed loan.

The findings of fact regarding the lack of an agreement to subsidize Dan River, if taken alone, fail to support the trial court's conclusion of law 7; however, the findings regarding the extension of waterlines do adequately support conclusion 7. The City, in its report, proposed to continue using Dan River waterlines since the City is prohibited from competing with Dan River, but the City failed to reach an agreement with Dan River regarding a plan to subsidize Dan River for the lower prices that the annexed residents will be charged for water. The lack of an agreement to subsidize Dan River, however, fails to

support the trial court's conclusion that the City's commitment to providing water services is illusory, given that the trial court found that the City could reimburse the customers directly.

The lack of an agreement regarding the extension of waterlines is more problematic. The report assumes, without providing any basis for the assumption, that the City will be able to negotiate an agreement with Dan River regarding the extension and use of Dan River's waterlines in order to reach part of the Indian Hills area that is not already serviced with water. If Dan River refuses to allow the City to use and extend its lines, that portion of the Indian Hills area which is currently without water may continue not to receive water services. In the absence of such an agreement, the City would have to arrange for more costly measures such as extending its own lines solely to service this area, since it cannot compete with areas already serviced by Dan River due to Dan River's protected status. As such, there should have been an agreement with Dan River or other concrete indication that such an agreement could be obtained prior to the creation of the report so that the report could set forth reasonably concrete information about the feasibility and costliness of extending water services and the governing board could make an informed decision about this matter with informed public comment. Rather, the report merely assumes that Dan River will grant such acceptance and does not address whether the City has the means to extend water services if Dan River fails to negotiate with them. Accordingly, in the absence of an agreement or analysis in the report discussing the feasibility and costliness of providing water services if Dan River refuses to bargain with the City, the trial court properly concluded that the City's statement regarding its commitment to provide water services is illusory.

Regarding fire suppression services, the trial court found:

27. The Report states that the City will extend its fire protection and fire suppression services into the Indian Hills area.

28. The undertaking to extend fire suppression services assumes the ability to negotiate with [Dan River] to install additional hydrants on existing [Dan River] lines.

29. The installation of the additional hydrants is necessary to obtain the same insurance rating (Class 4) for the Indian Hills Area as is applicable in the City.

30. The City has not complied with or implemented [Dan River's] water line extension policy with respect to installing the fire hydrants within the Indian Hills Area.

31. No agreement exists between the City and [Dan River] concerning installation of new hydrants.

32. Within the Indian Hills Area, the flow rate in [Dan River's] water lines is less than the flow rate within the City's water lines such that the installation and use of booster pumps is necessary in order for the City to be able to provide the same level of fire suppression service within the annexed area.

33. No agreement exists between the City and [Dan River] that provides for how the City will install or use the necessary booster pumps within the Indian Hills Area.

Likewise, the findings of fact support the trial court's conclusion that the City's statements regarding its commitment to provide fire protection and suppression services are illusory. The City's proposed plan required that it negotiate with Dan River regarding the installation of additional hydrants on Dan River's waterlines. If Dan River refuses to allow the installation of additional hydrants, the City would be unable to provide Indian Hill residents with the same insurance rating. The findings also state that booster pumps are necessary in order for the City to be able to provide a flow rate in [Dan River's] waterlines that is equivalent to the flow rate in the City waterlines and in order to provide an equivalent rate of fire suppression services; however, the City has no agreement with Dan River regarding the installation of booster pumps. Because the City failed to reach any agreement with Dan River regarding these matters, the trial court properly concluded that the City's statements regarding its commitment to fire protection and suppression services are illusory.

[3] The City next challenges conclusion of law number 8 which states, "The Report does not meet the requirements of [N.C. Gen. Stat.] § 160A-47(3)(a) and (b), pertaining to water service and fire suppression." The statute at issue in this case is N.C. Gen. Stat. § 160A-47 (2003), covering prerequisites to annexation. "The purpose of this statute is to insure that, in return for the financial burden of city taxes, annexed residents receive all major city services." *Parkwood Ass'n v. City of Durham*, 124 N.C. App. 603, 606, 478 S.E.2d 204, 206 (1996). "The requirements of the Act that plans for extension to the area to be annexed of all major municipal services

performed within the municipality at the time of annexation is a condition precedent to annexation." *In re Annexation Ordinance No. 1219 Adopted by City of Jacksonville, North Carolina, April 18, 1961*, 255 N.C. 633, 646-47, 122 S.E.2d 690, 700 (1961). "The minimum requirements of the [annexation] statute are that the City provide information which is necessary to allow the public and the courts to determine whether the municipality *has committed itself* to provide a nondiscriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services." *Cockrell v. City of Raleigh*, 306 N.C. 479, 484, 293 S.E.2d 770, 773 (1982) (emphasis added). However, while our Supreme Court has recognized that a city need only "substantially comply" with § 160A-47, *see Food Town Stores v. City of Salisbury*, 300 N.C. 21, 40, 265 S.E.2d 123, 135 (1980), it has also said a city is required to provide major municipal services under N.C. Gen. Stat. § 160A-47, and its performance of this duty "may not be made to depend upon a doubtful contingency." *In re Annexation Ordinance Adopted by City of Jacksonville*, 255 N.C. at 646, 122 S.E.2d at 700 (finding plans for extension of water and sewer services insufficient when they were purely conditional).

By statute, in pertinent part, the annexation report must contain

> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> a. Provide for extending . . . fire protection . . . services to the area to be annexed *on the date of annexation* on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. A contract with a rural fire department to provide fire protection shall be an acceptable method of providing fire protection. If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines. . . .
>
> b. Provide for extension of major trunk water mains . . . into the area to be annexed so that when such lines are constructed, property owners in the area to be annexed

> will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water . . . lines to individual lots or subdivisions. . . .
>
> c. If extension of major trunk water mains . . . and water lines is necessary, set forth a proposed timetable for construction of such mains . . . and lines as soon as possible following the effective date of annexation. In any event, the plans shall call for construction to be completed within two years of the effective date of annexation.

N.C. Gen. Stat. § 160A-47(3) (2003) (emphasis added).

The trial court's findings of fact support its conclusion of law number 8 because a doubtful contingency is present. In order for the City to provide water and fire protection as it claims in its report, under its proposed plan for doing so as conclusively established through the findings of fact, it would have to reach several agreements with Dan River. The necessity of reaching these agreements creates a doubtful contingency such that the City is not in substantial compliance with N.C. Gen. Stat. § 160A-47(3). *See In re Annexation Ordinance Adopted by City of Jacksonville*, 255 N.C. at 646, 122 S.E.2d at 700. Moreover, the City has failed to meet even the "minimum requirements" of the annexation statute in that it has not "provide[d] information which is necessary to allow the public and the courts to determine whether the municipality *has committed itself* to provide a nondiscriminatory level of service." *See Cockrell*, 306 N.C. at 484, 293 S.E.2d at 773. Although the City has stated that it made such a commitment, a statement of intent alone is insufficient to meet the requirements of N.C. Gen. Stat. § 160A-47(3). Our Supreme Court has held that "the report of plans for extension of services is the cornerstone of the annexation procedure . . . and to be of greatest possible benefit, the plans for services should be stated as fully and in as much detail as resources of the municipality reasonably permit." *Cockrell*, 306 N.C. at 485, 293 S.E.2d at 774. In order to show a true commitment to the extension of municipal services, there must be more than mere words of commitment; rather, there must be reasonably concrete and feasible plans in place for the extension of municipal services. *See id.* On these facts, the degree of noncompliance was so great as to make the proposed plan meaningless. If merely stating an abstract intent to provide municipal services to the annexed area were sufficient to meet the statutory requirements, cities would be

able to adopt ordinances without sufficient information of the costliness of the annexation and the feasibility of providing municipal services. Citizens would be unable to participate on an informed basis in the public hearing and offer feedback to the City on the prudence of adopting an annexation ordinance. *See Parkwood Ass'n*, 124 N.C. App. at 612, 478 S.E.2d at 209 (recognizing that the accuracy of projected annexation costs and items contained in the report should be challenged in the public hearing). Accordingly, because the City had no reasonably concrete and feasible plans in place, we hold that the trial court did not err in concluding that the City had failed to comply with N.C. Gen. Stat. § 160A-47.

C. Declaration by the Trial Court that the Annexation Ordinance is Null and Void

[4] The City argues that the trial court erred in declaring the annexation ordinance null and void under the applicable statute, which states:

> The court may affirm the action of the governing board without change, or it may
>
> (1) Remand the ordinance to the municipal governing board for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.
>
> (2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of [N.C. Gen. Stat.] 160A-48 if it finds that the provisions of [N.C. Gen. Stat.] 160A-48 have not been met; provided, that the court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service.
>
> (3) Remand the report to the municipal governing board for amendment of the plans for providing services to the end that the provisions of [N.C. Gen. Stat. 160A-47 are satisfied.]
>
> (4) Declare the ordinance null and void, if the court finds that the ordinance cannot be corrected by remand as provided in subdivisions (1), (2), or (3) of this subsection.

N.C. Gen. Stat. § 160A-50(g) (2003).

Specifically, the City argues that "[o]nly if the matter cannot be remanded and a Petitioner will suffer material injury by reason of the failure to comply with the statutes can the ordinance be declared null and void[,] [and] [t]he evidence and the findings do not support any material injury to the Petitioners." In response, the petitioners argue

> The City . . . failed to substantially comply with an essential requirement of the annexation procedure when it failed to approve a Report that met the requirements of [N.C. Gen. Stat. § 160A-47(3)]. In failing to meet this procedural requirement, the City compromised the substantive rights of the Petitioners, and of any other entity having an interest in this annexation proceeding, to participate, on an informed basis and as effectively as possible, in the informational meeting and public hearing. The fact that the City's annexation ordinance was, on its first reading, adopted by the thinnest of margins on a 4 to 3 vote, suggests that, but for the material prejudice stemming from the City's noncompliance the ordinance may have been voted down.

Although N.C. Gen. Stat. § 160A-50(g) sets forth three grounds on which a trial court may remand an ordinance to the governing board, it does not require that the trial court remand the ordinance "if the court finds that the ordinance *cannot* be corrected by remand[.]" (Emphasis added.) The trial court in its findings of fact stated that "[t]he City's failure to meet [the requirements of § 160A-47] results in material injury to Petitioners which the Court concludes *is not likely* to be corrected if remanded." (Emphasis added.) North Carolina General Statutes § 160A-50(g) permits remand of an ordinance for certain degrees of noncompliance when irregularities do not eviscerate the protections provided in N.C. Gen. Stat. § 160A-47. Where petitioners show that the degree of noncompliance with statutory requirements for annexation is so great as to eviscerate the protections provided in N.C. Gen. Stat. § 160A-47, a trial court does not err in declaring an ordinance null and void. However, in order for a trial court to properly declare an ordinance null and void under § 160A-50(g)(4), it must specifically find that "the ordinance *cannot* be corrected by remand" as opposed to finding that "the ordinance is not likely to be corrected on remand." *See* N.C. Gen. Stat. § 160A-50(g)(4). Because the trial court failed to make the appropriate finding, perhaps acting under a misapprehension of applicable law, *see Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334 (1979), we remand this matter to the

trial court for appropriate findings to support one of the statutory grounds under N.C. Gen. Stat. § 160A-50(g).

II. Cross-Assignments of Error by Petitioners

A. North Carolina General Statutes 160A-48(c)(3) (2003)

[5] Petitioners raise several assignments of error on appeal. Petitioners first argue that "the evidence does not support the findings of fact and conclusions of law that the Indian Hills Area met the subdivision requirement of [N.C. Gen. Stat.] 160A-48(c)(3) and that the city used reasonably reliable methods in determining the degree of subdivision." Of numerous findings of fact on this issue, petitioners only assign error to and argue in their brief finding 40. Finding 40 states,

> 40. The "actual use" evidence reflected in Pet. Exh. 27 is of questionable relevancy because the observations on which it is based were not as of the date of the Report or the Second Annexation Ordinance. The City and its contractor, the COG, used City data, supplemented by Geographic Information System (GIS) data and limited on-site observation by COG personnel, to apply the use and subdivision tests. Such sources are reasonably reliable, and Petitioners have not carried their burden of proof to the contrary.

As stated *supra*, on review of an annexation ordinance, findings of fact made below are binding on this Court if supported by evidence, even though there is evidence to the contrary. *Barnhardt*, 116 N.C. App. at 217, 447 S.E.2d at 473. Kandas Burnett ("Burnett"), petitioner's witness, testified that she had modified the City's "use" spreadsheet, and she acknowledged that the modified spreadsheet was petitioner's exhibit 27. Burnett further testified that she had gone out to observe the property and determine its uses the day prior to the hearing on this matter, 9 May 2004. Because this evidence supports the trial court's basis for finding petitioner's exhibit was "of questionable relevancy," that portion of the finding is conclusively established.

Likewise, evidence supports the portion of the finding that relates to the reliability of the City's evidence regarding the use and subdivision tests. Johanna Cockburn ("Cockburn"), a witness for the City, testified that she served as a senior planner at the Piedmont Triad Council of Governments and that her duties included, *inter*

alia, "transportation planning, land use planning, assistance with zoning, [and] annexation feasibility studies." She further testified that the methodology she used in preparing her calculations included digital data from Rockingham County's website in the place of actual hardcopy tax cards, a CD Rom that contained maps and drawings from GIS files, and property values. Additionally, she testified that the Piedmont Triad Council of Governments had been using GIS data "for the better part of ten years" and "[f]or area calculations, in particular, in association with annexations . . . for at least the last five or six." Accordingly, because evidence supports the trial court's finding 40, it is conclusively established.

[6] Having determined that finding 40 is conclusively established, we next turn to petitioner's challenge of conclusion of law 6, which states: "The City has substantially complied with the requirements of [N.C. Gen. Stat.] § 160A-48(c)(3) regarding development for urban purposes and satisfaction of the use and subdivision tests." North Carolina General Statutes § 160A-48(c)(3) requires that:

> (c) Part or all of the area to be annexed must be developed for urban purposes at the time of approval of the report provided for in G.S. 160A-47. . . . An area developed for urban purposes is defined as any area which meets any one of the following standards: . . .
>
> (3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts three acres or less in size. . . .

N.C. Gen. Stat. § 160A-54 (2003) provides that:

> In determining . . . degree of land subdivision for purposes of meeting the requirements of G.S. 160A-48, the municipality shall use methods calculated to provide reasonably accurate results. In determining whether the standards set forth in G.S. 160A-48 have been met on appeal to the superior court under G.S. 160A-50, the reviewing court shall accept the estimates of the municipality unless the actual . . . degree of land subdivision falls below the standards in G.S. 160A-48: . . .

(3) As to degree of land subdivision, if the estimates are based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable source, unless the petitioners on appeal show that such estimates are in error in the amount of five percent (5%) or more.

Findings of fact 34-35, 37-39, and 40, which relate to the "use" and "subdivision" requirements of the statute, support this conclusion of law. The findings state, *inter alia*, the following. The trial court found that "the area to be annexed 'is developed for urban purposes because it meets both the use and subdivision tests.' " The trial court also found that the City report contained a table that summarized the compliance criteria to include: 149 parcels; 68.4% of the parcels in use; 153.1 acres of total residential/undeveloped acreage; and 63.2% of residential/undeveloped acreage was subdivided into lots of three acres or less. Attached to its report was a spreadsheet marked petitioner's exhibit 5. Exhibit 5 was initially described by the City as the data compilation on which the report was based, but it was later determined that the correct compilation was defendant's exhibit 17. The trial court made the additional finding that although petitioners presented evidence showing the inaccuracy of the City's data, the court discounted petitioners' evidence "because the observations on which it is based were not as of the date of the Report of the Second Annexation Ordinance." Lastly, the trial court found that the City used reasonably reliable methods.

While these findings support the trial court's conclusion of law 6, we look at the findings as a whole. Two footnotes in the trial court's judgment must also be taken into consideration:

5. Unfortunately, Def. Exh. 17 contains several inaccuracies. . . . Second, only 12,500 square feet of . . . (parcel 1350) . . . should have been included. The metes and bounds description in the Second Annexation Ordinance and a map of "Indian Hills Annexation Area" dated June 27, 2003, . . . which is Pet. Exh. 1, include only a portion of the parcel, but Pet. Exh. 5 and Def. Exh. 17 erroneously include the whole parcel. The deletion of the balance of the area of parcel 1350, or 1,133,999.54 square feet, significantly reduces the size of the total area to be annexed (and significantly improves the City's qualification under the subdivision test).

6. By the evidence presented and its submission of proposed findings of fact and conclusions of law as requested by the

> Court, the City concedes that the "splitting" of parcel 1350 (which actually should be parcel 6602) is not appropriate and that either all or none of the parcel should be included in the area to be annexed. The City may address that question if the proposed annexation is revisited.

Since the data underlying the table presented in the report was flawed, it stands to reason that depending on whether the parcel is ultimately included or excluded from final calculations, it may have some bearing on whether the City has met the statutory requirements regarding development for urban purposes and satisfaction of the use and subdivision tests. Alternatively, the inclusion or exclusion of this parcel may have little bearing on whether the statutory requirements are met. We have no information in the record from which we can determine this matter, and, therefore, remand it to the trial court for its consideration.

B. North Carolina General Statutes § 160A-48(e)

[7] Next, petitioners argue that "the evidence does not support the findings of fact and conclusions of law that the city met the mandatory requirements of [N.C. Gen. Stat.] § 160A-48(e)." Although petitioners argue in part that the evidence does not support the findings of fact, we note petitioners failed to assign error to the findings, and the findings are thus conclusively established. We, therefore, consider only whether the trial court's findings of fact support its conclusion of law 4, which states:

> Although the City described a portion of the boundary of the area to be annexed along Matrimony Creek by reference to the courses of the creek and the Dan River, rather than by reference to existing property lines and streets, as N.C.G.S. § 160A-48(e) provides, the noncompliance was insubstantial (and, in any event, could be cured if the City were to initiate annexation in the future).

North Carolina General Statutes § 160A-48(e) requires, in pertinent part, that: "In fixing new municipal boundaries, a municipal governing board *shall* use recorded property lines and streets as boundaries[.]" Petitioners argue that this requirement is mandatory under *Arquila v. City of Salisbury*, 136 N.C. App. 24, 523 S.E.2d 155 (1999). In *Arquila*, a panel of this Court interpreted the language of an earlier version of § 160A-48(e), which said, whenever practical, a municipal governing board must follow "natural topographic features such as ridge lines and streams and creeks as boundaries, and

may use streets as boundaries." N.C. Gen. Stat. § 160A-48(e) (1994). This Court held " 'While section 160A-48(e) does not provide mandatory standards or requirements for annexation,' we believe that the provision itself is mandatory in light of our Supreme Court's holding that a boundary 'must' follow topographic features unless to do so would defeat the annexation." *Arquila*, 136 N.C. App. at 41, 523 S.E.2d at 167.

"An important function of statutory construction is to ensure accomplishment of the legislative intent." *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 315, 526 S.E.2d 167, 170 (2000) (citations omitted). Accordingly, we first look to the words chosen by the legislature and "if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 896 (1998). Our legislature, in enacting the current version of N.C. Gen. Stat. § 160A-48(e) (2005), removed the "whenever practical" language of the previous versions of the statute and used the word "shall." As such, the plain language of the statute establishes that § 160A-48(e) is a mandatory provision. However, we look not only to the provision at issue but also to the statutory scheme as a whole and to our prior interpretations of the statutory framework. Our Supreme Court has recognized that

> It is generally held that slight irregularities will not invalidate annexation proceedings if there has been substantial compliance with all essential provisions of the law. Absolute and literal compliance with a statute enacted describing the conditions of annexation is unnecessary; substantial compliance only is required. . . . The reason is clear. Absolute and literal compliance with the statute would result in defeating the purpose of the statute in situations in which no one has been or could be misled.

In re Annexation Ordinance Adopted by the City of New Bern, North Carolina, December 19, 1969, 278 N.C. 641, 648, 180 S.E.2d 851, 856 (1971) (citations omitted).

The trial court made the finding that "[t]he legal description of the Indian Hills Area contains boundary lines that follow the course of the Dan River and Matrimony Creek instead of using recorded property lines." In regard to the use of boundary lines that follow the course of Dan River and Matrimony Creek, the City argues that

> [t]he pre-annexation boundary line for the City ran with the meanderings of Matrimony Creek and this portion of the bound-

> ary coincides with a portion of the area to be annexed. If the property lines along the bank of the creek for the Indian Hills Subdivision had been used, then there would have been a "gap" from the center of the creek to the west bank of the creek which would not have been annexed.

It is not our belief that the legislature would have intended literal compliance with the statute such that a "gap" would be left between the City's current boundaries and the area of land to be annexed. Accordingly, we hold that the trial court correctly determined that the City had substantially complied on this matter.

[8] Petitioners also assign error to the trial court's failure to conclude that "the City failed to comply with the requirements of [N.C. Gen. Stat.] § 160A-48(e) in that it failed to use the recorded property lines of lot number 6602." The trial court found "the City concedes that the 'splitting' of parcel 1350 (which actually should be parcel 6602) is not appropriate and that either all or none of that parcel should be included in the area to be annexed." Footnote 5 of the trial court's judgment shows the great variance in the total land that would have been annexed if parcel 1350 had not been split: "only 12,500 square feet of [parcel 1350] should have been included" . . . and the balance of land which should not have been included equaled "1,133,999.54 square feet." We agree that the trial court may have erred in not concluding that the City failed to comply with the mandatory provision of N.C. Gen. Stat. § 160A-48(e). We remand this issue to the trial court for appropriate conclusions of law, including its determination whether or not this nonconformity amounted to a "slight irregularit[y]" in regard to the annexation at issue.

C. North Carolina General Statutes § 160A-47(1)b

[9] Lastly petitioners argue that "the evidence does not support the conclusion of law that the city met the requirements of [N.C. Gen. Stat.] § 160A-47(1)b with respect to the water and sewer line extension maps which were included with the report." Because no findings of fact on this matter are challenged, we take them as true and look only to whether the findings support the trial court's conclusion of law 2, which states

> While the maps showing the extensions of the water and sewer lines which were included with the Report did not bear the seal of a registered professional engineer, the report to which such maps were appended did bear such seal, and the City has substantially complied with [N.C. Gen. Stat.] § 160A-47(1)b.

The following findings of fact are relevant:

17. The Report does not include a "map or maps" bearing the seal of a registered professional engineer, showing existing and proposed extensions of trunk water mains in the Indian Hills Area (see N.C.G.S. § 160A-47(1)b), but does include an "Annexation Utilities Study of City of Eden" prepared by Finkbeiner, Pettis & Strout, Inc. (the FBS report), which bears the seal of a registered professional engineer, and which contains a map entitled "Figure 5 Water System Improvements Annexation Area 5" (Area 5 Water map), that purports to depict the location of existing City 12-inch and 6-inch lines, but not the location of any extensions thereof.

18. Area 5 is described in the FBS report as "the area in and around the Indian Hills subdivision."

25. The Report does not include a "map or maps" bearing the seal of a registered professional engineer, showing existing sewer interceptors and outfalls and proposed extensions of outfalls in the Indian Hills Area (see N.C.G.S. § 160A-47(1)b), but the FBS report contains a map entitled "Figure 6 Sewer System Improvements Annexation Area 5" (Area 5 Sewer map), that purports to depict the location of an existing City pump station, force main and gravity sewer, and of proposed gravity sewer extensions.

As stated *supra*, in assessing small nonconformities in annexation proceedings, our Supreme Court has said that "[i]t is generally held that slight irregularities will not invalidate annexation proceedings if there has been substantial compliance with all essential provisions of the law." *In re Annexation Ordinance Adopted by the City of New Bern*, 278 N.C. at 648, 180 S.E.2d at 856. The City substantially complied with the statutory requirement because the maps were both prepared by an engineering firm and attached to a report to which an engineer affixed his or her seal. As such, we reject petitioners' assignment of error.

D. Other Assignments of Error

We lastly note that petitioners' cross-assignments of error contain five assignments of error, numbers 3-6 and 17, regarding the trial court's *failure* to make certain findings of fact. On appeal, "a trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is competent evidence to sup-

port them, even though [] there may be evidence that would support findings to the contrary." *Biemann and Rowell Co. v. Donohoe Companies, Inc.*, 147 N.C. App. 239, 242, 556 S.E.2d 1, 4 (2001). We have considered these assignments of error and find them to be without merit.

Remanded.

Judges ELMORE and GEER concur.

JAMES CREECH HERRING, PLAINTIFF v. FOOD LION, LLC, DEFENDANT

No. COA05-202

(Filed 20 December 2005)

1. Evidence— employee handbook—authentication

The trial court did not err in a slip and fall case by admitting defendant company's employee handbook into evidence, because: (1) N.C.G.S. § 8C-1, Rule 901(a) provides that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims; and (2) the testimony of the store manager for defendant company was sufficient to support a finding that the document produced by plaintiff was a copy of defendant's employee handbook in effect at the time of plaintiff's accident.

2. Premises Liability— fall in grocery store—negligence by store owner—sufficiency of evidence

Plaintiff customer's evidence was insufficient for the jury in an action to recover for injuries plaintiff received when he fell over a stock cart in defendant's grocery store where plaintiff produced no evidence as to who left the stock cart in the position which caused plaintiff to fall and no evidence that defendant failed to correct a dangerous condition after it received actual or constructive notice of the condition.

Judge HUNTER concurring in part and dissenting in part.

HERRING v. FOOD LION, LLC

[175 N.C. App. 22 (2005)]

Appeal by defendant from order entered 6 August 2004 by Judge Russell J. Lanier, Jr., in Lenoir County Superior Court. Heard in the Court of Appeals 21 September 2005.

White & Allen, P.A., by Gregory E. Floyd, for plaintiff-appellee.

Poyner & Spruill LLP, by Timothy W. Wilson, for defendant-appellant.

TYSON, Judge.

Food Lion, LLC ("defendant") appeals from order entered setting aside an earlier order granting directed verdict in favor of defendant and granting James Creech Herring's ("plaintiff") motion for a new trial. We affirm in part and reverse in part.

I. Background

On 6 February 2003, plaintiff filed a complaint against defendant in Lenoir County Superior Court alleging he had sustained serious physical injuries as a result of defendant's negligence. Plaintiff's case was tried on 23 and 24 March 2004. Plaintiff presented evidence tending to show that on 3 March 2000, he sustained injuries while shopping at defendant's grocery store located in Snow Hill, North Carolina. Plaintiff testified he pushed a shopping cart down one or two aisles of the store and parked his cart by the meat counter, while he walked over to a display of two-liter soft drinks located at the end of the aisle. Plaintiff selected a bottle from the rear of the display and turned to return to his shopping cart, which remained parked by the meat counter. Plaintiff stated,

> When I took a step, I hit the edge of the [stock cart] . . . which I did not see. I hit the edge of it and I started to fall and it just took the skin off the front of my shin on my right leg so I didn't put my knee down or anything to try to break the fall. All the weight went on my hands.

The stock cart was empty, and its base was slightly lower than plaintiff's knee. Plaintiff described the stock cart as "four and a half feet long, maybe 17, 18 inches wide with—it had end posts that stuck up . . . They were rounded and I'd say they were maybe four and a half feet high . . . ."

In order to illustrate his testimony, plaintiff submitted photographs of a stock cart substantially similar to the one upon which he was injured. Plaintiff testified that the stock cart was not "anyplace

around that [he] noticed" as he approached the soft drink display. Plaintiff testified he never observed the stock cart near the end of the aisle before he fell. In plaintiff's opinion as he approached the end display, the stock cart was "in-between two displays and the ends were up against or very close to the end of these displays . . . so they were hidden." When plaintiff turned away from the soft drink display to return to his shopping cart, he asserts the stock cart must have been directly behind him. Plaintiff testified he had no opportunity to see the stock cart before he tripped on it.

As a result of his fall, plaintiff suffered a shoulder impingement ultimately requiring surgery. No one was tending the stock cart at the time of plaintiff's injury, but one of defendant's employees, believed to be Carlos Gurley ("Gurley"), was standing nearby and allegedly witnessed plaintiff's fall. Plaintiff left the store following his accident and did not contact defendant regarding the incident until after he learned his injury was serious and would result in permanent disability. Plaintiff spoke with the manager for defendant of the store, John Ashworth ("Ashworth"), and informed him of the accident. Ashworth told plaintiff that Gurley no longer worked at the store and that no incident report had been filed for the accident. Plaintiff never located Gurley, and he did not testify at trial.

Benjamin Metz ("Metz"), the current manager for defendant of the store where plaintiff was injured, testified regarding defendant's employee handbook. The handbook, which was required to be distributed to all employees, contained the following statements:

> STATEMENT OF POLICY
>
> The safety of our employees and customers is an important priority at Food Lion. Employees must share in the responsibility by obeying established safety rules and being alert for unsafe working conditions. No manager or employee may be relieved of his or her part of this responsibility.
>
> . . . .
>
> Do not commit an unsafe act which might result in injury to yourself or another person. Be alert to the presence of other people to avoid accidentally injuring someone.
>
> . . . .
>
> Report any unsafe conditions or practices to your manager immediately.

> Report all accidents of any kind to your manager at once. If the accident results in an injury, regardless of how slight the injury may seem, it must be reported without delay.
>
> . . . .
>
> Don't leave containers such as cartons, baskets, and other stock carriers unattended in aisles. Empty them promptly and return them to their proper place.
>
> . . . .
>
> Stock trucks and carts should be loaded to pass through aisles or doorways with ease. Unattended or empty trucks and carts should be placed out of the way.
>
> . . . .
>
> Notify the Store Manager or person in charge of the store of accidents immediately.

Metz testified that all of the stock carts within defendant's store are owned by defendant and that defendant is responsible for their use and placement within the store. At the close of plaintiff's evidence, defendant moved for a directed verdict. The trial court granted defendant's motion by order dated 5 April 2004.

Plaintiff filed a motion for a new trial and argued the trial court erred in granting defendant's motion for directed verdict. Upon review of plaintiff's motion for a new trial, the trial court determined defendant's motion for directed verdict had been improperly granted. The trial court entered an order setting aside the 5 April 2004 order and granted plaintiff's motion for a new trial. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) granting plaintiff's motion for a new trial after it had previously granted defendant's motion for directed verdict; and (2) admitting into evidence defendant's employee handbook.

III. Motion for New Trial

Plaintiff's motion for a new trial asserted the trial court erred in granting defendant's motion for directed verdict. Defendant asserts the trial court properly granted its motion for directed verdict because plaintiff presented insufficient evidence that defendant: (1) negligently created the condition leading to plaintiff's injury; or

(2) negligently failed to remove the stock cart after actual or constructive notice of its existence. To determine whether the trial court erred in granting plaintiff's motion for a new trial, we must determine whether the trial court erred in granting defendant's motion for directed verdict.

IV. Motion for Directed Verdict

The standard of review for 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). A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580-81 (1983) (citation omitted). This Court reviews a trial court's grant of a motion for directed verdict *de novo*. *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411-12, 583 S.E.2d 318, 320 (2003). The trial court properly granted defendant's motion for directed verdict.

V. Employee Handbook

[1] Defendant argues the trial court erred in admitting the employee safety handbook into evidence. Defendant contends plaintiff failed to properly authenticate the document before offering it into evidence. We disagree.

Metz, the store manager for defendant, testified that he obtained a copy of the employees' handbook effective in March 2000, the time of plaintiff's injury. Metz identified the document produced by plaintiff as defendant's employee handbook. Metz testified that it was the same handbook required to be distributed to all employees. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2003). We conclude Metz's testimony was sufficient to support a finding that the document produced by plaintiff was a copy of defendant's employee handbook in effect at the time of plaintiff's accident. This assignment of error is overruled.

VI. Duty to Lawful Visitors

[2] Owners and occupiers of land in this State owe "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), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). Where a plaintiff customer slips or falls on an object and is injured in a retail establishment, the "plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992) (citing *Hinson v. Cato's, Inc.*, 271 N.C. 738, 739, 157 S.E.2d 537, 538 (1967)).

A. Negligence

Here, plaintiff produced no evidence that defendant, its agent, employees, or contractors, negligently placed the stock cart in a position that would cause plaintiff to become injured. *Id.* Plaintiff failed to produce any evidence that any of defendant's employees breached any of defendant's safety rules by leaving the stock cart unattended in plain view in the aisle. No evidence whatsoever was presented regarding *who* left the stock cart in the position which caused plaintiff to fall, *when* it was placed there, or *how long* it remained.

Defendant's evidence tended to show that vendors, such as Pepsi, Coca-Cola, and Frito Lay, are permitted to use stock carts owned by defendant. Based on plaintiff's evidence, the jury could only speculate who left the stock cart in a position causing plaintiff to fall, whether it be an employee, a vendor, or another customer, and how long it remained there. "Cases are not to be submitted to a jury on speculations, guesses, or conjectures . . . [P]roof of negligence must rest on a more solid foundation that mere conjecture." *Id.* at 69, 414 S.E.2d at 345 (citations omitted).

B. Notice

Plaintiff also presented no evidence that defendant failed to correct a dangerous condition after it received actual or constructive notice of the condition. *Id.* at 64, 414 S.E.2d at 342-43. This case can be distinguished from cases in which courts of this State have held a defendant retail store to have constructive notice of a dangerous condition. Evidence that the dangerous condition existed for some period of time prior to the fall may create an inference of constructive notice. *Furr v. K-Mart Corp.*, 142 N.C. App. 325, 327, 543 S.E.2d 166, 168 (2001). In *Furr*, the plaintiff slipped in a K-Mart store on liquid detergent that had leaked from a container down the side of the shelving structure and onto the floor. *Id.* at 328, 543 S.E.2d at 169. The

plaintiff presented evidence that the detergent on the shelving structure had dried and become pink at the time of his fall. *Id.* This Court held that evidence to be "sufficient to raise an inference that the liquid detergent had been leaking for such a length of time that defendant should have known of its existence in time to have removed the danger or to have given proper warning of its presence." *Id.* Similarly, in *Long v. Food Stores*, our Supreme Court held that evidence of grapes on the floor that were "full of lint and dirt" was sufficient to show that the store owner had knowledge of their presence. 262 N.C. 57, 61, 136 S.E.2d 275, 278-79 (1964).

Here, plaintiff presented no evidence to raise an inference the stock cart had been left in its position for some period of time prior to his fall to place defendant on notice. Plaintiff testified that he did not know how the stock cart got there and did not see the stock cart before falling over it. Plaintiff also testified that after he fell, he looked up and saw one of defendant's employees, who worked in the meat department, speaking with an elderly lady "on the other side of the display." Plaintiff presented no evidence whether this or another employee had seen or should have seen the cart before plaintiff fell. Plaintiff also presented no evidence of how long the stock cart had been present in that position before he fell. Plaintiff testified the cart made "creaking" noises as it moved.

Without plaintiff offering sufficient evidence, the jury would have to speculate about: (1) who placed the stock cart in that location; (2) the amount of time the stock cart had been placed there; (3) whether any of defendant's employees saw it; (4) whether any of defendant's employees should have seen it and recognized the danger; and (5) whether any of defendant's employees had time to move the stock cart or warn plaintiff before he fell.

> It seems to be universally held that the *res ipsa loquitur* doctrine is inapplicable in suits against business proprietors to recover for injuries sustained by customers or invitees in falls during business hours on floors and passageways located within the business premises and on which there is litter, debris, or other substances.
>
> No inference of negligence on the part of defendant arises *merely* from a showing that plaintiff, a customer in defendant's store during business hours, fell and sustained an injury in the store.

Long, 262 N.C. at 60-61, 136 S.E.2d at 278 (internal citations omitted).

To hold defendant liable in this case would be to effectively make defendant an insurer and held to be strictly liable for any torts committed by a third person while in defendant's store. A purported and unproven breach of a property owner's or tenant's internal safety policy or manual is not evidence of a breach of a duty by defendant to any plaintiff who is injured on defendant's premises, even though a breach may have been caused by a third-party. North Carolina only imposes strict liability upon owners and occupiers of real property for injuries caused by possessing wild animals or "vicious" domestic animals and engaging in "abnormally dangerous activities." Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts* § 20.10, 411 (1999). The trial court properly granted directed verdict for defendant.

VII. Conclusion

The trial court did not err by admitting defendant's employee handbook into evidence. Plaintiff presented insufficient evidence to support his negligence claim against defendant. The trial court properly granted defendant's motion for directed verdict. On *de novo* review, the trial court erred by setting aside its previous order granting directed verdict in favor of defendant and granting plaintiff's motion for a new trial.

Affirmed in part, Reversed in part.

JUDGE STEELMAN concurs.

JUDGE HUNTER concurs in part, dissents in part.

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

I agree with the majority that the trial court did not err in admitting the employee handbook into evidence. I do not agree, however, that the trial court erred in granting plaintiff's motion for a new trial.

"A store has a duty 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." *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 137, 539 S.E.2d 331, 333 (2000); *Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 294, 401 S.E.2d 837, 838-39 (1991) (stating that "[t]he owner of a store is not an insurer of its customer's safety but is under a duty to exercise ordinary care in keep-

ing the store's aisles and passageways reasonably safe so as not to unnecessarily expose customers to danger"). Failure to do so constitutes negligence. *Freeman v. Food Lion, LLC*, 173 N.C. App. 207, 211, 617 S.E.2d 698, 701 (2005). Moreover, it is well established in North Carolina that the breach of a voluntarily-adopted safety rule may constitute evidence of a defendant's negligence. *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 656, 547 S.E.2d 48, 51 (2000).

On a motion by a defendant for a directed verdict at the close of the plaintiff's evidence in a jury case, the evidence must be taken as true and considered in the light most favorable to the plaintiff. *Stallings*, 141 N.C. App. at 137-38, 539 S.E.2d at 333. The plaintiff must be given the benefit of every reasonable inference which may legitimately be drawn from the evidence, with conflicts, contradictions, and inconsistencies being resolved in the plaintiff's favor. *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 62 N.C. App. 419, 422, 303 S.E.2d 332, 334 (1983). A directed verdict is not properly allowed unless it appears that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence tends to establish. *Willis v. Russell*, 68 N.C. App. 424, 427, 315 S.E.2d 91, 94 (1984). "Directed verdict in a negligence case is rarely proper because it is the duty of the jury to apply the test of a person using ordinary care." *Stallings*, 141 N.C. App. at 138, 539 S.E.2d at 333.

In the instant case, defendant, as owner and operator of the store in which plaintiff was injured, owed a duty to plaintiff to keep its premises safe and to warn him of any hidden dangers on the premises. *Freeman*, 173 N.C. App. at 211, 617 S.E.2d at 701. Further, defendant voluntarily adopted certain safety rules to ensure the safety of all lawful visitors. Most notably, defendant instructed its employees not to leave "stock carriers unattended in aisles." In addition, Metz testified that defendant was responsible for the use and placement of all of the stock carts within defendant's store. Plaintiff testified that the stock cart was unattended when he fell. Thus, notwithstanding the majority's assertion to the contrary, there was evidence from which the jury could find that defendant violated its own safety rule by leaving the stock cart unattended, which in turn would constitute some evidence of defendant's breach of the standard of care. *Thompson*, 138 N.C. App. at 656, 547 S.E.2d at 51. Even if a vendor or other third party placed the stock cart behind plaintiff, the jury could nevertheless find defendant negligent in leaving the stock cart unattended and in a position where anyone could push it behind plaintiff.

Plaintiff testified that, as he approached the soft drink display, the stock cart was not "anyplace around that [he] noticed." The evidence showed that the stock cart was quite large, at least as long as the soft drink display at the end of the aisle, and with end posts four and a half feet high. When plaintiff turned away from the drink display, the low, unloaded stock cart was then directly behind him where he could not see it. This evidence contradicts the majority's assertion that plaintiff presented "no evidence of how long the stock cart had been present in that position before he fell." Plaintiff was only at the end aisle long enough to retrieve the soft drink bottle. It would be unreasonable to infer that the stock cart was present in front of the end aisle the entire time and plaintiff simply failed to notice it, as plaintiff would have had to walk around the large stock cart to reach the soft drink display on the end aisle. In the light most favorable to plaintiff, which is the standard we must apply, the jury could reasonably conclude from the evidence that someone placed or pushed the stock cart to its position behind plaintiff while he stood at the display. As plaintiff turned, he immediately struck the stock cart and fell. Although the stock cart was unattended at the time, plaintiff observed one of defendant's employees standing nearby, speaking with a customer, directly after his fall. The employee witnessed plaintiff's injury, but he did not report the accident to management, in violation of store policy. No accident report was made of plaintiff's accident until several months after the incident. Taken in the light most favorable to plaintiff, there was evidence from which the jury could find that defendant failed to adhere to its own safety policies by neglecting to properly supervise the stock cart that caused plaintiff's injury.

As issues of fact existed requiring resolution by a jury, the trial court improperly granted a directed verdict in favor of defendant. A new trial may be granted for "[e]rror in law occurring at the trial[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(8) (2003). This Court reviews *de novo* the trial court's granting of a motion for a new trial based upon error of law. *Chiltoski v. Drum*, 121 N.C. App. 161, 164, 464 S.E.2d 701, 703 (1995). The trial court's error of law in granting a directed verdict for defendant supports the trial court's subsequent decision to grant a new trial. I would hold the trial court did not err in granting plaintiff's motion for a new trial.

IN RE E.T.S.

[175 N.C. App. 32 (2005)]

IN THE MATTER OF: E.T.S.

No. COA05-82

(Filed 20 December 2005)

1. Termination of Parental Rights— subject matter jurisdiction—standing—termination of parental rights

The trial court had subject matter jurisdiction based on N.C.G.S. § 7B-1103(a)(5) to terminate respondent mother's parental rights, because: (1) a child having resided with a person for two years provides the necessary standing to initiate a termination of parental rights action pursuant to N.C.G.S. § 7B-1103(a)(5), the minor child has lived continuously with petitioner since December 1999, and the petition for termination was filed 17 December 2002; and (2) contrary to the assertion made in the dissenting opinion, the two year period required under N.C.G.S. § 7B-1103(a)(5) was not tolled until respondent mother reached the age of majority in February 2001 even though she did not have a guardian ad litem appointed in the earlier proceedings since respondent was an adult the entire pendency of the termination of parental rights proceedings, was represented by counsel, and at no time did she attempt to directly attack the prior proceedings based on the failure of the trial court to appoint a guardian ad litem.

2. Appeal and Error— preservation of issues—failure to contest admission of orders—failure to appeal from orders

Although respondent mother contends the trial court erred by relying on prior orders in other files to conclude that grounds existed to terminate her parental rights even though the orders were obtained when she was a minor and no guardian ad litem had been appointed for respondent, this assignment of error is dismissed, because: (1) respondent did not contest the admission of these orders in the instant proceeding as required by N.C. R. App. P. Rule 10; (2) respondent never appealed the orders she now contests, even though she was represented by counsel in all those proceedings; and (3) the Court of Appeals declined to review these orders under N.C. R. App. P. Rule 2.

3. Termination of Parental Rights— grounds—neglect—sufficiency of evidence

The trial court did not err by concluding that grounds existed to terminate respondent mother's parental rights based on neglect, because: (1) although respondent assigned as error numerous findings of fact in the termination order, she did not make any specific argument in her brief that any of these findings of fact were not supported by clear, cogent, and convincing evidence, and thus, respondent abandoned this assignment of error; and (2) the findings of fact support the trial court's conclusion of neglect under N.C.G.S. § 7B-1111(a)(1) when the findings demonstrated that respondent failed to maintain stable housing, was unemployed at the time of the termination hearing, failed to comply with the child support order effective 1 June 2001 by missing numerous payments or by submitting incomplete payments, had on more than one occasion left her minor child with others to be cared for, including the incident initiating the minor child's removal from respondent's custody when she left the child with her housemate and disappeared which prompted the housemate to contact petitioner, failed to provide proper medication to the child, had attempted suicide, had not cooperated with social workers, did not follow through with mental health counseling, did not complete parenting classes, had only visited or contacted the minor child on a sporadic basis between December 1999 and Easter 2001, made no phone calls and sent no letters or cards between these visits, and had not visited the child at all from Easter 2001 until the hearing in April and May 2004 but made only a couple of phone calls.

4. Termination of Parental Rights— best interests of child—abuse of discretion standard

The trial court did not abuse its discretion by concluding that it was in the best interests of the child to terminate respondent mother's parental rights, because: (1) the findings revealed that the child has been living continuously with petitioner since December 1999, and also with petitioner's husband and his son since their marriage in July 2001; (2) the child considers petitioner's stepson her big brother; and (3) respondent's personal situation has not improved or stabilized to a significant degree since the child was placed in the care of petitioner in 1999, even though respondent has been aware of petitioner's intent to adopt the minor child since mid 2002.

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

The remaining assignments of error that respondent failed to argue in her brief in a termination of parental rights case are deemed abandoned under N.C. R. App. P. Rule 28(b)(6).

Judge TYSON dissenting.

Appeal by respondent mother from order entered 7 June 2004 by Judge Lawrence C. McSwain in Guilford County District Court. Heard in the Court of Appeals 14 September 2005.

Joyce L. Terres, for petitioner-appellee Guilford County Department of Social Services.

Anne R. Littlejohn, for petitioner-appellee Guardian ad Litem.

Richard Croutharmel, for respondent-appellant.

STEELMAN, Judge.

E.T.S. was born in May of 1998. At the time of the child's birth, appellant-mother (respondent) was 15 years old. From her birth until October 1998, the child resided with respondent and petitioner Kelli Williams (now Kelli Williams Neal) (petitioner) in Albemarle, Stanly County, North Carolina. From October 1998 until July of 1999, the child resided with respondent in Albemarle. From July 1999 through October 1999 the child resided with the petitioner in Guilford County, North Carolina. From October 1999 until December 1999, the child resided with respondent in Albemarle. In December 1999, petitioner retrieved the child and took the child to her home in Guilford County. On 21 December 1999, the Stanly County Department of Social Services filed a juvenile petition in the District Court of Stanly County, alleging neglect and dependency. The petition outlined a history of neglect by respondent going back to July of 1999. Respondent left the child with a caretaker in December 1999, and then could not be located. Respondent failed to administer prescribed medicine to the child. On 19 December 1999, respondent was admitted to Stanly Memorial Hospital for an attempted drug overdose. Between July 1999 and December 1999, respondent moved five times. On 23 December 1999, a memorandum of agreement and order was entered in the District Court of Stanly County vesting legal custody of E.T.S. in Stanly County Department of Social Services, and physical custody in petitioner. On 23 March 2000, an adjudication/disposition order was entered by the District Court of Stanly County, which found

dependency and confirmed the legal and physical custody arrangements of the previous order. On 17 January 2001, an order was entered arising from a hearing on 27 July 2000. This order stated: "That the legal and physical custody of the minor child E.T.S. shall remain with Kelli Williams." At all times during the proceedings in Stanly County, respondent was represented by counsel. There was a guardian *ad litem* for E.T.S., but the record does not show that a guardian *ad litem* was appointed for respondent, even though she was less than 18 years of age during these proceedings. E.T.S. has continuously resided with petitioner in Guilford County since December 1999. Petitioner married Christopher Cheva Neal (along with petitioner, "petitioners") in July of 2002, and E.T.S. has lived together with them and Mr. Neal's son since that date.

On 17 October 2002, petitioners filed a petition to terminate the parental rights of both the mother and father of E.T.S. in Guilford County. On 7 June 2004, Judge McSwain entered an order terminating both parents' parental rights. From this order, respondent appeals.

[1] In respondent's first argument, she contends that the trial court did not acquire subject matter jurisdiction over her and that the order terminating her parental rights must be vacated. We disagree.

In North Carolina, standing is "jurisdictional in nature and 'consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.' " *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) (quoting *In re Will of Barnes*, 157 N.C. App. 144, 155, 579 S.E.2d 585, 592 (2003)). This Court recognizes its duty to insure subject matter jurisdiction exists prior to considering an appeal. *In re N.R.M.*, 165 N.C. App. 294, 296-98, 598 S.E.2d 147, 148-49 (2004).

Respondent argues that petitioners never obtained standing to file their petition to terminate her parental rights under N.C. Gen. Stat. § 7B-1103(a), and therefore the trial court never obtained jurisdiction over the subject matter of this case. N.C. Gen. Stat. § 7B-1103(a) provides, in relevant part:

> A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:
>
> . . . .

> (5) Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.
>
> . . . .
>
> (7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

Respondent argues that the trial court erroneously based its subject matter jurisdiction on N.C. Gen. Stat. § 7B-1103(a)(7), because petitioners did not properly file their petition for adoption pursuant to Chapter 48. Because we find that the trial court had subject matter jurisdiction based on N.C. Gen. Stat. § 7B-1103(a)(5), we do not address respondent's argument.

N.C. Gen. Stat. § 7B-1103 limits the parties who can file a termination of parental rights action to persons or agencies having an interest in the child. A child having resided with a person for two years provides the necessary standing to initiate a termination of parental rights action pursuant to N.C. Gen. Stat. § 7B-1103(a)(5). In the instant case, E.T.S. has lived continuously with petitioner since December of 1999. The petition for termination was filed 17 December 2002, over two years after E.T.S. began living with petitioner. This fact establishes petitioner's standing to petition for the termination of respondent's parental rights under N.C. Gen. Stat. § 7B-1103(a)(5). Therefore, the trial court had subject matter jurisdiction over this matter.

The dissent argues that the two year period required under N.C. Gen. Stat. § 7B-1103(a)(5) was tolled until respondent reached the age of majority in February of 2001 because she did not have a guardian *ad litem* appointed in the earlier Stanly County proceedings. According to the dissent, the alleged tolling of the two year period divested the trial court of jurisdiction to hear the termination of parental rights petition. We find this proposition to be unsupported by the statutes and case law of North Carolina.

This Court recently decided the question of whether the failure to appoint a guardian *ad litem* for a parent in a dependency adjudication proceeding constitutes grounds for reversal of a later termination of parental rights order. We held that it did not. *In re O.C.*, 171 N.C. App. 457, 615 S.E.2d 391 (2005), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). In that case, we noted the clear distinction

between the situation where the trial court fails to appoint a required guardian *ad litem* in the proceedings on appeal (which requires reversal), and where the court fails to appoint a guardian *ad litem* in prior adjudication proceedings (which does not require reversal). Judge Levinson gave three clear reasons why the law compels this result.

> We make several additional observations which help illustrate the fallacy of respondent's argument that, where the trial court fails to appoint a GAL for the parent during the adjudication proceedings, a later order on termination of parental rights must be reversed. First, this would create uncertainty and render judicial finality meaningless. Termination orders entered three, five, even ten years after the initial adjudication could be cast aside. Secondly, by necessarily tying the adjudication proceedings and termination of parental rights proceedings together, respondent misapprehends the procedural reality of matters within the jurisdiction of the district court: Motions in the cause and original petitions for termination of parental rights may be sustained irrespective of earlier juvenile court activity. *See In re R.T.W.*, 2005 N.C. LEXIS 646, 30, 359 N.C. 539, 553, 614 S.E.2d 489, 497 (2005) ("Each termination order relies on an independent finding that clear, cogent, and convincing evidence supports at least one of the grounds for termination under N.C.G.S. § 7B-1111. . . . Simply put, a termination order rests upon its own merits."). Thirdly, even if respondent was entitled to a GAL for the proceedings associated with the earlier dependency proceedings, there cannot be prejudice to her in the termination proceedings because she was not even entitled to the appointment of a GAL for the termination proceedings. Finally, respondent's argument does not account for the fact that circumstances surrounding an individual change over time: The parent may no longer have the concerns which caused his or her incapacity months or years earlier.
>
> Finally, the consequences of reversing termination orders for deficiencies during some prior adjudication would yield nonsensical results. While the order on termination would be set aside, the order on adjudication would not; consequently, the order on adjudication would remain a final, undisturbed order in all respects. This would generate a legal quagmire for the trial court: It has continuing jurisdiction over these children by operation of the undisturbed order on adjudication, but must "undo" everything following the time the children were initially removed from

> the home if it ever wishes to enter a valid termination of parental rights order. This assignment of error is overruled.

Id. at 463-64, 615 S.E.2d at 396.

It should be noted in the instant case that the respondent was an adult during the entire pendency of the termination of parental rights proceedings and was represented by counsel. At no time did she attempt to directly attack the prior proceedings in Stanly County based on the failure of the trial court to appoint a guardian *ad litem*.

N.C. Gen. Stat. § 7B-1103 limits the parties who can file a termination of parental rights action to persons or agencies having an interest in the child. The child having resided with a person for two years provides a basis for a person to have standing to initiate a termination of parental rights action pursuant to N.C. Gen. Stat. § 7B-1103(a)(5). This requirement is based upon the relationship between the petitioner and the child.

The case of *Bryant v. Adams*, 116 N.C. App. 448, 448 S.E.2d 832 (1994), which holds that a statute of limitations is tolled during the minority of a plaintiff, is not applicable. While *Bryant* correctly states the law, it does not follow that the two year requirement of N.C. Gen. Stat. § 7B-1103(a)(5) is a statute of limitations or the equivalent of such. This statute confers standing on petitioners based on their two year relationship with the child, which is in no manner related to the respondent or her relationship with the child during that two year period. N.C. Gen. Stat. § 7B-1103(a)(5) (emphasis added) grants standing to: "Any person with whom the juvenile has *resided* for a continuous period of two years or more next preceding the filing of the petition or motion." The person or persons with whom legal custody lies during this time period is irrelevant. This argument is without merit.

[2] In her second argument, respondent contends that the trial court erred by relying on prior orders in other files to conclude that grounds existed to terminate her parental rights. We disagree.

Respondent argues that the trial court erred in relying on prior Stanly County orders because they were obtained when she was a minor and no guardian *ad litem* had been appointed to her. Respondent admits that she did not contest the admission of these orders in the instant proceeding as required by N.C. R. App. P. Rule 10. Further, respondent never appealed the orders she now contests, even though she was represented by counsel in all those proceedings.

Nonetheless, respondent requests that we review the admission and consideration of those orders for error pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. We decline to do so. *See Viar v. N.C. DOT*, 359 N.C. 400, 610 S.E.2d 360 (2005). This argument is without merit.

[3] In her third argument, respondent contends that the trial court erred in concluding that grounds existed to terminate her parental rights based on neglect. We disagree.

Parental rights may be terminated if the trial court determines that a child has been neglected by its parents. N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile is defined as:

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

N.C. Gen. Stat. § 7B-101.

> "The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." We then consider, based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child.

In re Shepard, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (2004) (citations omitted). Though respondent assigned as error numerous findings of fact in the termination order, she does not make any specific argument in her brief that any of these findings of fact were not supported by clear, cogent and convincing evidence. Having failed to argue these assignments of error in her brief, they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6), *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 567, 500 S.E.2d 752, 755 (1998). Our review is thus limited to whether the trial court's findings of fact support its conclusion of law. *First Union Nat'l Bank v. Bob Dunn Ford, Inc.*, 118 N.C. App. 444, 446, 455 S.E.2d 453, 454 (1995).

The trial court's findings of fact demonstrate that respondent failed to maintain stable housing; was unemployed at the time of the

termination hearing; had failed to comply with the child support order effective 1 June 2001 by missing numerous payments, or submitting incomplete payments; had on more than one occasion left E.T.S. with others to be cared for, including the incident initiating E.T.S.' removal from respondent's custody where she left the child with her house-mate and disappeared, prompting the house-mate to contact petitioner; failed to provide proper medication to the child; had attempted suicide; had not cooperated with social workers; did not follow through with mental health counseling, nor complete parenting classes; only visited or contacted E.T.S. on a sporadic basis between December 1999 and Easter of 2001; made no phone calls and sent no letters or cards between these visits; and from Easter of 2001 until the hearing in April and May of 2004 (some three years), had not visited the child at all (nor requested any such visit), and had made only a "couple" of phone calls.

We hold that these findings of fact support the trial court's conclusion that E.T.S. is a neglected juvenile as defined in N.C. Gen. Stat. § 7B-101. The findings thus support the trial court's finding of neglect under N.C. Gen. Stat. § 7B-1111(a)(1). We note that because we have determined the trial court did not err in finding neglect, we do not address respondent's arguments concerning the trial court's conclusions of law relating to N.C. Gen. Stat. §§ 7B-1111(a)(3) and (7). *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). This argument is without merit.

[4] In respondent's sixth and seventh arguments, she contends that the trial court erred and abused its discretion in concluding that it was in the best interests of the child to terminate respondent's parental rights. We disagree.

"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." N.C. Gen. Stat. § 7B-1110(a) (emphasis added). "The trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard." *In re Yocum*, 158 N.C. App. 198, 206, 580 S.E.2d 399, 404 (2003).

In addition to the findings of fact recited above, the trial court entered additional findings of fact in support of its determination that termination was in the best interests of the child. These findings state

that the child has been living continuously with petitioner since December of 1999, and with petitioner's husband and his son since their marriage in July 2001. E.T.S. consider's petitioner's step-son her big brother. Though respondent has been aware of petitioners' intent to adopt E.T.S. since mid 2002, her "personal situation has not improved or stabilized to a significant degree since the child was placed in the care of [petitioner] in 1999." We hold that the trial court did not abuse its discretion in determining that termination was in the best interests of E.T.S. This argument is without merit.

[5] Because defendant has not argued her other assignments of error in her brief, they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2003).

AFFIRMED.

Judges HUNTER concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

I. Jurisdiction

In North Carolina, "standing is jurisdictional in nature and 'consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.' " *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) (quoting *In re Will of Barnes*, 157 N.C. App. 144, 155, 579 S.E.2d 585, 592, *disc. rev. denied*, 357 N.C. 460, 586 S.E.2d 96 (2003)).

This Court has stated:

> regardless of whether subject matter jurisdiction is raised by the parties, this Court may review the record to determine if subject matter jurisdiction exists in [the] case. A court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking.
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> . . . .
>
> Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. 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 N.R.M., 165 N.C. App. 294, 297, 598 S.E.2d 147, 149 (2004) (internal quotations omitted).

> In North Carolina the rule is that the statute of limitations begins to run against an infant or an insane person who is represented by a guardian at the time the cause of action accrues. *If he has no guardian at that time, then the statute begins to run upon the appointment of a guardian or upon the removal of his disability* as provided by G.S. § 1-17, *whichever shall occur first.*

Bryant v. Adams, 116 N.C. App. 448, 459, 448 S.E.2d 832, 837 (1994) (citations omitted) (emphasis supplied), *disc. rev. denied*, 339 N.C. 736, 454 S.E.2d 647 (1995).

N.C. Gen. Stat. § 7B-1103(5) (2003) provides, "[a]ny person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition" may file a petition to terminate parental rights.

This Court in *In re Miller*, held DSS did not have standing to file a petition to terminate respondent's parental rights in accordance with N.C. Gen. Stat. § 7B-1103(3). 162 N.C. App. at 359, 590 S.E.2d at 866. When DSS filed its petition to terminate the respondent's parental rights, DSS no longer had custody of the minor child. *Id.* at 358, 590 S.E.2d at 866. "Because DSS no longer had custody of the child, DSS lacked standing, under the plain language of N.C. Gen. Stat. § 7B-1103(a), to file a petition to terminate respondent's parental rights." *Id.*

Here, the trial court lacked subject matter jurisdiction to terminate respondent's parental rights. Petitioners' petition, filed 17 December 2002, alleged E.T.S. had resided with them for over two years. The trial court asserted jurisdiction over these proceedings based solely on this claim. N.C. Gen. Stat. § 7B- 1103(5). However, when petitioners received custody of E.T.S. and when the petition was filed, respondent was a minor under legal disability. Respondent was not represented by an appointed guardian when: (1) DSS intervened and filed a petition for non-secure custody; (2) E.T.S. was adjudicated dependent; (3) petitioners gained custody of E.T.S.; or (4) the petition before us was filed. N.C. Gen. Stat. § 1A-1, Rule 17 (2003).

Although evidence was presented to show E.T.S. had lived with petitioners for over two years, a substantial portion of that time period was tolled until either the court appointed a guardian or respondent attained legal majority. *Id.* Until a guardian was appointed or respondent attained legal majority, respondent remained under a legal disability. The two-year time period required to confer jurisdiction on the trial court under the grounds asserted in the petition had not yet accrued after respondent's legal disability was removed. The petition for termination of respondent's parental rights filed by petitioners was fatally flawed and failed to vest jurisdiction to the trial court.

The majority's opinion cites this Court's decision in *In re O.C.*, 171 N.C. App. 457, 615 S.E.2d 391, *disc. rev. denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). The facts and applicable law in *In re O.C.* have no bearing or precedential authority here. In *In re O.C.*, the respondent alleged that she was entitled to a guardian ad litem under N.C. Gen. Stat. § 7B-1101 and § 1111(a)(6), which mandates a guardian ad litem to be appointed to a parent where it is alleged that the parent's rights should be terminated and the parent is incapable of providing for the minor child due to substance abuse, mental retardation, etc. *Id.* at 460-61, 615 S.E.2d 394. The respondent, in *In re O.C.*, was an adult and at all times during the proceeding did not assert a jurisdictional claim. This Court held that the respondent was not entitled to the appointment of a guardian ad litem because the motion to terminate her parental rights failed to allege the respondent was incapable of providing for her minor children due to a debilitating condition. *Id.* at 461, 615 S.E.2d 396.

The respondent, in *In re O.C.*, also argued she should have been appointed a guardian ad litem under N.C. Gen. Stat. § 7B-602(b)(1) during the dependency adjudication proceedings, because she was incapable of providing support to her minor children as a result of her substance abuse. This Court held that even if respondent had erroneously been denied the appointment of a guardian ad litem at the proceedings, "there is no statutory authority for the proposition that the instant order is reversible because of a [guardian ad litem] appointment deficiency that may have occurred years earlier." *Id.* at 461, 615 S.E.2d at 395.

Here, it is undisputed that respondent was a minor and under a legal disability at the time of the dependency adjudication proceedings. N.C. Gen. Stat. § 7B-602 was not in effect until June 2001, six months after the proceedings in this case were completed. However,

Rule 17 of the North Carolina Rules of Civil Procedure mandates, "[i]n actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided." N.C. Gen. Stat. § 1A-1, Rule 17. The trial court did not appoint respondent a guardian ad litem when one was clearly mandated under N.C. Gen. Stat. § 1A-1, Rule 17. As a minor under legal disability, any adjudication affecting her legal or parental rights was void in the absence of a guardian who could legally accept service, appear on respondent's behalf, assert her claims, and protect her constitutional rights. The facts or holding in *In re O.C.* are not analogous or relevant to this case.

The trial court's failure to appoint a guardian ad litem for respondent in the dependency adjudication proceedings, when the child was removed from her custody, or at the time the present petition to terminate her rights was filed, voids the trial court's assertion of subject matter jurisdiction in the hearing to terminate her parental rights and requires its order to be vacated.

Petitioners filed for the termination of respondent's parental rights in accordance with N.C. Gen. Stat. § 7B-1103(5). Petitioners gained custody of the minor child from respondent at the dependency adjudication proceedings. After petitioners retained custody of E.T.S. for two years, they filed the petition to terminate respondent's parental rights. Petitioners' petition was erroneously granted because when E.T.S. was adjudicated dependent and custody over E.T.S. was taken away, respondent was not represented by a statutorily required guardian ad litem. This omission is deemed "prejudicial error per se." *Id.* The two years that elapsed while the minor child remained in petitioners' illegally obtained custody, standing alone, does not provide any basis under N.C. Gen. Stat. § 7B-1103(5) for petitioners to petition for the trial court to assert jurisdiction to adjudicate the matter or to terminate respondent's parental rights.

II. Conclusion

The trial court erred in asserting subject matter jurisdiction over respondent and E.T.S. Petitioners' petition solely asserted a two-year time period as grounds for jurisdiction to file the petition. E.T.S. was adjudicated dependent, custody was removed from respondent, and a portion of the two-year required time period all occurred while respondent was a minor. No statutorily required guardian was ap-

pointed to represent respondent's interests or to assert her rights as a minor when the adjudication was made that placed E.T.S. in petitioners' custody or when the present petition was filed. The failure of the court to appoint a guardian for respondent was "prejudicial error per se." *Id*. I vote to vacate the trial court's judgment. I respectfully dissent.

WELCH CONTRACTING, INC., PLAINTIFF-APPELLANT v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, AS AN AGENCY OF THE STATE OF NORTH CAROLINA, AND THE EASTERN BAND OF CHEROKEE INDIANS, DEFENDANTS-APPELLEES

No. COA05-100

(Filed 20 December 2005)

1. Appeal and Error— appellate rules violations—notice

Although plaintiff's brief in a breach of contract case violates N.C. R. App. P. 10 and 28 since the assignment of error in the record on appeal does not correspond to the question presented in plaintiff's brief, defendants had sufficient notice of the basis upon which the Court of Appeals might rule because: (1) plaintiff made only one assignment of error, and that assignment of error referenced the order of the trial court; (2) under these circumstances, defendants reasonably should have known that plaintiff's assignment of error contained a clerical error incorrectly citing summary judgment as the ground for dismissal; and (3) defendants were not prejudiced by plaintiff's error.

2. Immunity— sovereign immunity—construction agreement—statutory bidding procedures—failure to provide supervision and control

The trial court did not err in a breach of contract case by concluding that it lacked subject matter jurisdiction over the case, and as a result, by granting defendant North Carolina Department of Transportation's (NCDOT) motion to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(1) and (b)(6) for failure to state a claim upon which relief could be granted even though plaintiff contends NCDOT waived its sovereign immunity as to plaintiff when it entered into a construction agreement with defendant Eastern Band of Cherokee Indians (EBCI), because: (1) when a state agency such as NCDOT enters into an agreement with a devel-

oper who then alone enters into a contract with a contractor, the state agency waives its sovereign immunity only to the original party to their agreement and not to others; (2) there was no contract between plaintiff and NCDOT, and thus, NCDOT did not waive its immunity as to plaintiff when it entered into a contract with EBCI; (3) the contract at issue between NCDOT and EBCI was a construction agreement under N.C.G.S. § 136-18(12) and not N.C.G.S. § 136-28.1, and even assuming arguendo that NCDOT failed to follow bid-letting procedures, plaintiff did not present statute or case law to support the contention that the contract bidding statute is an express waiver by the North Carolina General Assembly of NCDOT's sovereign immunity; (4) although plaintiff contends NCDOT failed to provide supervision and control over EBCI which led to a breach of contract between EBCI and plaintiff, there was no language in defendants' construction agreement that holds NCDOT responsible for the supervision and control of EBCI in its dealings with third-party contractors; and (5) plaintiff is not a party to the contract that plaintiff claims induced plaintiff to expend funds to its detriment, and there is no existence of a quasi-contractual relationship between plaintiff and NCDOT based upon the express contract between NCDOT and EBCI.

3. Indians— tribal sovereign immunity—subject matter jurisdiction of courts of North Carolina

The trial court did not err in a breach of contract case by concluding that it lacked subject matter jurisdiction over the case, and as a result, by granting defendant Eastern Band of Cherokee Indians' (EBCI) motion to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(1) and (b)(6) for failure to state a claim upon which relief could be granted even though plaintiff contends EBCI waived its tribal sovereign immunity, because: (1) contrary to plaintiff's assertion, EBCI's corporate charter in 1889 does not waive EBCI's tribal sovereign immunity; (2) a waiver of tribal immunity cannot be implied from entering into a contract, but rather must be unequivocally expressed; and (3) Congress has not abrogated the immunity of EBCI, nor has EBCI waived it.

Appeal by plaintiff from order dated 9 September 2004 by Judge James U. Downs in Superior Court, Swain County. Heard in the Court of Appeals 21 September 2005.

McLean Law Firm, P.A., by Russell L. McLean, III for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for defendant-appellee North Carolina Department of Transportation.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Elizabeth A. Martineau and Taurus E. Becton; and David L. Nash, for defendant-appellee Eastern Band of Cherokee Indians.

McGEE, Judge.

The North Carolina Department of Transportation (NCDOT) and the Eastern Band of Cherokee Indians (the EBCI) (collectively, defendants) entered into a construction agreement on 11 June 1999 to make improvements to U.S. Highway 19 from Cherokee, North Carolina, to Maggie Valley, North Carolina (Highway 19 project). The Highway 19 project was designated as a "high priority project" by the United States Congress, under 23 U.S.C. § 117, commonly known as the "High Priority Projects Program." Designated as High Priority Project number 1303 under the federal statute, the Highway 19 project was to "upgrade and improve U.S. 19 from Maggie Valley to Cherokee." 23 U.S.C. § 117. Congress allocated fifteen million dollars for the project, which constituted eighty percent of the total cost of construction. Under the terms of defendants' construction agreement, the EBCI was responsible for the remaining twenty percent, or three million dollars, of the cost. The EBCI was also responsible for administering the construction of the Highway 19 project and was authorized to hire contractors for the construction.

Welch Contracting, Inc. (plaintiff) filed a complaint against defendants on 16 February 2004, alleging plaintiff had been hired by EBCI as a sub-contractor pursuant to defendants' construction agreement. Plaintiff alleged wrongdoing by defendants under two contracts: (1) defendants' construction agreement and (2) an alleged contract between plaintiff and the EBCI. Plaintiff, a minority-owned North Carolina corporation, claimed it entered into a thirty-month contract with the EBCI, through an authorized agent, to perform work on the Highway 19 project. Plaintiff did not include a copy of said contract in either its complaint or the record on appeal. Plaintiff alleged in its complaint, *inter alia*, that NCDOT failed to supervise the EBCI as required by defendants' construction agreement, and that NCDOT failed to adhere to federal and state minority business poli-

cies. Plaintiff alleged that the EBCI breached its contract with plaintiff by forcing plaintiff to change the scope and nature of its work, and later by terminating plaintiff without just cause, right or provocation. Plaintiff sought recovery from NCDOT for incidental and consequential damages incurred as a result of NCDOT's actions under defendants' construction agreement. Plaintiff sought recovery from the EBCI for breach of the alleged contract between plaintiff and the EBCI.

Defendants filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1), (b)(2), (b)(6), and (h)(3). N.C. Gen. Stat. § 1A-1, Rule 12 (2003). Thereafter, plaintiff filed an amended complaint, which contained the additional allegation that NCDOT failed to follow state bidding requirements. NCDOT amended its motion to dismiss to include plaintiff's amended complaint, as well as the original complaint.

Defendants' motion to dismiss was heard by the trial court on 20 May 2004. The hearing was heard out-of-county and out-of- session by the consent of the parties. The trial court allowed defendants' motion to dismiss under N.C.R. Civ. P. 12(b)(1) and (b)(6). The trial court held that it lacked subject matter jurisdiction over the case, and, as a result, the complaint failed to state a claim upon which relief could be granted. Plaintiff appeals.

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[1] Plaintiff's only assignment of error is that the trial court erred as a matter of law "in granting summary judgment" for defendants. However, the order entered by the trial court did not, in fact, grant summary judgment. Rather, the order granted a motion to dismiss under Rules 12(b)(1) and (b)(6) of the North Carolina Rules of Civil Procedure, on the grounds that the trial court lacked subject matter jurisdiction and that consequently the complaint failed to state a claim upon which relief could be granted. Plaintiff's assignment of error refers to an incorrect ground for dismissal, summary judgment. However, plaintiff's brief contains arguments on the correct ground, lack of subject matter jurisdiction.

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

> (a) . . . [T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10.

> (c) (1) . . . A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal[.] . . . 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.

N.C.R. App. P. 10(a) and (c)(1).

Under Rule 28 of the North Carolina Rules of Appellate Procedure,

> (b) (6) . . . Immediately following each question [presented] shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

N.C.R. App. P. 28(b)(6).

Plaintiff's brief is in violation of Rules 10 and 28 in that the assignment of error in the record on appeal does not correspond to the question presented in plaintiff's brief. Our Supreme Court has held that "[t]he North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar v. North Carolina Dept. of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). The rationale underlying the *Viar* decision, however, was that "otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Id.* at 402, 610 S.E.2d at 361. Here, clearly, defendants had sufficient notice of the basis upon which our Court might rule. Plaintiff made only one assignment of error, and that assignment of error referenced the order of the trial court. The trial court's order stated only one ground from which plaintiff could appeal, that being the lack of subject matter jurisdiction under Rule 12. The order read in pertinent part:

> This Matter having come on to be heard before the undersigned Senior Resident Superior Court Judge . . . the Court finds and concludes that the Superior Court of Swain County, North Carolina lacks subject matter jurisdiction of this case and consequently

> holds that the complaint fails to state a claim upon which relief can be granted[.]
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motions of both defendants to dismiss the plaintiff's action on the grounds that the Superior Court of Swain County lacks subject matter jurisdiction of this case, and as a result thereof the complaint fails to state a claim upon which relief can be granted . . . and the same are hereby allowed.

As defendants concede, there was no mention of summary judgment in the order. The trial court ruled solely on the motion made under N.C.R. Civ. P. 12. Under these circumstances, defendants reasonably should have known that plaintiff's assignment of error contained a clerical error, incorrectly citing summary judgment as the ground for dismissal. As defendants were not prejudiced by plaintiff's error, we review the merits of plaintiff's argument. In so doing, we do not address an issue "not raised or argued by plaintiff," nor do we "create an appeal for an appellant." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. Upon review, we affirm the order of the trial court.

Rule 12(b)(1) of the Rules of Civil Procedure allows for dismissal based upon a trial court's lack of jurisdiction over the subject matter of the claim. N.C. Gen. Stat. § 1A-1, Rule 12. Our Court has held that the defense of sovereign immunity is a Rule 12(b)(1) jurisdiction defense. *Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 587 S.E.2d 426 (2003). "[T]he standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*." *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 155, 610 S.E.2d 210, 212 (2005) (internal citations omitted). The standard of review on a motion to dismiss under Rule 12(b)(6) 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).

Plaintiff argues that dismissal was erroneous as to both NCDOT and the EBCI because both defendants waived their sovereign immunity.

I.

[2] Plaintiff first argues that dismissal as to NCDOT was improper because NCDOT waived its sovereign immunity when it entered into a construction agreement with the EBCI.

The law of state sovereign immunity is quite clear in this State:

> It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit. *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952). By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute. *Id.*

Battle Ridge, 161 N.C. App. at 157, 587 S.E.2d at 427. Sovereign immunity is waived whenever the State, "through its authorized officers and agencies, enters into a valid contract[] [because] the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). Even then, however, "recovery, if any, must be within the terms and framework of the provisions of the contract . . . and not otherwise." *Teer Co. v. Highway Commission*, 265 N.C. 1, 16, 143 S.E.2d 247, 258 (1965).

Our Court decided this issue in a case with facts similar to our present case, *Rifenburg Constr., Inc. v. Brier Creek Assocs. Ltd. P'ship*, 160 N.C. App. 626, 586 S.E.2d 812 (2003), *aff'd per curiam*, 358 N.C. 218, 593 S.E.2d 585 (2004), in which a contractor sought relief under a contract between NCDOT and a third party. In *Rifenburg*, NCDOT and a private developer entered into a construction agreement under a private/public development arrangement as allowed by N.C. Gen. Stat. § 136-28.6. *Id.* at 628, 586 S.E.2d at 814. The developer was responsible for the day-to-day management and progress of the project, just as the EBCI was responsible for the Highway 19 project in the present case. *Id.* at 632, 586 S.E.2d at 817. The developer in *Rifenburg* entered into a separate agreement with a contractor, who later filed suit against NCDOT. Upon review, our Court held that "[w]hen a state agency, such as NCDOT, enters into an agreement with a developer, who then alone enters into a contract with a contractor, the state agency waives its sovereign immunity only to the original party to their agreement *not to others*." *Id.* at 631, 586 S.E.2d at 816 (emphasis added). In the present case, there was no contract between plaintiff and NCDOT. Accordingly, NCDOT did not waive its immunity as to plaintiff when it entered into a contract with the EBCI. We therefore find plaintiff's argument to be without merit.

Plaintiff also argues that NCDOT waived its sovereign immunity by failing to comply with statutory bidding procedures when it entered into a contract with the EBCI. N.C. Gen. Stat. § 136-28.1 (2003) sets forth NCDOT's contract-letting procedures:

> (a) All contracts over one million two hundred thousand dollars ($1,200,000) that the Department of Transportation may let for construction or repair necessary to carry out the provisions of this Chapter shall be let to a responsible bidder after public advertising under rules and regulations to be made and published by the Department of Transportation.

However, the contract at issue here between NCDOT and the EBCI was a construction agreement under N.C. Gen. Stat. § 136-18(12), not § 136-28.1. N.C. Gen. Stat. § 136-18(12) (2003) authorizes NCDOT to do all "things necessary to carry out fully the cooperation contemplated and provided for" by federal programs relating to transportation. Even assuming, *arguendo*, that NCDOT failed to follow bid-letting procedures, this failure would not necessarily result in a waiver of sovereign immunity. Sovereign immunity can be expressly waived by statute. *See*, *e.g.*, *Allan Miles Cos. v. N.C. Dept. of Transportation*, 68 N.C. App. 136, 141-42, 314 S.E.2d 576, 579-80 (1984) (holding that N.C. Gen. Stat. § 136-29, then entitled "Adjustment of Claims," expressly waived sovereign immunity with respect to disputes between contractors and NCDOT). However, plaintiff presents no statute or case law to support the contention that the contract bidding statute is an express waiver by the North Carolina General Assembly of NCDOT's sovereign immunity. Accordingly, we find this argument lacks merit.

Plaintiff also contends that NCDOT failed to provide supervision and control over the EBCI, which led to a breach of contract between the EBCI and plaintiff. We find no language in defendants' construction agreement that holds NCDOT responsible for the supervision and control of the EBCI in its dealings with third-party contractors. In fact, paragraph seven of the agreement specifically provides: "(B) The construction, engineering and supervision will be furnished by the EBCI." Plaintiff also contends that NCDOT "specifically set out in [defendants' construction agreement] that [plaintiff] could become a contractor so long as it followed the terms of the agreement," thereby "authoriz[ing] and induc[ing]" plaintiff to expend funds to its detriment. Citing *Smith*, plaintiff argues that it would be unfair "to hold that a state may arbitrarily avoid its obligations under a contract after having induced the other side to change its position or expend time

or money[.]" *Smith*, 289 N.C. at 320, 222 S.E.2d at 423. In reviewing defendants' construction agreement, we find no language that specifically states that plaintiff could become a contractor. Paragraph seven of the agreement reads in pertinent part: "(A) If the EBCI elects to enter into a contract for the construction of any portion of said projects, the contractor shall comply with all specifications and policies of the [NCDOT] and the terms of this agreement." Moreover, plaintiff misapplies *Smith*. Unlike the facts of *Smith*, plaintiff in the present case is not a party to the contract that plaintiff claims induced plaintiff to expend funds to its detriment.

Plaintiff seems to imply the existence of a quasi-contractual relationship between plaintiff and NCDOT, based upon the express contract between NCDOT and the EBCI. However, our Supreme Court has stated:

> We will not imply a contract in law in derogation of sovereign immunity. . . . [W]e will not first imply a contract in law where none exists in fact, then use that implication to support the further implication that the State has intentionally waived its sovereign immunity and consented to be sued for damages for breach of the contract it never entered in fact. Only when the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State[.]

Whitfield v. Gilchrist, 348 N.C. 39, 42-43, 497 S.E.2d 412, 415 (1998) (citing *Smith*). As no contract was entered into between NCDOT and plaintiff, NCDOT did not waive its sovereign immunity as to plaintiff. Accordingly, the assignment of error as to NCDOT is overruled.

II.

[3] Plaintiff next argues that dismissal as to the EBCI was improper because the EBCI waived its tribal sovereign immunity. Plaintiff concedes that the EBCI is a federally recognized Indian tribe, and that the doctrine of tribal sovereign immunity for federally recognized tribes normally prevents state courts from obtaining jurisdiction over them. Plaintiff asks this Court to decide "the very narrow issue . . . [of] whether the [] EBCI has waived its sovereign immunity to allow this suit."

Tribal sovereign immunity is a matter of federal law. *Kiowa Tribe v. Manufacturing Tech.*, 523 U.S. 751, 755-60, 140 L. Ed. 2d 981,

986-88 (1998). The Fourth Circuit has explicitly held that the right to sue the EBCI is dependant upon the explicit permission of Congress and that the principles of federal preemption apply. *See Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373 (4th Cir. 1980) (discussing *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957)). An Indian tribe such as the EBCI is subject to suit only where Congress has authorized the suit or the tribe has expressly and unequivocally waived its tribal sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 L. Ed. 2d 106 (1978); *see also Oklahoma Tax Com. v. Potawatomi Tribe*, 498 U.S. 505, 112 L. Ed. 2d 1112 (1991).

Plaintiff argues that the EBCI expressly and unequivocally waived its tribal sovereign immunity when it incorporated under the laws of North Carolina in 1889. Plaintiff contends that pursuant to the corporate charter, the tribe consented to sue and be sued in North Carolina courts. However, federal courts have held that the EBCI's charter does not waive the EBCI's tribal sovereign immunity. The U.S. District Court for the Western District of North Carolina held that

> Chapter 211 of the Private Laws of North Carolina of 1889 entitled "An act incorporating the Eastern Band of Cherokee Indians, and for other purposes," as subsequently amended by other Acts of the General Assembly of North Carolina, is operative . . . only in so far as it does not interfere with the supervisory control which the Federal Government exercises over this Indian Tribe. Since the Federal Government has plenary power and control over this Indian Tribe, the State of North Carolina is without power by Act of its Legislature to authorize suit to be brought against [the EBCI], or in any other manner to interfere with Federal control over its affairs.

Haile v. Saunooke, 148 F. Supp. 604, 607 (W.D.N.C. 1947), *aff'd*, 246 F.2d 293 (4th Cir. 1957), *cert. denied*, *Haile v. Eastern Band of Cherokee Indians*, 355 U.S. 893, 2 L. Ed. 2d 191 (1957).

In *Haile*, the plaintiff sought to recover from the EBCI and from individual members of EBCI for personal injuries suffered in the collapse of a swinging bridge located on tribal land. *Id.* at 605. The district court dismissed the action as to the EBCI based upon sovereign immunity of the tribe. *Id.* at 608. The Fourth Circuit, in affirming, concluded:

> It is said that the right to sue the [EBCI] is given by the act of the Legislature of North Carolina incorporating the band; but it is

> perfectly clear that an act of a state legislature cannot be allowed to interfere with the guardianship over these people which the United States has assumed, since Congress alone must determine the extent to which the immunities and protection afforded by tribal status are to be withdrawn.

Haile, 246 F.2d at 297-98. In light of this federal precedent, we hold that the charter granted to the EBCI by the State of North Carolina does not operate to waive the EBCI's tribal sovereign immunity.

Plaintiff relies on *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E.2d 577 (1979) for the proposition that the EBCI is subject to the jurisdiction of North Carolina courts. However, *Sasser* is distinguishable on its facts. In *Sasser*, a non-Indian minor, through his guardian ad litem, brought a tort action against an individual member of the EBCI, not the EBCI as an entity. The plaintiff sought to recover for personal injuries he sustained in a motel swimming pool owned by the defendant. Our Court held that the superior court had civil jurisdiction over the tort action against the individual member of the EBCI. *Sasser* at 674, 253 S.E.2d at 581.

Plaintiff also argues that because the EBCI entered into the construction agreement with NCDOT off reservation territory, with authority to employ plaintiff off the reservation, North Carolina law places the EBCI in the position of a general contractor from whom plaintiff should be entitled to seek relief in state court for a breach of contract.

First, we note that the record does not contain a copy of any contract between plaintiff and the EBCI. Accordingly, the language of any such contract is beyond the scope of our review. *See* N.C.R. App. P. 9. Moreover, plaintiff presents no argument that the contract included any language whereby the EBCI unequivocally expressed a waiver of tribal sovereign immunity. A waiver of tribal sovereign immunity cannot be implied from entering into a contract; rather, it must be unequivocally expressed. *See*, *e.g.*, *Oklahoma Tax Comm'n*; *Santa Clara Pueblo*. A waiver of tribal sovereign immunity is distinguishable from a waiver of state sovereign immunity, which may be implied from entering into a contract. *See Kiowa*, 523 U.S. at 755-56, 140 L. Ed. 2d at 986.

In *Kiowa*, the U.S. Supreme Court affirmed the rigid criteria that apply to a waiver of tribal sovereign immunity. The facts of *Kiowa* are that the tribe defaulted on an agreement to purchase stock from

a private manufacturer. *Id.* at 754, 140 L. Ed. 2d at 984. The manufacturer obtained a summary judgment against the tribe in state court. On appeal, the Oklahoma Court of Civil Appeals held the tribe was subject to suit in state court, based upon the law of state sovereign immunity. *Id.* at 753, 140 L. Ed. 2d at 984. The U.S. Supreme Court reversed and rejected the state court's reliance on cases involving state sovereign immunity, holding that "[w]e have often noted . . . that the immunity possessed by Indian tribes is not coextensive with that of the States. . . . [T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Id.* at 755-56, 140 L. Ed. 2d at 986 (internal citations omitted). The Court concluded: "[W]e choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. [Where] Congress has not abrogated this immunity, nor has petitioner waived it, [] the immunity governs[.]" *Id.* at 760, 140 L. Ed. 2d at 988.

In this case, Congress has not abrogated the immunity of the EBCI, nor has the EBCI waived its immunity. Accordingly, the EBCI enjoys tribal sovereign immunity from jurisdiction of the courts of North Carolina. Without jurisdiction over the EBCI, the trial court properly dismissed plaintiff's claim under Rules 12(b)(1) and (b)(6).

Affirmed.

Judges McCULLOUGH and JACKSON concur.

PAMMY AUSTIN EZELL AS GUARDIAN AD LITEM OF MICHELLE LYNN MORLAND, PLAINTIFF AND NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, INTERVENOR V. GRACE HOSPITAL, INC., JOHN F. WHALLEY, M.D. AND MOUNTAIN VIEW PEDIATRICS, P.A., DEFENDANTS

No. COA04-721

(Filed 20 December 2005)

1. Public Assistance— Medicaid subrogation lien—equitable principles not applicable

The plain language of N.C.G.S. § 108A-57(a) precludes the application of common law equitable principles to the right of subrogation of the Division of Medical Assistance.

2. Public Assistance— medical malpractice—Medicaid lien—causal connection required

The trial court did not err by finding that recovery of medical malpractice settlement amounts by the Division of Medical Assistance (DMA) should be limited to the amount paid for medical services that corresponded to defendants' alleged negligence. Without a requirement of a causal nexus between the DMA lien and a Medicaid beneficiary's third-party recovery, DMA would have unlimited subrogation rights to a beneficiary's proceeds obtained from a third party, rather than to those proceeds obtained "by reason of injury or death," as specified in N.C.G.S. § 108A-57(a).

3. Public Assistance— Medicaid lien—limited—not a violation of federal law

Reducing the Division of Medical Assistance's lien on medical malpractice proceeds was not contrary to federal Medicaid law. The statute requires reimbursement only to the extent of the third party's legal liability for injuries resulting in "care and service" paid by Medicaid.

4. Public Assistance— Medicaid lien—medical malpractice proceeds—findings insufficient

A medical malpractice settlement approval was remanded for further findings about the proceeds plaintiff obtained by reason of injury or death. There was no evidence to support a causal connection between the alleged negligence and Medicaid payments.

5. Public Assistance— Medicaid lien—medical malpractice proceeds—presumption of ownership

The trial court acknowledged the Division of Medical Assistance's right to subrogation, but did not apply a presumption that medical malpractice settlement proceeds were the property of plaintiff.

6. Public Assistance— Medicaid lien—medical malpractice—limited to proceeds obtained by reason of injury

Although the Division of Medical Assistance correctly cited the underlying policy that subrogation statutes were designed to replenish Medicaid funds, those statutes require that DMA's subrogation rights be limited to proceeds obtained by reason of injury.

Judge STEELMAN concurring in part and dissenting in part.

EZELL v. GRACE HOSP., INC.

[175 N.C. App. 56 (2005)]

Appeal by intervenor from order entered on 22 January 2004 by Judge Robert C. Ervin, in Burke County Superior Court. Heard in the Court of Appeals 1 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Belinda A. Smith, for intervenor-appellant.

Elam & Rousseaux, P.A., by Michael J. Rousseaux and William H. Elam, for plaintiff-appellee.

No brief filed for defendants.

HUDSON, Judge.

Plaintiff filed a medical malpractice suit against defendants Grace Hospital, Inc., John F. Whalley, M.D., and Mountain View Pediatrics, Inc., for alleged negligent medical care. The plaintiffs settled with the tort defendants and the Department of Health and Human Services, Division of Medical Assistance (DMA) intervened, seeking payment of its statutory Medicaid lien for payments it made on behalf of plaintiff, a Medicaid recipient. On 22 January 2004, the trial court denied DMA's motion requesting payment of its full statutory Medicaid lien of one-third of the settlement amount, instead awarding DMA a lesser sum, amounting to a pro-rated share of treatment allegedly related to the defendants' negligence. DMA appeals.

Michelle Morland was born on 16 May 1998 at Grace Hospital in Morganton, North Carolina. Immediately following birth, she displayed signs of respiratory distress. Dr. John F. Whalley, a pediatrician, assumed care for her. After several hours of respiratory problems, she was transferred to another hospital for additional care. Several years later, Michelle Morland was diagnosed with Cerebral Palsy. Upon belief that Michelle's condition was caused by the respiratory difficulties she experienced after birth, Michelle's grandmother and guardian, Pammy Austin Ezell, filed a medical malpractice suit as Guardian Ad Litem for Michelle, against Dr. Whalley and Grace Hospital. From the time of her birth, Michelle Morland has been a recipient of Medicaid.

Early in the lawsuit, plaintiff and defendant Grace Hospital entered into a settlement agreement for $100,000 which is not at issue in this appeal. As discovery proceeded with the remaining defendants, deposition testimony revealed credible evidence by numerous experts that no causal link existed between the alleged negligence following birth and Michelle's cerebral palsy. Plaintiff thus entered

into a second settlement with defendants Whalley and Mountain View Pediatrics, also in the amount of $100,000. At the 12 December 2004 hearing for judicial approval of the agreement, the trial court heard arguments from DMA that the settlement proceeds should be subject to a lien in favor of DMA for Medicaid payments made on behalf of Michele Morland. On the date of the hearing, the Medicaid lien totaled $86,840.92.

[1] On 2 January 2004, Judge Robert C. Ervin approved the settlement but limited DMA's recovery to $8,054.01, the amount of medical expenses he determined to be causally related to the alleged negligence of defendants Whalley and Mountain View. On 22 January 2004, after hearing DMA's Motion for a New Hearing and to Intervene, Judge Ervin entered another order which clarified and upheld the terms of his previous approval. DMA appeals from Judge Ervin's 22 January 2004 order limiting DMA's subrogation rights to the proceeds obtained on behalf of plaintiff from defendants Whalley and Mountain View Pediatrics. In its brief, appellant first argues that the trial court committed reversible error in its application of common law principles of equity to the Division of Medical Assistance's right of subrogation. Appellant argues that N.C. Gen. Stat. § 108A-57(a)(2003) abrogates the equitable principles of subrogation. We agree. N.C. Gen. Stat. § 108A-57(a) provides as follows:

> Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance, or of the beneficiary's personal representative, heirs, or the administrator or executor of the estate, against any person . . . Any attorney retained by the beneficiary of the assistance shall, out of the proceeds obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of injury or death, distribute to the Department the amount of assistance paid by the Department on behalf of or to the beneficiary, as prorated with the claims of all others having medical subrogation rights or medical liens against the amount received or recovered, but the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered.

Id. (emphasis added). The trial court found that subrogation under N.C. Gen. Stat. § 108A-57 does not alter the common law application of principles of equity. Citing dictates of "equity, good conscience and

public policy," the trial court found that awarding DMA one-third of plaintiff's recovery would be unfair, resulting in plaintiff receiving less than ten percent of the settlement proceeds.

Our standard of review of the order of the superior court is de novo, as defendants have raised an issue of law. *Medina v. Div. of Soc. Servs.*, 165 N.C. App. 502, 505, 598 S.E.2d 707, 709 (2004), citing *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). In matters of statutory construction, this Court must "ascertain and effectuate the intent of the legislative body." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). It is well-established that legislative intent may be determined from the language of the statute, and "if a statute is facially clear and unambiguous, leaving no room for interpretation, the courts will enforce the statute as written." *Haight v. Travelers/Aetna Property Casualty Corp.*, 132 N.C. App. 673, 675, 514 S.E.2d 102, 104 (1999). We conclude that plain language of the statute here precludes the application of equitable subrogation principles. We conclude that the legislature specifically abrogated the application of common law principles of equity when it stated that the State "shall be subrogated to all rights of recovery," "notwithstanding any other provisions of the law." N.C. Gen. Stat. § 108A-57(a). Although our Supreme Court has held that subrogation is "a creature of equity," designed to prevent injustice, *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 324, 130 S.E.2d 645, 651 (1963), we must enforce the statute as written and if the legislature wishes for common law equitable principles to apply to this statute, it may certainly amend it accordingly.

[2] Appellant also argues that the trial court erred in finding that DMA's recovery should be limited to the amount it paid for medical services that corresponded to defendants' alleged negligence. We disagree. In its brief, appellant argues that "North Carolina law entitles the State to full reimbursement for any Medicaid payments made on a plaintiff's behalf in the event the plaintiff recovers an award for damages." (emphasis added). However, we conclude that the plain language of the statute, which gives the State subrogation rights to proceeds obtained from a third-party "by reason of injury or death," indicates an intent to limit that subrogation right to the amount resulting from such injury or death. N.C. Gen. Stat. § 108A-57 (a). Indeed, in a 24 November 2003 letter to plaintiffs regarding the amount of the Medicaid lien, an assistant chief of the third party recovery section of DMA stated that Medicaid must be reimbursed for "medical care and services needed as a result of [plaintiff's] injury."

Appellant cites *Cates v. Wilson*, 321 N.C. 1, 361 S.E.2d 634 (1987), *Campbell v. N.C. Dep't of Human Res.*, 153 N.C. App. 305, 569 S.E.2d 670 (2002), and *Payne v. N.C. Dept. of Human Res.*, 126 N.C. App. 672, 486 S.E.2d 469, *disc. review denied*, 347 N.C. 269, 493 S.E.2d 656 (1997), in support of its position, but none of these cases involved the issue of causation or whether damages may be apportioned according to the amounts paid which were related to the injuries.

The legislature surely did not intend that DMA could recoup for medical treatment unrelated to the injury for which the beneficiary received third-party recovery. Without a requirement of a causal nexus between the DMA lien and a Medicaid beneficiary's third-party recovery, DMA could theoretically do so. For example, under the interpretation encouraged by Appellant, if a Medicaid beneficiary received treatment for cancer, and later received treatment for injuries sustained in a car accident for which she recovered damages from a third-party, DMA could impose a lien for the cancer treatment as well as for the injuries related to the accident. This would allow DMA unlimited subrogation rights to a beneficiary's proceeds obtained from a third-party, rather than to those proceeds obtained "by reason of injury or death," as specified in N.C. Gen. Stat. § 108A-57(a).

[3] Appellant also argues that reducing DMA's lien is contrary to federal Medicaid law. We disagree. It is undisputed that Federal law requires the State to collect money from third party tortfeasors liable to Medicaid beneficiaries. 42 U.S.C.A. § 1396(a)(25) provides:

> A State plan for medical assistance must provide:
>
> ****
>
> (A) that the State or local agency administering such plan will take all reasonable measures to ascertain *the legal liability of third parties* (including health insurers) *to pay for care and service* available under the plan, including—
>
> ****
>
> (B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual . . . the State or local agency will seek reimbursement for such assistance *to the extent of such legal liability.*

Id. (emphasis added). This Court in *Payne* correctly read the federal statute to require the State "to take measures to determine the legal

liability of third parties and to seek reimbursement from them." *Payne* at 676. However, the federal statute does not require the State to seek reimbursement for a certain amount, or percentage, of a recipient's recovery. See *Smith v. Alabama Medicaid Agency*, 461 So.2d 817, 820 (Ala. Civ. App. 1984) (holding that 42 U.S.C. § 1396(a)(25) does not "specifically require or even suggest 100% recovery"). We read the statute here as requiring reimbursement only to the extent of the third party's legal liability for injuries resulting in "care and service" paid by Medicaid. The federal statute specifies that the legal liability for which the State should seek reimbursement is "the legal liability . . . to pay for care and services." 42 U.S.C.A. § 1396(a)(25)(A).

[4] Although we conclude that N.C. Gen. Stat. § 108A-57 (a) limits DMA's subrogation rights to the injury for which the beneficiary received third-party recovery, we also conclude that the trial court's findings here regarding causation are not supported by competent evidence. The court found the following:

> 7. The Court finds that Michelle Morland suffered injury at birth from a delay in treating her respiratory distress and this comprises the major portion of her existing claim. Michelle Morland received treatment at Grace Hospital for these injuries
>
> * * *
>
> 12. Of the full Medicaid lien for funds expended for the minor, $66,666.66, the Plaintiff contends, and the Court agrees and so finds, that only $8,054.01 is causally related to Defendants [sic] alleged negligence.

However, our careful review of the record reveals no competent evidence to support these findings. The deposition testimony provided in the record establishes that defendants' alleged negligence did not cause plaintiff's cerebral palsy but does not address what other injury, if any, was caused by defendants' actions, nor does it establish that there was any negligence. In the consent judgment and order approving settlement, both the plaintiff and defendant Grace Hospital consented to the following finding of fact:

> 2. This action involves the alleged medical negligence of Defendants which are alleged to have caused permanent physical and psychological injury to Michelle Lynn Morland that has necessitated medical care and treatment, and which, the Plaintiff alleges, will require medical care and treatment for the remainder

> of Michelle Lynn Morland's life. *The Defendants have denied these allegations.*

(emphasis added). Although plaintiff asserted a causal connection between the alleged negligence and Medicaid payments of $8,054.01, in its petition for judicial approval of the settlement, no evidence of record supports this contention. Accordingly, we vacate and remand for further proceedings, and specifically for new findings, if any, regarding what proceeds plaintiff obtained "by reason of injury or death," and thus, what portion of plaintiff's award are subject to DMA's right of subrogation.

[5] Appellant also contends that the trial court committed reversible error in presuming that the proceeds were the property of the plaintiff. N.C. Gen. Stat. § 108A-59 provides that, as a condition of Medicaid eligibility, a Medicaid recipient must assign to the State "the right to third party benefits, contractual or otherwise, to which he may be entitled." However, the trial court acknowledged DMA's right to recovery by subrogation and made no finding or conclusion that the proceeds were the "property of the plaintiff." Because we conclude that the court did not apply such a presumption, we overrule this assignment of error.

[6] Finally, appellants argue that the trial court committed reversible error in its failure to follow public policy. Appellants assert that Medicaid was intended to be the payor of last resort and that the subrogation statutes are designed to replenish Medicaid funds when a recipient recovers from a tortfeasor. We do not disagree that these policy considerations underlie the subrogation statutes, however, as discussed, we conclude that the statute requires that DMA's subrogation rights be limited to proceeds obtained "by reason of injury."

For the reasons discussed above, we vacate the court's order and remand for further findings in accordance with this opinion.

Vacated and remanded.

Judge WYNN concurs.

Judge STEELMAN concurs in part and dissents in part.

STEELMAN, Judge concurring in part and dissenting in part.

I concur in those portions of the majority's opinion dealing with equitable subrogation and holding that the trial court did not apply a

presumption that the settlement proceeds were the property of plaintiff. However, I must respectfully dissent as to the remainder of the opinion.

In *Cates v. Wilson*, our Supreme Court stated, "North Carolina law entitles the state to full reimbursement for any Medicaid payments made on a plaintiff's behalf in the event the plaintiff recovers an award for damages." 321 N.C. 1, 6, 361 S.E.2d 734, 738 (1987). In *Campbell v. N.C. Dep't of Human Res.*, this Court held it was irrelevant whether a settlement compensated a plaintiff for medical expenses because "N.C. Gen. Stat. § 108A-57(a) does not restrict defendant's right of subrogation to a beneficiary's right of recovery only for medical expenses." 153 N.C. App. 305, 307, 569 S.E.2d 670, 672 (2002). The applicable portion of the statute dealing with the scope of DMA's right of subrogation reads as follows:

> Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State, or the county providing medical assistance benefits, shall be subrogated to **all rights of recovery, contractual or otherwise**, of the beneficiary of this assistance, or of the beneficiary's personal representative, heirs, or the administrator or executor of the estate, against any person. . . .

N.C. Gen. Stat. § 108A-57(a) (2005) (emphasis added).

The above language contemplates a broad right of subrogation, which is indicated by the reference to "all rights of recovery." Subrogation is not limited to tort recovery, as the statute expressly covers contractual rights or "otherwise." *See State v. Shade*, 115 N.C. 757, 759, 20 S.E. 537, 537 (1894) (noting that when the words "or otherwise," follows an explicit example in a statute, the legislature intends to include every other manner of fulfilling the purpose of the statute, for example here, recovery, no matter what might be the attendant circumstances). The causation language discussed by the majority is from the portion of the statute dealing with the duty of a plaintiff's attorney to distribute settlement proceeds to DMA, not from the portion of the statute defining the scope of DMA's right of subrogation, which is set forth *verbatim* above. The punctuation of the statute gives further credence to this interpretation. The provisions in the statute are set apart by periods, not commas or semicolons. This indicates their separateness. *See Stephens Co. v. Lisk*, 240 N.C. 289, 294, 82 S.E.2d 99, 102 (1954) ("There is no reason why

punctuation, which is intended to and does assist in making clear and plain all things else in the English language, should be rejected in the case of interpretation of statutes") (citations and internal quotation marks omitted). In light of these principles of statutory construction, I do not read the scope of DMA's right of subrogation as narrowly as the majority.

By remanding this matter to the trial court, the majority is expressly authorizing the trial court to find that if there is not a "causal connection" between an actual injury suffered by plaintiff as a result of Dr. Whalley's medical negligence and the medical bills paid by DMA, the trial court can reduce the amount of DMA's lien below the one-third provided for in N.C. Gen. Stat. § 108A-57(a) and this state's prior case law.

I agree with the majority that no DMA lien would attach to proceeds of a settlement from an automobile accident for Medicaid payments for unrelated cancer treatments. However, that is not the case before this Court.

Plaintiff's complaint alleged:

> 27. That as a direct and proximate result of the deviations of the standard of care from and by Defendant Whalley recited herein, Michelle Morland suffered extensive, severe and permanent neurologic and physical damage, including cerebral palsy, which has been directly associated with the Defendant's negligence.

The basis of the suit was a single claim for medical negligence resulting in plaintiff suffering cerebral palsy, a catastrophic condition. The $100,000.00 settlement with Dr. Whalley is a direct result of that lawsuit. This conclusion is unaltered by the fact that during discovery plaintiff realized Dr. Whalley was not as negligent as was originally believed. The settlement with Dr. Whalley was for a single lump-sum of $100,000.00.

Our cases have consistently rejected attempts by plaintiffs to characterize portions of settlements as being for medical bills or for pain and suffering in order to circumvent DMA's statutory lien. *See Campbell*, 153 N.C. App. 305, 569 S.E.2d 670; *Payne v. N.C. Dept. of Human Resources*, 126 N.C. App. 672, 486 S.E.2d 469, *disc. review denied*, 347 N.C. 269, 493 S.E.2d 656 (1997). The majority would resurrect this practice through a very narrow reading of DMA's subrogation right.

This Court's decision in *Payne*, 126 N.C. App. 672, 486 S.E.2d 469, provides guidance on this issue. In *Payne*, DMA had a statutory lien in the amount of $138,198.53. The plaintiff settled his claim for one million dollars, allocated $45,000 of this amount for medical bills, and asserted that DMA was only entitled to one-third of that amount. This Court ordered that DMA was entitled to recover the full amount of its lien of $138,198.53 from the plaintiff. *Id.* at 677, 486 S.E.2d at 471.

Payne highlights the problem which arises if the courts allow a plaintiff to characterize the nature of the settlement proceeds, whether by denominating them for medical bills or not for medical bills, as was the case in *Payne*, or causally related to the third-party recovery as posited by the majority in this case. Both devices are designed to circumvent DMA's statutory right of subrogation and to place more of the recovery in the hands of the plaintiff. However sympathetic one may be to the plaintiff's plight in this case, such a result is contrary to the law of this state.

DMA's right of subrogation under N.C. Gen. Stat. § 108A-57(a) is broad rather than narrow. Even assuming the majority's narrow causation test is proper, any causal connection required for purposes of this statute was satisfied when plaintiff obtained a settlement as a direct result of filing the medical negligence action against Dr. Whalley.

I would hold that DMA is subrogated to the entire amount of the $100,000.00 settlement and is entitled to receive one-third of that amount as partial payment of its $86,540.92 lien.

IN RE: J.A.A. & S.A.A.

No. COA05-105

(Filed 20 December 2005)

1. Termination of Parental Rights— guardian ad litem for parent—incapacity to provide care not alleged

The trial court did not err by not appointing a guardian ad litem under N.C.G.S. § 7B-1111(a)(6) for the parent in a termination of parental rights proceeding where incapability to provide proper care for the children was not alleged and respondent did not request a guardian ad litem.

2. Mental Illness— termination of parental rights—Rule 17—guardian for parent—not appointed

The trial court did not abuse its discretion by not appointing a guardian ad litem under N.C.G.S. § 1A-1, Rule 17 for the parent in a termination of parental rights proceeding.

3. Constitutional Law— effective assistance of counsel—termination of parental rights

A termination of parental rights respondent was not denied effective assistance of counsel when her attorney informed the court that she did not need the appointment of a guardian ad litem. Respondent's attorney was familiar with respondent and vigorously and zealously represented her; moreover, there was overwhelming evidence supporting termination of respondent's parental rights.

4. Termination of Parental Rights— assignment of error—only one of three grounds for termination

Only one of the grounds in N.C.G.S. § 7B-1111(a) is necessary to terminate parental rights. Whether there was sufficient evidence to support one of those grounds in this case was not addressed where respondent did not assign error to the other two grounds cited by the trial court.

5. Termination of Parental Rights— relative available for custody—termination not an abuse of discretion

The trial court did not abuse its discretion by terminating parental rights when a sister was allegedly able to take custody. Whether a relative can take custody is for the dispositional rather than the adjudicatory phase, the court is not required to make findings on all of the evidence, the court may have considered this issue without mentioning it, and the sister's statement was equivocal.

Appeal by respondent from judgment entered 22 June 2004 by Judge Patricia K. Young in Buncombe County District Court. Heard in the Court of Appeals 14 September 2005.

Charlotte W. Nallan, for petitioner-appellee Buncombe County Department of Social Services.

Judy N. Rudolph, for Guardian Ad Litem.

Carol Ann Bauer for respondent-appellant.

STEELMAN, Judge.

Respondent-mother appeals the district court's order terminating her parental rights to two of her children, J.A. and S.A. For the reasons discussed herein, we affirm.

Because respondent-mother has not assigned error to any of the trial court's findings of fact, they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Those findings establish the following facts. Respondent-mother is the natural mother of four children, two of whom are the subject of this appeal. The minor children's legal father was incarcerated during the time the following described events occurred. Their biological father is unknown. Life in the home was one of chaos, drug abuse, and prostitution. Prior to the family's move to North Carolina, respondent lived in Lee County, Florida with her four children: Christina, Eric, J.A., and S.A. Respondent has a long history of drug abuse. While living in Florida, she would take pills, as well as use cocaine and marijuana with her children, including J.A. In addition, respondent and her daughter Christina engaged in prostitution to support their drug habit. Respondent's two husbands were abusive and engaged in significant criminal activities. Respondent's first husband sexually abused Christina, for which he was imprisoned, and her second husband was incarcerated for drug trafficking.

In October 2001, respondent's father died from heart disease. The next month her boyfriend died of leukemia. In December 2001, while at a Christmas party, respondent's oldest son, Eric, died of a drug overdose. Family members testified they believed respondent owed a neighbor money for drugs and when she failed to pay him he intentionally put an overdose into her son's drink. Following the funeral, respondent returned home to find a statement to the effect of "J.A.'s next" spray-painted on the side of their trailer. This was understood to be a threat that if respondent did not pay the money she owed for the drugs, J.A. would be killed. The next day, respondent left Florida and moved the children to Buncombe County, North Carolina.

While respondent's life was unstable before these deaths, it sharply declined thereafter. In the late night hours of 27 April 2002, the Buncombe County DSS received a telephone call from the minor children who were trying to locate their mother. Respondent had left the home at 10:00 a.m. and had not returned. An officer was dispatched and when he arrived at respondent's home, he found J.A. and S.A. alone with a registered sex offender, for whom there was an out-

standing arrest warrant. It appeared he had been staying at respondent's home on and off for three weeks. A social worker arrived at approximately 12:30 a.m. She found the condition of the home unsanitary, with no food in the home. The children were dirty and unkempt and had not bathed recently. The social worker testified "[S.A.'s] hair was so dirty it looked wet. Their clothes were dirty [and J.A.] had a foul odor. They appeared to not have been bathed for many days."

The children were immediately removed from the home. The trial court granted DSS non-secure custody. On 6 June 2002, the trial court adjudicated the minor children neglected and dependent. The trial judge entered this order with respondent's agreement. While in the custody of DSS, J.A. admitted he had sexually abused his sister, S.A., for years. There were also allegations that J.A. had been sexually abused as well, but these claims were not substantiated. While in DSS's custody, both children had significant emotional problems and had to receive extensive mental health treatment. On numerous occasions, each child was admitted to psychiatric treatment facilities—S.A. for suicidal tendencies, and J.A. for treatment of bi-polar disorder and aggressive behavior.

The trial court ordered respondent to obtain a drug and alcohol assessment, a psychological evaluation, and participate in parenting classes. Respondent failed to comply with this order. Instead, she engaged in prostitution, drug use, and at one time, was admitted to Broughton Hospital for treatment for suicidal ideation. Her treating physician reported respondent most likely did not suffer from a bipolar disorder. Respondent was diagnosed as having antisocial personality disorder because she had cocaine dependency and was deceitful. The trial judge found respondent's testimony concerning her substance abuse not to be credible. Respondent failed to keep in contact with either child for almost a year. It was not until after DSS filed its petition for termination of her parental rights that respondent began to minimally comply with the court's order.

On 23 June 2004, DSS filed a petition for termination of parental rights to J.A. and S.A. Respondent filed an answer, but the children's father did not. The petition alleged the following grounds for termination: (1) respondent had neglected the minor children while they were in the care of DSS within the meaning of N.C. Gen. Stat. § 7B-101 (N.C. Gen. Stat. § 7B-1111(a)(1); (2) respondent willfully left her children in foster care for more than twelve months without demonstrating she had made reasonable progress to correct the conditions which led to the removal of the children (N.C. Gen.

Stat. § 7B-1111(a)(2)); and (3) respondent willfully failed to pay a reasonable portion of the cost of care for the minor children while they were in the custody of DSS (N.C. Gen. Stat. § 7B-1111(a)(3)). The matter came on for hearing before the Buncombe County District Court in February 2004. At the hearing, respondent testified that even if the court did not terminate her parental rights to J.A., she did not want him to live with her. The trial court terminated respondent's parental rights as to both children, finding as a basis each of the three grounds for termination alleged in the petition. The trial court further determined it was in the best interests of both children that respondent's parental rights be terminated and entered an order providing for such termination. However, respondent did not file a timely notice of appeal of the 22 June 2004 order terminating her parental rights. Respondent filed a petition for writ of *certiorari* to this Court on 27 April 2005. This Court granted respondent's petition and allowed her appeal of the order terminating her parental rights.

Tragically, on 11 September 2004, S.A. died in her residential facility when a care provider attempted to restrain her, resulting in her suffocation. Respondent's sister has qualified as the administrator of S.A.'s estate and filed a wrongful death action. Respondent asserts her appeal of the termination of her parental rights to S.A. is not moot because if she prevails on appeal she would be entitled to the proceeds from the wrongful death action under N.C. Gen. Stat. § 28A-18-2 and § 29-15.

[1] We first address respondent's argument that the trial court erred in failing to appoint a guardian *ad litem* to represent her.

> Pursuant to N.C. Gen. Stat. § 7B-1101(1) (2005):
>
> a guardian *ad litem* shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent . . . (1) where it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111[a](6), and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition.

See also In re J.D., 164 N.C. App. 176, 180, 605 S.E.2d 643, 645 (noting the duty of appointment arises when the allegation of incapability under N.C. Gen. Stat. § 7B-1111(6) is alleged in the petition for termination), *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). In the instant case, the petitions for termination of respondent's

parental rights contained no allegations that respondent was incapable of properly providing care for her children. Rather, the petition alleged the children were neglected within the meaning of N.C. Gen. Stat. § 7B-1111. Although the petition does contain reference to respondent's drug abuse and alleged mental illness, the trial court is not required to appoint a guardian *ad litem* "in every case where substance abuse or some other cognitive limitation is alleged." *In re H.W.*, 163 N.C. App. 438, 447, 594 S.E.2d 211, 216 (applying N.C. Gen. Stat. § 7B-602(b)(1)), *disc. review denied*, 358 N.C. 543, 603 S.E.2d 877 (2004).

N.C. Gen. Stat. § 7B-1101 requires that a guardian *ad litem* be appointed "in accordance with the provisions of G.S. 1A-1, Rule 17 to represent a parent . . . ." This means that where an allegation is made that parental rights should be terminated, the trial court is required to conduct a hearing to determine whether a guardian *ad litem* should be appointed to represent the parent. An allegation under N.C. Gen. Stat. § 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian *ad litem* should be appointed. At the hearing, the trial court must determine whether the parents are incompetent within the meaning of N.C. Gen. Stat. § 35A-1101, such that the individual would be unable to aid in their defense at the termination of parental rights proceeding. The trial court should always keep in mind that the appointment of a guardian *ad litem* will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 102, 165 S.E.2d 490, 498 (1969).

This case is distinguishable from *In re T.W.*, 173 N.C. App. 153, 617 S.E.2d 702 (2005) and *In re B.M.*, 168 N.C. App. 350, 607 S.E.2d 698 (2005). In *In re T.W.*, although incapability was not alleged, the respondent specifically requested the court appoint her a guardian *ad litem* and she underwent psychological evaluation, in which the doctor recommended she be appointed a guardian *ad litem*. 173 at 155-56, 617 S.E.2d at 703. Despite this, the trial court failed to revisit the guardian *ad litem* issue during the entire ensuing proceedings. *Id.* at 159, 617 S.E.2d at 706. In *In re B.M.*, DSS's petition to terminate the respondents' parental rights alleged the parents' incapability as grounds for termination. 168 N.C. App. at 353, 607 S.E.2d at 703. In neither of these cases did the trial court conduct a hearing on whether a guardian *ad litem* should have been appointed.

In this case, neither incapability within the meaning of N.C. Gen. Stat. § 7B-1111(a)(6) was alleged, nor did respondent request that a guardian *ad litem* be appointed. The trial court inquired *ex meru moto* into the issue of whether respondent needed a guardian *ad litem* appointed after questions concerning her mental condition were brought to the judge's attention.

[2] The fact there was no allegation of incapacity in the petition does not end our inquiry. We must consider whether the trial court had a duty to appoint a guardian *ad litem* to represent respondent under Rule 17 of the Rules of Civil Procedure.

Rule 17(b)(2) provides:

> In actions or special proceedings when any of the defendants are . . . incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such . . . incompetent persons . . . .

N.C. Gen. Stat. § 1A-1, Rule 17(b)(2) (2005).

A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*. *Rutledge v. Rutledge*, 10 N.C. App. 427, 432, 179 S.E.2d 163, 166 (1971). The trial judge should make such inquiry as soon as possible in order to avoid prejudicing the party's rights. *Id.* "Whether the circumstances . . . are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge." *Id.*

Rutledge and similar cases expanded the trial court's authority under Rule 17 to determine competency in certain circumstances. This authority was questioned in *Culton v. Culton*, 96 N.C. App. 620, 622, 386 S.E.2d 592, 593 (1989), which held N.C. Gen. Stat. § 35A-1101 preempted the *Rutledge* line of cases, thereby divesting the trial court of jurisdiction to determine a defendant's competency. On appeal, our Supreme Court reversed *Culton* on procedural grounds. *Culton v.*

Culton, 327 N.C. 624, 398 S.E.2d 323 (1990). Subsequently, the General Assembly superseded this Court's holding in *Culton* by amending N.C. Gen. Stat. § 35A-1102 to provide that "nothing in N.C. Gen. Stat. § 35A-1101 shall interfere with the authority of a judge to appoint a guardian *ad litem* for a party to litigation under Rule 17(b) of the North Carolina Rules of Civil Procedure." 2003 N.C. Sess. Law ch. 236, § 4. Chapter 35A of the general statues sets forth the procedure for determining incompetency, which the trial judge must comply with when conducting a competency hearing under Rule 17.

Before the termination hearing began, the judge noted the petition did not allege respondent was incapable of providing care for her children and inquired as to whether either party was requesting that a guardian *ad litem* be appointed for respondent. Counsel responded as follows:

> [Respondent's Attorney]: Well, there is no allegations here pursuant to 7B-111[1(6)] that she's incapable, Your Honor. Certainly, we would argue that she has some mental health issues that impact her ability to parent the child but does not make her incapable or incompetent to provide care for the children. She certainly has the ability—I think she chooses not to do so. That's not incapable, Your Honor. That's just not doing it. And so we—there's nothing in there that says that she is incompetent or incapable of prosecuting her own case—not prosecuting—presenting her own case and assisting her counsel.
>
> [State's Attorney]: Yes, Your Honor, I would concur with [respondent's attorney], that has not been alleged, and I do think that there will be a lot of evidence given about mental issues. But it's not regarded to her incapacity.

During the trial, counsel for DSS requested that the judge stop the trial and order respondent to submit to a drug test due to her erratic behavior while testifying. The judge immediately stopped the trial. Respondent agreed to take a drug test, which was negative. Respondent stated she had a hyper-type personality. Her attorney acknowledged she was fine and the hearing could continue.

The trial court conducted a hearing pursuant to Rule 17 regarding the issue of respondent's competency. After careful review of the record and transcript, we are unable to say that the trial judge abused her discretion by not appointing a guardian *ad litem* for respondent.

[3] Respondent also contends she was denied effective assistance of counsel when her attorney informed the court that she did not need the appointment of a guardian *ad litem*.

A parent has a right to counsel in termination of parental rights proceedings. N.C. Gen. Stat. § 7B-1101 (2005); *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996). To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing. *Id.*

Careful review of the record indicates respondent's attorney vigorously and zealously represented her client. Respondent's attorney had represented her for many months and was familiar with respondent's ability to aid in her own defense, as well the idiosyncrasies of her personality. Further, the record contains overwhelming evidence supporting termination of respondent's parental rights. Therefore, respondent has failed to demonstrate that her trial counsel's failure to request the appointment of a guardian *ad litem* denied her a fair trial, the outcome of which is reliable. This argument is without merit.

[4] Next, respondent contends the trial court erred in finding as grounds for termination that she wilfully left her children in foster care for more than twelve months without making reasonable progress to correct the conditions that led to their removal.

The trial court can terminate a respondent's parental rights upon the finding of one of the grounds enumerated in N.C. Gen. Stat. § 7B-1111(a). *See also In re Brimm*, 139 N.C. App. 733, 743, 535 S.E.2d 367, 373 (2000). In the instant case, the trial court cited three grounds for terminating respondent's parental rights. Respondent only assigned as error one of those grounds. "The appellant must assign error to each conclusion it believes is not supported by the evidence. N.C.R. App. P. 10. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999). Since respondent does not contest the other two grounds, they are binding on appeal. As only one ground is necessary to support the termination, we need not address whether evidence existed to support termination based on N.C. Gen. Stat. § 7B-1111(a)(3). This argument is without merit.

[5] In respondent's final argument, she contends the trial court erred in finding it was in the best interests of S.A. to terminate her parental

rights when her sister, Loretta D'Souza, was able to take custody of her. We disagree.

The trial court is required to conduct a two-part inquiry during a proceeding for termination of parental rights. *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003). First is the adjudicatory phase. *Id.* In this phase, the court must take evidence, find the facts, and adjudicate the existence or nonexistence of any of the circumstances set forth in N.C. Gen. Stat. § 7B-1111, which authorizes the termination of the respondent's parental rights. *Id.* (citing N.C. Gen. Stat. § 7B-1109(e)). Second, is the disposition phase, which is governed by N.C. Gen. Stat. § 7B-1110 (2005). *Id.* This statute provides that upon a finding:

> 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 . . . unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated.

N.C. Gen. Stat. § 7B-1110 (2005). The decision to terminate parental rights is vested within the sound discretion of the trial judge and will not be overturned on appeal absent a showing that the judge actions were manifestly unsupported by reason. *In Re V.L.B.*, 168 N.C. App. 679, 684, 608 S.E.2d 787, 791 (2005).

During the adjudicatory phase, the trial court does not consider whether there is a relative who can take custody of the minor child, but focuses on whether there is evidence to support termination on the grounds alleged in the petition. If a fit relative were to come forward and declare their desire to have custody of the child, the court could consider this during the dispositional phase as grounds for why it would not be in the child's best interests to terminate the respondent's parental rights.

Although the order does not contain any findings rejecting Mrs. D'Souza outright as a possible placement for S.A., the trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered. *Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 753, 315 S.E.2d 537, 538 (1984). Rather, it must only "make brief, pertinent and definite findings and conclusions about the matters in issue[.]" *Id.* Just because the trial judge did not mention he considered granting Mrs. D'Souza custody of S.A.

does not mean he did not consider it. Further, Mrs. D'Souza testified that while she initially wanted S.A. to live with her, she changed her mind upon learning that S.A. had been suicidal and felt she could not provide her the level of care and attention she needed. Based on this equivocal statement, we cannot say the trial court abused its discretion in not placing S.A. with Mrs. D'Souza rather than terminating respondent's parental rights. This argument is without merit.

AFFIRMED.

Judges HUNTER and TYSON concur.

MARTHA FALLS CLARK, PLAINTIFF-EMPLOYEE v. THE SANGER CLINIC, P.A., DEFENDANT-EMPLOYER, AND ITT HARTFORD INSURANCE COMPANY, INC., DEFENDANT-CARRIER

No. COA05-477

(Filed 20 December 2005)

1. Workers' Compensation— arthritis—insufficient evidence of causation

There was competent evidence to support the Industrial Commission's conclusion that plaintiff's degenerative arthritic condition in her knees and its treatment were not compensable. Although plaintiff suffered a prior compensable knee injury from falls, she did not establish that she had a preexisting arthritic condition, and there was evidence that tears such as those suffered by plaintiff were not well-accepted as causing arthritis and that obesity such as plaintiff's could aggravate degenerative changes.

2. Workers' Compensation— side effects of medication— insufficient evidence of actual causation

There was competent evidence to support the Industrial Commission's finding and conclusion that plaintiff's restorative dental treatment was not compensable where, although "dry mouth" was a potential side effect of several of plaintiff's medications, there was no testimony as to what actually caused plaintiff's dental condition.

3. Workers' Compensation— side effects of medication— insufficient evidence of actual causation

The Industrial Commission did not err by not finding compensable treatment of plaintiff's esophageal reflux, constipation, and nausea. While there was testimony that many of plaintiff's medications have those conditions as side effects, there was no testimony as to actual cause.

4. Workers' Compensation— attorney fees denied—defense not unnecessarily unreasonable

The Industrial Commission did not err by failing to award plaintiff attorney fees pursuant to N.C.G.S. § 97-88.1 because defendants' defense of plaintiff's claims was not necessarily unreasonable.

Appeal by plaintiff from an Opinion and Award filed 18 October 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2005.

Seth M. Bernanke for plaintiff-appellant.

Morris York Williams Surles & Barringer, LLP, by Susan H. Briggs and Keith B. Nichols, for defendant-appellees.

BRYANT, Judge.

Martha Falls Clark (plaintiff) appeals from an Opinion and Award of the North Carolina Industrial Commission (Full Commission) ordering her former employer, the Sanger Clinic, and its insurance carrier, ITT Hartford Insurance Company, (defendants) to continue paying plaintiff permanent total disability benefits, provide all medical treatment arising from her compensable injury by accident, provide modifications to plaintiff's house or assist plaintiff in seeking alternative housing, and awarding interest on unpaid medical compensation.

Facts and Procedural History

Plaintiff was injured on 16 April 1993 while pushing a cart transporting 600 to 800 pounds of equipment into an elevator. The wheel of the cart became wedged in the threshold of the elevator, and in her attempt to dislodge the wheel, plaintiff suffered an admittedly compensable injury to her back. On 4 October 1999, the Full Commission awarded plaintiff temporary total disability and permanent total dis-

ability benefits, and, in part, ordered defendants to provide all medical treatment arising from her injury by accident, including subsequent falls resulting from her back injury causing dental problems and a knee injury.

This matter was initiated on 8 February 2001 when plaintiff filed a Form 33 Request that Claim be Assigned for Hearing, claiming defendants had failed to pay plaintiff benefits and had not modified plaintiff's home as previously ordered by the Industrial Commission. The claim came before Deputy Commissioner Amy L. Pfeiffer on 18 October 2001. Deputy Commissioner Pfeiffer filed her Opinion and Award on 14 October 2002. Plaintiff and defendants filed a Notice of Appeal to the Full Commission on 22 October 2002. The claim was heard by the Full Commission on 2 May 2003 and a companion case was subsequently heard by the same panel of the Full Commission on 2 March 2004. On 18 October 2004, the Full Commission filed its Opinion and Award in this matter. Plaintiff appeals.

Plaintiff argues the Full Commission erred: (I) by holding plaintiff's arthritic conditions in her knees are not compensable; (II) by holding plaintiff's dental problems caused by "dry mouth" syndrome are not compensable; (III) by failing to specify treatment for plaintiff's esophageal reflux, constipation and nausea were compensable; and (IV) by failing to award plaintiff attorney's fees. For the following reasons, we disagree and affirm the Opinion and Award of the Full Commission.

Standard of Review

Review by this Court of a decision by the North Carolina Industrial Commission is limited to the determination of "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's findings of fact are conclusive on appeal even where there is contrary evidence, and such findings may only be set aside where there is a "complete lack of competent evidence to support them." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (citation omitted); *see also Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Our review "goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). However,

the Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

I

[1] Plaintiff first argues the Full Commission erred in holding plaintiff's arthritic conditions in her knees are not compensable. The Full Commission found that although meniscal tears in plaintiff's knees were related to falls, and therefore compensable, treatment for plaintiff's degenerative arthritis was not compensable.

Plaintiff argues that, as the prior Opinion and Award includes "problems caused by falls" as compensable conditions, it is not plaintiff's burden to continually prove that treatment for these problems is compensable; instead, it is defendants' burden to prove that the need for treatment they dispute is not related. *See Parsons v. Pantry. Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997). However, in *Parsons*, the plaintiff was suffering from the exact same complaint (headaches) for which she was initially awarded medical expenses and future medical treatment. *Id.* at 542, 485 S.E.2d at 869. This Court held that requiring the plaintiff to prove a causal relationship between her accident and her current headaches in order to get further medical treatment ignored the prior award. *Id.* "To require plaintiff to re-prove causation each time she seeks treatment for the **very injury** that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees." *Id.* (Emphasis added). In the instant case, plaintiff is suffering from degenerative arthritis, while at the time of the initial award plaintiff suffered a compensable knee injury caused by falls related to her compensable injury by accident. Thus, plaintiff's reliance on *Parsons* is misplaced.

Plaintiff also contends that even if the burden were correctly placed, if a compensable injury "materially aggravates or accelerates" the need for treatment, that need is also compensable. *Little v. Anson County Sch. Food Ser.*, 295 N.C. 527, 532, 246 S.E.2d 743, 746 (1978). Plaintiff relies on testimony by Dr. James Yates, Jr., who first saw plaintiff on 22 October 1998, to support this argument.

> Q: Do you have an opinion within a reasonable medical probability as to whether her history of falls and landing on the knee or twisting when she fell would have materially aggravated, would or could have materially aggravated pre-existing arthritis of the knee?

A: Yes, sir. I absolutely believe that certainly is, is the case.

However, plaintiff does not establish, and we are unable to find any indication in the record before us, that she actually had a preexisting arthritic condition in her knees prior to her 16 April 1993 compensable injury by accident.

There is ample, competent evidence of Record to support the Full Commission's findings of fact. When asked whether there was a connection between torn or malpositioned menisci and/or loose bodies in the knee and degeneration of the knee, Dr. Yates answered "I don't know . . . I don't think its well-accepted in the orthopaedic community, specifically those of us who primarily do knee surgery that a long-standing meniscal tear can cause arthritis of the knee . . . ." Dr. Yates further testified that it was not uncommon for a woman of 50 years old to have severe arthritis in both knees, "particularly in a big person, and she is a very large lady" and that there was "no question at all that obesity is a risk factor for development of osteoarthritis." While there is evidence of record to support a finding that plaintiff's falls could have aggravated her degenerative knee condition, there is also testimony of record that plaintiff's pre-existing obesity could have aggravated the degenerative changes in her knees:

Q. And you indicated, I believe, that she had fairly extensive degenerative changes in her knee?

A. She really does.

Q. And would excessive weight aggravate that condition?

A. Obesity?

Q. Obesity.

A. Yes.

Q. And she was obese when you first saw her. Is that right?

A. Yes.

The Full Commission is the ultimate finder of fact in a workers' compensation case. *Adams*, 349 N.C. at 681, 509 S.E.2d at 413. "The Commission may weigh the evidence and believe all, none, or some of the evidence." *Hawley v. Wayne Dale Const.*, 146 N.C. App. 423, 428, 552 S.E.2d 269, 272 (2001). The Full Commission "may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same."

Anderson v. Northwestern Motor Co., 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951). Finding of Fact Number 18 is supported by competent evidence and in turn supports the Full Commission's conclusion that plaintiff's degenerative arthritic condition and treatment related thereto is not compensable. This assignment of error is overruled.

II

[2] Plaintiff similarly argues the Full Commission erred in holding plaintiff's dental problems caused by "dry mouth" syndrome are not compensable. The Full Commission found as fact:

> Plaintiff also saw thereafter Dr. Jakubek on many other occasions for treatment of "extensive cavities" and to do other restorative treatment. These extensive problems could have been caused initially by poor hygiene, by plaintiff being in a six-week coma following her unrelated gastric bypass surgery, by dry mouth that was possibly caused by medications taken by plaintiff for medical conditions, some of which were and some were not related to the fall, or even from stones in the salivary glands. Therefore, due to the tenuous nature of any causal relationship between plaintiff's compensable injury by accident and the need for restorative treatment, the Full Commission hereby finds that Dr. Jakubek's restorative treatment, if not directly related to a fall by plaintiff, was unrelated to plaintiff's compensable back injury and is not compensable.

The Full Commission then concluded as a matter of law that defendants were not required to pay for restorative treatment unrelated to falls by plaintiff.

Again, there is competent evidence of Record supporting the Full Commission's findings. Dr. Joseph T. Jakubek, a general dentist, testified regarding the cause of plaintiff's extensive dental problems. Dr. Jakubek testified that plaintiff's dental condition could have been caused by poor hygiene, xerostomia ("dry mouth" syndrome) possibly brought on by plaintiff's medications, stones in her salivary glands, or the six weeks that plaintiff was in a coma following her unrelated gastric bypass procedure in 1998. Dr. John Wilson, III, also testified that "dry mouth" syndrome was a potential side effect of several of plaintiff's medications. However, there is no testimony as to what *actually* caused plaintiff's dental condition. While Dr. Wilson may have testified with certainty that many of plaintiff's medications have "dry mouth" syndrome as a side effect, there is no testimony that plaintiff's dental condition was caused by "dry mouth" syndrome.

"To show that the prior compensable injury caused the subsequent injury, the evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Cooper v. Cooper Enters., Inc.*, 168 N.C. App. 562, 564, 608 S.E.2d 104, 106 (2005) (internal quotations omitted). Based upon the testimony of record, the Full Commission properly concluded that the causal relationship between plaintiff's compensable injuries and the need for restorative dental treatment was tenuous. Finding of Fact Number 21 is supported by competent evidence and in turn supports the Full Commission's conclusion that plaintiff's restorative dental treatment is not compensable. This assignment of error is overruled.

III

[3] Plaintiff also argues the Full Commission erred by failing to specify treatment for plaintiff's esophageal reflux, constipation and nausea as compensable. "When [a] matter is 'appealed' to the full Commission . . ., it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties." *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992). The only testimony before the Full Commission regarding plaintiff's esophageal reflux, constipation and nausea came from Dr. Wilson. The Full Commission made the following findings of fact regarding Dr. Wilson's treatment of plaintiff:

> 14. Upon her temporary move to South Carolina in 1998, plaintiff presented to Dr. Wilson, an internist, for medical management for chronic low back pain and complications from recent surgery. Plaintiff presented to the physician while she was recovering from the unrelated gastric bypass surgery, and she was noted to be severely deconditioned. Because physical therapy had been suggested upon her hospital discharge, Dr. Wilson sent plaintiff to physical therapy. This therapy was due mostly to plaintiff's severe deconditioning and complications stemming from the gastric bypass surgery, and only in very small part to her back. In fact, Dr. Wilson's first medical note only references plaintiff's deconditioning due to surgery as the reason for physical therapy. This initial course of physical therapy ordered by Dr. Wilson was unrelated to plaintiff's compensable back or knee conditions and is not compensable.

15. Dr. Wilson, over the course of his treatment of plaintiff, treated plaintiff for many unrelated medical conditions. These conditions include but are not limited to restrictive lung disease, osteopenia, a hernia, and various illnesses such as upper respiratory infections. None of the treatment for these conditions or illnesses was related to plaintiff's compensable conditions. However, any treatment by Dr. Wilson that actually was related to her compensable back and knee conditions, including but not limited to prescriptions for diet pills, was reasonably necessary to effect a cure or give relief, and defendants are therefore obligated to provide this treatment. It was reasonable for plaintiff to seek treatment by Dr. Wilson to manage her medical care during the period of time that she resided in South Carolina, and to the extent that treatment by Dr. Wilson related to the conditions found compensable by the Full Commission, defendants are responsible for payment of this treatment.

As in Issue II, *supra*, there is no testimony as to what actually caused plaintiff's esophageal reflux, constipation and nausea. While Dr. Wilson may have testified that many of plaintiff's medications have esophageal reflux, constipation and nausea as side effects, there is no testimony that these conditions were causally related to plaintiff's compensable injuries. Furthermore, Dr. Wilson testified that plaintiff had "ample reason to have nausea, having had . . . the gastric surgery, the complications from that, and sometimes pain medication." Pursuant to the Full Commission's award, if plaintiff can establish that her esophageal reflux, constipation, or nausea, are related to her compensable injuries, defendants would be obligated to provide the treatment for those ailments. This assignment of error is overruled.

IV

[4] Plaintiff lastly argues the Full Commission erred by failing to award plaintiff attorney's fees pursuant to Section 97-88.1 of the North Carolina General Statutes. Under Section 97-88.1 the Industrial Commission may assess "the whole cost of the proceedings including reasonable [attorney's fees]" if the Commission determines "any hearing has been brought, prosecuted or defended without reasonable ground." N.C. Gen. Stat. § 97-88.1 (2003); *see also*, *Hieb v. Howell's Child Care Ctr., Inc.*, 123 N.C. App. 61, 69, 472 S.E.2d 208, 213 (1996) (where the Full Commission properly awarded attorney's fees upon finding defendants in violation of Industrial Commission rules by terminating compensation without the Commission's

approval, and by refusing to resume immediate payments following the Deputy Commissioner's order). "The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55, 464 S.E.2d 481, 486 (1995). "An abuse of discretion results only where a decision is manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Goforth v. K-Mart Corp.*, 167 N.C. App. 618, 624, 605 S.E.2d 709, 713 (2004) (internal quotations omitted).

In the instant case, the Full Commission concluded that "neither party is entitled to attorney's fees pursuant to N.C. Gen. Stat. §§ 97-88 or 88.1." However, the Full Commission reiterated the award of plaintiff's permanent total disability compensation benefits subject to the attorney's fees approved in the initial Opinion and Award. Plaintiff argues the Full Commission's finding that "defendants' defense of the issues addressed herein was reasonable" is a legal judgment and thus cannot support the Full Commission's conclusion that she is not entitled to attorney's fees. The Full Commission did make the following findings of fact, which are not assigned as error by plaintiff and are therefore binding upon this Court:

> 4. The Full Commission ordered defendants to modify plaintiff's house according to a June 1997 plan devised by a rehabilitation technology consultant. However, as of the date of the filing of the first Opinion and Award by the Full Commission in February 1999, plaintiff was living out of the state. In addition, plaintiff had her house on the market for about a year in approximately 1999 through 2000. Plaintiff did not return to her house until early 2001, and at that time she did not contact defendants about beginning the modifications. Furthermore, she was only back at her house for approximately one month before she filed the Form 33 in the matter. For these reasons, the Full Commission finds it was not unreasonable for defendants to have failed to follow through on the Full Commission's order to modify plaintiff's house at that time.
>
> . . .
>
> 22. Plaintiff was seen at Miller Orthopaedic Clinic on several occasions in July and August 1997. These appointments were with Dr. Meade for treatment of knee pain following a fall or

falls. Plaintiff, through counsel, now argues that defendants failed to pay for these medical expenses, although as of the date of the deposition in this matter, defendants had not been billed by Miller Orthopaedic Clinic for this treatment. . . .

23. Plaintiff was also seen at Miller Orthopaedic Clinic twice in November 1999, and once in 2000. . . . However, it was not unreasonable for defendants not to have paid for these evaluations and treatment, as plaintiff specifically informed the medical care provider in question that the treatment was not related to workers' compensation. In fact, the medical notes from these visits report a diagnosis of "displaced degenerative lateral meniscal tear right knee," thereby corroborating the nonwork-related status of these visits. In addition, as of the date of the deposition of the representative from Miller Orthopaedic Clinic on January 23, 2002, this medical care provider had not billed defendant-carrier for any of these services. It was not until September 7, 2000 that plaintiff asked defendants for reimbursement for this medical compensation. This treatment was for plaintiff's degenerative condition and is therefore not compensable.

Given the facts and circumstances of the instant case, we are unpersuaded that defendants' defense of plaintiff's claims was necessarily unreasonable. Further, we discern no abuse of discretion in the Full Commission's decision not to award attorney's fees to either party. This assignment of error is overruled.

Affirmed.

Judges CALABRIA and JACKSON concur.

BETTY CHATMON, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA05-112

(Filed 20 December 2005)

1. Administrative Law— declaratory judgment—exhaustion of administrative remedies

The trial court did not have jurisdiction over a complaint which sought a declaratory judgment concerning the Work First Program where petitioner did not exhaust administrative reme-

dies by first seeking a declaratory ruling from the Department of Health and Human Services under N.C.G.S. § 150B-4.

2. Public Assistance— findings—articulation of regulatory definition—inadequate ultimate findings of fact

A superior court decision affirming a Heath and Human Services decision to issue sanctions reducing petitioner's family assistance benefits was remanded for further findings concerning petitioner's diabetic condition and her ability to work. The superior court never articulated what it considered to be the ADA definition of disability, and its findings, which merely recited the evidence, were not adequate to support a conclusion that petitioner was or was not disabled under the ADA definition.

Appeal by Petitioner from order entered 2 December 2004 by Judge W. Erwin Spainhour in Superior Court, Rowan County. Heard in the Court of Appeals 11 October 2005.

Legal Aid of North Carolina, Inc., by Stanley B. Sprague, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Belinda A. Smith, for the State.

WYNN, Judge.

Where a statute provides an effective administrative remedy, that remedy must be exhausted before recourse may be had to the courts. *See Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 532-33, 571 S.E.2d 52, 57 (2002). In this case, Plaintiff appealed to Superior Court seeking (1) a Declaratory Judgment that the Work First Manual violates the Americans with Disabilities Act (ADA), and (2) Judicial Review of the Final Agency Decision reducing her Work First Family assistance benefits. We dismiss Petitioner's appeal from the denial of Declaratory Judgment because she failed to first exhaust her administrative remedies, and remand the superior court's order affirming the agency's decision for further findings of fact.

The facts show that Rowan County participates as an electing county under section 108A-27.3 of the North Carolina General Statutes in the administration of a Work First Program. The statute permits Rowan County to establish its own eligibility criteria for recipients and ensure that participants engage in the minimum hours

of work activities required under the federal block grant to North Carolina for Temporary Assistance for Needy Families. 42 U.S.C. § 601 *et seq.* (2004). The North Carolina Department of Health and Human Services approved Rowan County's Work First Plan which provides that as a condition of eligibility a recipient must sign a Mutual Responsibility Agreement.

Petitioner Betty Chatmon applied for Work First benefits in Rowan County which required her to submit to a medical examination. Dr. Bradley Chotiner examined Ms. Chatmon, instructed her to fill out the medical report form, reviewed the form, made a few changes, and signed it. The medical report listed diagnosis for Ms. Chatmon including diabetes, high blood pressure, and back pain. The report stated that Ms. Chatmon could work four hours a day, three days a week.

On 24 September 2003, the Rowan County Department of Social Services (DSS) informed Ms. Chatmon that she had to sign a Mutual Responsibility Agreement which contained a provision requiring her to spend forty hours per week in a volunteer position. While Ms. Chatmon stated that she did not believe she was physically able to work forty hours per week, DSS reviewed her medical report and concluded that she could work forty hours per week in a sedentary and low-stress situation.

In addition to the work hour requirement, the Mutual Responsibility Agreement included the following conditions:

> Keep all appointments as scheduled; contact Social Worker prior to appointments if unable to attend; report any problems or concerns immediately; return time cards monthly.
>
> PRIOR NOTIFICATION TO DSS SOCIAL WORKER IS REQUIRED IF UNABLE TO ATTEND SCHEDULED ACTIVITIES.

Ms. Chatmon signed the Mutual Responsibility Agreement the same day.

DSS assigned Ms. Chatmon to volunteer with the Red Cross, beginning on 25 September 2003. But on the morning of that day, Ms. Chatmon went to Rowan Regional Medical Center's emergency room for treatment of her high blood sugar levels. She stated that she left a message with the Red Cross that she would not come in on 25 September. However, Ms. Chatmon did not report for work after that date nor did she call the Red Cross or DSS to advise them of her absence from work.

On 2 October 2003, DSS issued a notice of sanction that Ms. Chatmon's Work First check would be reduced from $257.00 to $193.00 based on her failure to comply with the Mutual Responsibility Agreement. DSS sent Ms. Chatmon a notice and scheduled a case management appointment for 7 October 2003; but, Ms. Chatmon neither attended the appointment nor responded to the notice.

Ms. Chatmon appealed the 2 October 2003 sanction to a local hearing officer who upheld the sanction on 23 October 2003. Thereafter, she appealed to the State DSS Hearings and Appeals Office which affirmed the local decision on 4 February 2004. From that decision, she filed a Petition for Judicial Review, and a Complaint for Declaratory Judgment in Superior Court, Rowan County. By Order filed 2 December 2004, the superior court affirmed the agency's decision to issue sanctions and denied the Declaratory Judgment.

On appeal to this Court, Ms. Chatmon argues that the superior court erred in (1) denying her request for a declaratory judgment and (2) affirming the agency's issuance of sanctions.

I. Declaratory Judgment

[1] In her Complaint seeking a declaratory judgment, Ms. Chatmon contended that (1) Rowan County's Work First policy requiring all persons who are subject to a work requirement to work forty hours a week violates the Americans with Disabilities Act; and (2) North Carolina's Work First policy requiring all families work at least thirty-five hours a week violates the Americans with Disabilities Act.

Section 150B-4 of the North Carolina General Statutes provides a method for petitioners to seek a declaratory ruling with the agency. Section 150B-4 provides in pertinent part:

> On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court.

N.C. Gen. Stat. § 150B-4 (2004). However, Ms. Chatmon neither filed a declaratory judgment nor sought review of these policies

with the Department of Health and Human Services before filing the Complaint.

"Where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Affordable Care, Inc.*, 153 N.C. App. at 532-33, 571 S.E.2d at 57 (quoting *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 220-21, 517 S.E.2d 406, 410 (1999)); *see also Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979); *Bryant v. Hogarth*, 127 N.C. App. 79, 83, 488 S.E.2d 269, 271, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 406 (1997). Where a plaintiff has failed to exhaust his or her administrative remedies, a trial court has no subject-matter jurisdiction to hear the case. *See Bryant*, 127 N.C. App. at 83, 488 S.E.2d at 271 ("An action is properly dismissed under [Rule 12(b)(1)] for lack of subject matter jurisdiction when the plaintiff has failed to exhaust its administrative remedies."); *Porter v. N.C. Dep't of Ins.*, 40 N.C. App. 376, 381, 253 S.E.2d 44, 47 (1979); *see also Richards v. Nationwide Homes*, 263 N.C. 295, 303, 139 S.E.2d 645, 651 (1965) (holding that the question of subject matter jurisdiction may be raised at any time, even in the Supreme Court).

Since Ms. Chatmon failed to seek a declaratory ruling from the Department of Health and Human Services under section 150B-4 of the North Carolina General Statutes, the trial court did not obtain jurisdiction over the Complaint. *Bryant*, 127 N.C. App. at 83, 488 S.E.2d at 271; *Porter*, 40 N.C. App. at 381, 253 S.E.2d at 47. Accordingly, this assignment of error is dismissed.

II. Judicial Review of Agency Decision

[2] Ms. Chatmon further argues that the superior court erred by affirming the agency's decision to issue sanctions reducing her Work First benefits. We remand for further findings of fact.

Ms. Chatmon sought review of a sanction imposed upon her first by seeking administrative review and then by filing a petition for judicial review under section 108A-79(k) of the North Carolina General Statutes. As this Court has recently reiterated, "[t]his Court's review of the superior court's order on appeal from an administrative agency decision generally involves '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Luna v. Div. of Soc. Servs.*, 162 N.C. App. 1, 3, 589 S.E.2d 917, 919 (2004)

(quoting *Amanini v. N.C. Dept. of Human Res.*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)).

Section 108A-79(k) of the North Carolina General Statutes provides:

> Any applicant or recipient who is dissatisfied with the final decision of [DHHS] may file . . . a petition for judicial review in superior court of the county from which the case arose. . . . The hearing shall be conducted according to the provisions of Article 4, Chapter 150B, of the North Carolina General Statutes. The court shall, on request, examine the evidence excluded at the hearing under G.S. 108A-79(e)(4) or G.S. 108A-79(i)(1) and if the evidence was improperly excluded, the court shall consider it. Notwithstanding the foregoing provisions, *the court may take testimony and examine into the facts of the case*, including excluded evidence, to determine whether the final decision is in error under federal and State law, and under the rules and regulations of the Social Services Commission or the Department of Health and Human Services. . . . Nothing in this subsection shall be construed to abrogate any rights that the county may have under Article 4 of Chapter 150B.

N.C. Gen. Stat. § 108A-79(k) (2004) (emphasis added). Thus, although a superior court is sitting in an appellate capacity when reviewing public assistance and social services decisions, the statute authorizes the superior court to engage in independent fact-finding in order to determine whether the Department of Health and Human Services' final decision is consistent with state and federal law.

The task of the superior court in this case was not to determine whether a sanction was warranted on any basis, but rather whether the Department of Health and Human Services' decision, and the basis upon which it relied, was legally and factually justified. While section 108A-79(k) authorizes a trial court to take testimony and reexamine the facts, this authorization is only "to determine whether the final decision [of the Department of Health and Human Services] *is in error* . . . ." N.C. Gen. Stat. § 108A-79(k) (emphasis added). Accordingly, section 108A-79(k) requires the trial court to sit as both a trial and appellate court. In order to give meaning to both functions, the trial court should be limited to determining whether the reason offered for the Department of Health and Human Services' decision to sanction Ms. Chatmon was factually and legally correct. Section 108A-79(k) should not be read to authorize the trial court to rehear

the case, make wholly new factual findings, and determine that alternative grounds not relied upon by the Department of Health and Human Services would also justify the sanction.

Here, an integral part of the Department of Health and Human Services' decision was its belief that Ms. Chatmon had not been discriminated against under the ADA. The Department of Health and Human Services concluded:

> There is no evidence that the appellant has been found disabled. Her physician's statement did not indicate that she was unable to work at all due to her impairments. The Americans with Disabilities Act protects the disabled so that they have equal opportunities. The county never denied her right to apply for the work program. However, the appellant must comply with work requirements of this work program unless there is clear documentation that she is unable to do so. Her physician's statement indicated she could work. The county gave her a low stress sedentary work experience. She failed to report for this work experience, not only on the day she sought treatment for her health problems, but all week. She never informed the county of this as required by her signed Mutual Responsibilities contract.

The superior court was required to address whether these conclusions were factually and legally correct.

Under the Administrative Procedure Act, the scope of review to be applied by this Court is the same as it is for other civil cases. N.C. Gen. Stat. § 150B-52 (2004); *Henderson v. N.C. Dep't of Human Res., Div. of Soc. Servs.*, 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988). Therefore,

> 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. Findings of fact by the trial court in a non-jury trial . . . are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Medina v. Div. of Soc. Servs., 165 N.C. App. 502, 505, 598 S.E.2d 707, 709 (2004) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)).

The record shows that Ms. Chatmon did not assign error to any of the superior court's findings of fact which are therefore binding on

appeal. *Id.* Moreover, she did not assign error to any specific conclusion of law. The only conclusion of law that relates to an assignment of error is conclusion of law number five: "The evidence of record does not support a conclusion that Petitioner was disabled under the ADA definition of disability." We will review this conclusion of law *de novo*.

The Americans With Disabilities Act defines disability as,

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (2004). "[W]hether a person has a disability under the ADA is an individualized inquiry." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483, 144 L. Ed. 2d 450, 463 (1999). Ms. Chatmon asserts that her physical impairment, diabetes, substantially limits a major life activity, work.

Federal regulations define "physical or mental impairment" to mean, "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine[.]" 28 C.F.R. § 35.104(1)(i)(A) (2005). Diabetes is a physical impairment. *See* 28 C.F.R § 35.104(1)(i)(B)(ii) (2005); *Johnson v. Becton Dickinson Labware, Inc.*, 2001 U.S. Dist. LEXIS 24978 at *5 (M.D.N.C. 2001).

Federal regulations define "major life activities" to mean, "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(h)(2)(i) (2005); *see also Sutton*, 527 U.S. at 491, 144 L. Ed. 2d at 468.

The question remains whether Ms. Chatmon's diabetes *substantially limited* her ability to work. Several factors are considered in determining whether a person is substantially limited in a major life activity: (1) the nature and severity of the impairment; (2) its duration or anticipated duration; and (3) its long-term impact. *Taylor*

v. Nimock's Oil Co., 214 F.3d 957, 960 (8th Cir. 2000) (citing 29 C.F.R. § 1630.2(j)(2)(i)-(iii) (2004)). " 'Based on the aforementioned factors, it is evident that the term 'disability' does not include temporary medical conditions . . . .' Thus, 'a disabling, but transitory, physical or mental condition' will not trigger the protections of the ADA." *Atkins v. USF Dugan, Inc.*, 106 F. Supp. 2d 799, 804 (M.D.N.C. 1999) (quoting *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997) and *McDonald v. Pennsylvania*, 62 F.3d 92, 95-96 (3d Cir. 1995)).

The superior court made the following pertinent findings of fact relating to Ms. Chatmon's diabetic condition and her ability to work:

> 5. The report of medical examination listed diagnoses for Petitioner including diabetes, high blood pressure, and back pain. The report described Petitioner's diabetic condition as the current functional limitation to employment. The report stated that Petitioner could work only four hours a day, three days a week.
>
> 6. The report of medical examination failed to adequately respond to the question regarding Petitioner's expected work capacity limitations following treatment/evaluation.
>
> 7. Petitioner applied for Social Security disability benefits and was denied prior to her application for Work First.
>
> ***
>
> 9. Petitioner told [Work First worker Patti] Kluttz that she did not believe she was physically capable of working or volunteering 40 hours per week, and that her doctor had stated she could work only 12 hours per week.
>
> 10. DSS reviewed the report of medical examination, took into consideration Petitioner's diagnoses, and concluded that Petitioner would be expected to participate in a volunteer work experience in a sedentary position, low stress situation. Ms. Kluttz told Petitioner that she must sign the agreement with the 40 hour per week requirement before she could receive Work First cash assistance.
>
> ***
>
> 21. There is insufficient evidence in the record to support a finding that Petitioner was disabled under the Americans With Disabilities Act definition of disability.

These findings of fact are inadequate for this Court to review *de novo* whether the superior court properly affirmed the agency's decision that the sanctions did not violate the ADA.

The superior court never articulated what it considered to be "the Americans With Disabilities Act definition of disability." We cannot, therefore, determine whether it applied the correct definition. Moreover, the superior court's "findings" merely recite the evidence. This Court has repeatedly held that such statements do not constitute adequate findings of the ultimate facts. *See*, *e.g.*, *Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)). Thus, the superior court's findings of fact are not adequate to support a conclusion either that Ms. Chatmon was or that she was not disabled under the ADA definition of disability.

Accordingly, we vacate conclusion of law five and remand to the superior court for further findings of fact as to the issues related to Ms. Chatmon's ADA contentions. Once those findings of fact have been made, then the legal issues relating to the ADA may be determined. *See Medina*, 165 N.C. App. at 508, 598 S.E.2d at 711 ("[W]e vacate the conclusions of law, leave standing the findings of fact, and remand for further proceedings. On remand, the trial court should resolve the important factual issues mentioned above and then decide the legal issue of coverage.").

Dismissed in part; Remanded in part.

Judges McGEE and GEER concur.

MAMIE L. DAVIS, EMPLOYEE, PLAINTIFF v. COLUMBUS COUNTY SCHOOLS, EMPLOYER, SELF-INSURED, KEY RISK MANAGEMENT, SERVICING AGENT, DEFENDANTS

No. COA04-864

(Filed 20 December 2005)

1. Appeal and Error— assignments of error—lack of enumerated findings—basis of assignment of error easily determined

Assignments of error were heard under Rule 2 of the Rules of Appellate Procedure despite the lack of enumerated findings or conclusions of law therein where the legal basis of the assignments of error could be determined easily.

2. Workers' Compensation— injury by accident—arm grabbed by fellow teacher

There was sufficient evidence to support a finding and conclusion that a teacher whose arm was grabbed by another teacher suffered an injury by accident which exacerbated her pre-existing condition.

3. Workers' Compensation— medical benefits—aggravation of existing condition

Medical benefits were properly awarded where there was no error in concluding that plaintiff's accident aggravated her pre-existing shoulder condition.

Appeal by defendants from opinion and award entered by the North Carolina Industrial Commission on 22 March 2004. Heard in the Court of Appeals 21 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General Stacey A. Phipps, for the State.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray, for plaintiff-appellee.

HUDSON, Judge.

Plaintiff alleges that she sustained a work-related injury on 26 October 1998. Shortly thereafter, defendants filed a Form 19, recording that a co-worker grabbed plaintiff by the arm, and spun her around, causing pain. Defendants paid plaintiff's medical bills from 26 October to 10 November 1998 while the claim was being investi-

gated. Some time later that fall, plaintiff filed a Form 33 requesting a hearing and further compensation. Defendants responded by filing a Form 33R on 7 December 2000, in which they denied compensability for lack of causation. After a hearing on 9 May 2002, Deputy Commissioner Morgan S. Chapman granted several extensions for the parties to complete medical depositions and filed an opinion and award on 30 April 2003, denying plaintiff's claim for workers' compensation. Deputy Commissioner Chapman held that plaintiff "did not sustain an injury by accident arising out of and in the course of her employment." Plaintiff appealed to the Full Commission, which reversed the Deputy Commissioner's decision on 22 March 2004. Defendants appeal. We affirm.

The facts as found by the Commission show that plaintiff was employed as a school social worker with the Columbus County Schools. On 26 October 1998, plaintiff was standing in the hall talking to students when the band teacher, who wished to speak with her, came up behind her, grabbed her by the arm, and spun her around. Plaintiff felt immediate pain in her left arm. Prior to this incident, plaintiff had been experiencing problems with her left shoulder and Dr. Ogden, an orthopedic surgeon, had diagnosed her with a frozen shoulder and given her an injection on 1 October 1998. Immediately after the incident on 26 October 1998, plaintiff received medical treatment from Dr. Hodgson, her family physician. She informed Dr. Hodgson of her prior shoulder problems and her diagnosis of a frozen shoulder and explained the event from earlier in the day. Dr. Hodgson's exam revealed significant reduction of range of motion with exquisite tenderness in the shoulder and left upper back. He diagnosed her with shoulder and arm pain of unclear etiology.

Plaintiff returned to Dr. Hodgson on 3 November 1998 and reported severe pain and swelling in her left arm and the left side of her neck. He diagnosed her with pericervical hypersthesias and paresthesias of undetermined etiology. Dr. Hodgson advised plaintiff not to work. On 2 February 1999, he instructed her that she could return to work on 15 February 1999.

On 16 December 1998, plaintiff began treatment with Dr. Speer, an orthopedic surgeon at Duke University Medical Center, while continuing treatment with Dr. Hodgson. Dr. Speer diagnosed her with a frozen shoulder and possible reflex sympathetic dystrophy and recommended that she wear a sling and cold therapy pads. On 27 January 1999, plaintiff returned to Dr. Speer and reported improvement and Dr. Speer recommended gentle physical therapy. On 14 June

1999, plaintiff reported tremendous improvement and Dr. Speer recommended another month of physical therapy and released her from his care. Plaintiff returned to work in March 1999.

[1] Before reaching the merits of defendants' arguments, we must address certain violations of the rules of appellate procedure. Rule 10(c)(1) requires an appellant, in assigning error, to set forth the legal basis for the assignment and to "direct[] the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C. R. App. P. 10(c)(1) (2004). Here, defendants made the following three assignments of error:

> I. The Full Commission erred in finding *Plaintiff sustained an injury by accident to her left arm arising out of and in the course of her employment with defendant that aggravated or exacerbated her pre-existing left shoulder condition.* (R p 20).
>
> II. The Full Commission erred in ordering that benefits and medical expenses be paid to Plaintiff by Defendant. (R p 20).
>
> III. The Full Commission's findings and conclusions are not supported by competent evidence. (R p 20).

(emphasis added). Defendants failed to specify any enumerated findings of fact or conclusions of law, but each assignment of error refers to page twenty of the record, and on page twenty, the following finding of fact appears:

> 11. The competent evidence in the record establishes that *plaintiff sustained an injury by accident to her left shoulder arising out of and in the course of her employment with defendant that aggravated or exacerbated her pre-existing left shoulder condition.*

(emphasis added). Defendants' first assignment of error, which they bring forward with Argument I in their brief, quotes from this finding of fact verbatim. Thus, we have no trouble discerning which finding of fact defendants challenge by this assignment of error. Similarly, the second assignment of error clearly corresponds to the second and third conclusions of law, which granted plaintiff disability compensation and medical expenses, respectively. The third assignment of error, by itself, is too general to preserve for review objections to specific findings of fact. *See In Re Adoption of Shuler*, 162 N.C. App. 328, 331, 590 S.E.2d 458, 460 (2004). However, we conclude that when con-

sidered along with the first two assignments of error, it adequately sets forth the legal basis for the other assignments of error.

Rule 2 of the Appellate Rules of Procedure allows this Court to review an appeal, despite rules violations. N.C. R. App. P. 2 (2005). In *Viar v. N.C. DOT*, our Supreme Court admonished this Court not to use Rule 2 to "create an appeal for an appellant," and vacated the decision of the Court of Appeals. 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). However, in *Viar*, neither of appellant's assignments of error made specific record references and the Court of Appeals had reviewed an assignment of error which was not argued in appellant's brief, as required by Rule 28(b)(6). *Id.* Here, defendants did bring forth their assignments of error with record references in their brief.

Furthermore, this Court, after *Viar*, has chosen to review certain appeals in spite of rules violations. In *Youse v. Duke Energy Corp.*, this Court reviewed appellant's appeal in spite of at least eight rules violations, because "[d]espite the Rules violations, we are able to determine the issues in this case on appeal." 171 N.C. App. 187, 614 S.E.2d 396, 400 (2005). The Court noted that appellee, "in filing a brief that thoroughly responds to [appellant's] arguments on appeal, was put on sufficient notice of the issues on appeal." *Id.*, citing *Viar*. *See also Coley v. State*, 173 N.C. App. 481, 620 S.E.2d 25, 27 (2005) ("Plaintiff's noncompliance with the [appellate] rules . . . is not substantive nor egregious enough to warrant dismissal of plaintiff's appeal"). In contrast, the Court declined to address appellant's broadside assignments of error that were not "followed by citations to the record or transcript [and] none of the assignments of error specify which findings respondent challenges." *N.C. Dep't of Crime Control and Public Safety v. Greene*, 172 N.C. App. 530, 616 S.E.2d 594, 599 (2005). The Court noted that as one assignment of error could have referred to several of the ALJ's and the trial court's findings of fact, it could not "determine which findings of fact respondent challenges and therefore cannot review this assignment of error." *Id.* Here, as discussed, we can easily determine which finding of fact defendants challenge. *Cf.*, *In Re A.E.*, *J.E.*, 171 N.C. App. 675, 615 S.E.2d 53, 56 (2005) (holding that review not properly before court where appellant failed to object at trial and to assign error to challenged testimony); *State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356, 358 (2005) (holding that appellate review not preserved where criminal defendant failed to properly move for dismissal at end of trial).

[2] Defendants argue first that the Commission erred in finding that plaintiff sustained an injury by accident arising out of and in the

course of her employment that aggravated or exacerbated her pre-existing left shoulder condition. We disagree.

We review decisions of the Industrial Commission to 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) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)). This Court may not "weigh the evidence and decide the issue on the basis of its weight," but must only determine whether the record contains "any evidence tending to support the finding." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (internal citation and quotation marks omitted). The Commission is the "sole judge of the weight and credibility of the evidence," and thus, its findings are binding if supported by any evidence, even if the evidence could also have supported a contrary finding. *Deese*, 352 N.C. at 115-16, 530 S.E.2d at 552-53. Furthermore, on appeal, this Court must view the evidence in the light most favorable to plaintiff. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

The Workers' Compensation Act states that " '[i]njury and personal injury' shall mean only injury by accident arising out of and in the course of the employment." N.C. Gen. Stat. § 97-2 (6).

> [A]n injury arising out of and in the course of employment is compensable only if it is caused by an accident . . . . The term accident, under the Act, has been defined as an unlooked for and untoward event, and a result produced by a fortuitous cause. Unusualness and unexpectedness are its essence. 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, 765-66 (1982)(internal quotation marks and citations omitted). Here, the Commission found and concluded, in relevant part, that:

> 4. On October 26, 1998 plaintiff reported for work with her arm in a sling. As she stood in a hallway talking to a student, the band teacher came up from behind her, grabbed her left arm and spun her around to face him so that he could ask her a question. Plaintiff experienced an immediate onset of pain when this occurred . . .
>
> ***

10. The circumstances of plaintiff's October 26, 1998 injury constituted an interruption of her normal work routine and the introduction thereby of unusual conditions likely to result in unexpected circumstances.

11. The competent evidence in the record establishes that plaintiff sustained an injury by accident to her left shoulder arising out of and in the course of her employment with defendant that aggravated or exacerbated her pre-existing left shoulder condition.

***

1. On October 26, 1998, plaintiff sustained an injury by accident to her left arm arising out of and in the course of her employment.

Because defendants only preserved review of finding of fact eleven, the other unchallenged findings of fact are conclusive on appeal. *First Union Nat'l Bank v. Bob Dunn Ford, Inc.*, 118 N.C. App. 444, 446, 455 S.E.2d 453, 454 (1995).

Defendants argue that the Commission erred by finding and concluding that plaintiff sustained an injury arising out of and in the course of her employment. This argument addresses finding of fact number eleven, which is a mixed finding of fact and conclusion of law. "Whether an accident arises out of the employment is a mixed question of fact and law, and the [factual] finding of the Commission is conclusive if supported by any competent evidence." *Lee v. F. M. Henderson & Associates*, 284 N.C. 126, 131, 200 S.E.2d 32, 36 (1973) (internal citation and quotation marks omitted). Here, the Commission found, in finding of fact four, that plaintiff was injured while at work, "[a]s she stood in a hallway talking to a student" and "the band teacher came up behind her, grabbed her left arm and spun her around so that he could ask her a question," and concluded that plaintiff's injury arose from her employment. As discussed above, findings four and ten are conclusive on appeal, and we conclude that they support finding eleven and the Commission's conclusion, as plaintiff's injury "had its origin in a risk connected with the employment, and [] flowed from that source as a rational consequence." *Pittman v. Twin City Laundry & Cleaners*, 61 N.C. App. 468, 472, 300 S.E.2d 899, 902 (1983). Plaintiff was grabbed by a co-worker who wished to ask her a question, a situation which had its origin in the employment.

It is well-established that in order to be compensable, an accident must both "arise out of" and happen "in the course of employment,"

and the two phrases are not synonymous, but impose separate conditions which must each be satisfied. N.C. Gen. Stat. § 97-2(6); *Murray v. Biggerstaff*, 81 N.C. App. 377, 380, 344 S.E.2d 550, 552, *disc. review denied*, 318 N.C. 696, 350 S.E.2d 858 (1986). However, defendants here contend only that the accident did not arise out of plaintiff's employment. The term "arising out of" refers to the connection of the accident to the employment. *Pittman*, 61 N.C. App. at 472, 300 S.E.2d at 902. "To be compensable an injury must spring from the employment or have its origin therein." *Perry v. American Bakeries Co.*, 262 N.C. 272, 274, 136 S.E.2d 643, 645 (1964). Furthermore, "[f]or an accident to 'arise out of' the employment, it is necessary that the conditions or obligations of the employment put the employee in the position or at the place where the accident occurs." *Pittman*, 61 N.C. App. at 472, 300 S.E.2d at 902 (internal citation omitted). The accident "need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." *Id.* (internal citation omitted).

In order for a Workers' Compensation claim to be compensable, there must be proof of a causal relationship between the injury and the employment. *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 374, 64 S.E.2d 265, 266 (1951). "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Expert testimony need not show that the work incident caused the injury to a reasonable degree of medical certainty; "[a]ll that is necessary is that an expert express an opinion that *a particular cause was capable of producing this injurious result.*" *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 599-600, 532 S.E.2d 207, 211-12 (2000) (emphasis added). When an injury by accident accelerates or aggravates an employee's pre-existing condition, the injury is compensable. *Anderson*, 233 N.C. at 374, 64 S.E.2d at 267. "In such a case, where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the pre-existing condition will not be weighed." *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 196, 352 S.E.2d 690, 694 (1987). We conclude that there was sufficient competent evidence to support finding of fact number eleven, and that this finding, in turn, supports the Commission's conclusions that plaintiff's injury by acci-

dent exacerbated her pre-existing condition and thus entitled her to temporary total disability compensation.

[3] In their next argument, defendants assert that the Commission erred in ordering medical benefits be paid by defendants. Defendants argue that because the Commission erred in concluding that plaintiff's accident aggravated her pre-existing shoulder condition, it improperly awarded medical benefits for it. Because we have concluded otherwise, for the reasons discussed above, the Commission's award of medical benefits for plaintiff's compensable injury is proper.

Affirmed.

Chief Judge MARTIN and Judge JACKSON concur.

THE ESTATE OF VICKY BARKSDALE, BY AND THROUGH HER EXECUTOR, MICHAEL FARTHING, PLAINTIFF v. DUKE UNIVERSITY MEDICAL CENTER; DUKE UNIVERSITY HEALTH SYSTEM, INC.; DUKE HOSPITAL; DUKE UNIVERSITY; YVETTE DOUGLAS-LEWIS, M.D.; BROADHEAD FAMILY PRACTICE, P.C.; ARMC PRIMARY CARE, INC. D/B/A YANCEYVILLE FAMILY PRACTICE OF ALAMANCE REGIONAL MEDICAL CENTER F/K/A BROADHEAD FAMILY PRACTICE, P.C.; AND THOMAS A. D'AMICO, M.D., DEFENDANTS

No. COA05-101

(Filed 20 December 2005)

1. Medical Malpractice— initial filing without Rule 9(j) certification—voluntary dismissal and refiling with certification—statute of limitations—no relation back

Plaintiff's medical malpractice claims were properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff's initial complaint did not have a Rule 9(j) certification; plaintiff took a voluntary dismissal and later refiled with the requisite certification after the statute of limitations had expired; and the complaints were dismissed for violation of the statute of limitations. Plaintiff's last complaint should not be permitted to relate back to the original; the original was not properly filed, as it failed to comply with Rule 9(j) and did not suffice to toll the statute of limitations.

2. Civil Procedure— voluntary dismissal and refiling—changing constitutional rulings

A plaintiff was required to comply with Rule 9(j) in refiling a medical malpractice action after a voluntary dismissal where the original complaint was controlled by the Court of Appeals holding that Rule 9(j) is unconstitutional, but the N.C. Supreme Court had vacated that ruling by the time plaintiff took the voluntary dismissal.

Appeal by plaintiff from orders entered 16 July 2004 and 22 September 2004 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 September 2005.

Hollowell, Mitchell, Eyster & Warner, P.A., by Joseph T. Copeland and Joan M. Mitchell, for plaintiff-appellant.

Hunton & Williams LLP, by Frank E. Emory, Jr. and Brent A. Rosser, for Duke University Medical Center, Duke University Health Systems, Inc., Duke Hospital, Duke University, and Thomas A. D'Amico, M.D., defendants-appellees.

Sharpless & Stavola, P.A., by Joseph P. Booth, III, for Broadhead Family Practice, P.C., and ARMC Primary Care, Inc. d/b/a Yanceyville Family Practice of Alamance Regional Medical Center f/k/a Broadhead Family Practice, P.C., defendants-appellees.

Carruthers & Roth, P.A., by Kenneth L. Jones, for Yvette Douglas-Lewis, M.D., defendants-appellees.

JACKSON, Judge.

On 15 March 2002, the estate of Vicky Barksdale ("plaintiff") filed a complaint alleging defendants failed to timely diagnose and treat Vicky Barksdale's recurrence of cancer, and failed to treat her with proper palliative care once the recurrence was discovered. Vicky Barksdale passed away on 18 March 2000 as a result of the recurrence of cancer. Defendants listed in the complaint included: Duke University Medical Center, Duke University Health System, Inc., Duke Hospital, Duke University, and Thomas A. D'Amico, M.D. (collectively "Duke defendants"); Broadhead Family Practice, P.C., ARMC Primary Care, Inc., d/b/a Yanceyville Family Practice of Alamance Regional Medical Center, f/k/a Broadhead Family Practice, P.C. (collectively

"Broadhead defendants"); and Yvette Douglas-Lewis, M.D. ("defendant Douglas-Lewis").

Plaintiff's initial complaint filed in March 2002 did not contain a Rule 9(j) certification nor any allegation showing that her estate had standing to institute an action pursuant to North Carolina General Statutes, section 1A-1, Rule 17(a) and sections 28A-18-1 and -2. Plaintiff amended her initial complaint twice to include an allegation stating that her estate had standing to sue. Neither of the amendments included the requisite Rule 9(j) certification.

On 9 December 2002, plaintiff voluntarily dismissed her initial complaint pursuant to North Carolina General Statutes, section 1A-1, Rule 41(a). Plaintiff re-filed the same action against all defendants on 19 November 2003, in a complaint containing the requisite Rule 9(j) certification. On 5 February 2004, Duke defendants answered plaintiff's complaint and asserted that it should be dismissed because it failed to comply with Rule 9(j) and that it was time barred by the statute of limitations. Duke defendants filed a motion to dismiss on 9 June 2004, and the matter was heard on 12 July 2004. The trial court entered an order on 16 July 2004 granting Duke defendants' motion and dismissing plaintiff's case against Duke defendants with prejudice. In dismissing plaintiff's complaint, the trial court held that plaintiff failed to comply with Rule 9(j) when she initially filed her complaint, and that the certification in the November 2003 complaint occurred after the three-year medical malpractice statute of limitations had run.

Broadhead defendants and defendant Douglas-Lewis filed motions to dismiss on 21 and 26 July 2004 respectively, and their motions were granted on 22 September 2004. Plaintiff appeals from the orders ruling that her claims against all defendants were barred by the statute of limitations.

[1] Plaintiff contends the trial court erred in dismissing her complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and that her action was not time barred by the statute of limitations.

A motion to dismiss based on Rule 12(b)(6) should be granted when the plaintiff has failed "to state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2004). A defendant may raise the defense of statute of limitations in a Rule 12(b)(6) motion to dismiss "if it appears on the face of the complaint that

such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994). Once a defendant has raised this defense, the burden shifts to the plaintiff to show that the action was instituted within the prescribed period. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). "A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996).

North Carolina General Statutes, section 1-15(c) (2004), provides that a claim for malpractice arising out of the "performance of or failure to perform professional [medical] services shall be deemed to accrue . . . [upon] the occurrence of the last act of the defendant giving rise to the cause of action." A plaintiff has three years from that date within which to bring suit. *Id.*

Upon commencing a medical malpractice action in North Carolina, plaintiffs must plead specifically that their alleged improper medical care has been reviewed by an expert who is willing to testify that the medical care provided to plaintiff "fail[ed] to comply with the applicable standard of care." N.C. Gen. Stat. § 1A-1, Rule 9(j) (2004). North Carolina General Statutes, section 1A-1, Rule 9(j) (2004) provides:

> Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate . . . may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

Per Rule 9(j), plaintiffs may extend the three-year statute of limitations for an additional 120 days upon motion, in order to allow them additional time to comply with the Rule 9(j) certification requirement.

A plaintiff may take a voluntary dismissal of his or her action without prejudice pursuant to North Carolina General Statutes, section 1A-1, Rule 41(a) (2004). Rule 41(a) allows a plaintiff who has commenced an action "within the time prescribed therefor," and who takes a voluntary dismissal without prejudice, to commence a new action on the same claim within one year of the voluntary dismissal. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2004); *Bass v. Durham County Hosp. Corp.*, 158 N.C. App. 217, 223, 580 S.E.2d 738, 742 (2003), *rev'd*, 358 N.C. 144, 592 S.E.2d 687 (2004) (Supreme Court reversed Court of Appeals decision and adopted dissenting opinion). When taking a voluntary dismissal without prejudice, a plaintiff always will have the remaining time prescribed under the applicable statute of limitations, and also will have an additional year as provided by Rule 41(a)(1). *Whitehurst v. Virginia Dare Transp. Co.*, 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973). The effect of Rule 41 is that a plaintiff may " 'dismiss an action that originally was filed within the statute of limitations and then refile the action after the statute of limitations ordinarily would have expired.' " *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 594, 528 S.E.2d 568, 571 (2000) (quoting *Clark v. Visiting Health Prof'ls, Inc.*, 136 N.C. App. 505, 508, 524 S.E.2d 605, 607, *disc. review denied*, 351 N.C. 640, 543 S.E.2d 867 (2000)).

The issue before us is whether Plaintiff's complaint filed in November 2003 should be permitted to relate back to her original complaint filed in March 2002 for purposes of the statute of limitations.

Our courts have addressed the interplay of Rule 9(j) and voluntary dismissals under Rule 41(a) in several cases. *Bass v. Durham County Hosp. Corp.*, 158 N.C. App. 217, 580 S.E.2d 738 (2003) in-

volved a plaintiff who commenced a medical malpractice action on the last day of the 120-day extension, and whose complaint failed to comply with the Rule 9(j) certification requirement. The plaintiff later dismissed her claims pursuant to Rule 41(a), and refiled her complaint within the one year. Our Supreme Court reversed this Court's holding in *Bass*, and upheld the dissent in that case. Based upon the dissent, the holding in *Bass* provides that when an original complaint is filed after the original statute of limitations and the 120-day extension both have expired, and it fails to comply with the Rule 9(j) certification requirement, the complaint is "not 'commenced within the time prescribed therefor' " based on the failure to comply with the rule. *Id.* at 223, 580 S.E.2d at 742. The Court went on to hold that "[a] Rule 41(a) voluntary dismissal would salvage the action and provide another year for re-filing had plaintiff filed a complaint complying with Rule 9(j) before the limitations period expired." *Id.* at 225, 580 S.E.2d at 743. In *Bass*, the plaintiff's complaint was untimely filed based on the fact that her initial action, although filed within the statute of limitations and 120-day extension time frame, failed to comply with the Rule 9(j) certification requirements, and thus, for purposes of the statute of limitations, her subsequent filing could not relate back to the date of the initial commencement of the action.

In *Thigpen v. Ngo*, 355 N.C. 198, 205, 558 S.E.2d 162, 167 (2002), our Supreme Court held that "once a party receives and exhausts the 120-day extension of time in order to comply with Rule 9(j)'s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification." The Court continued to hold that "Rule 9(j) expert review must take place before the filing of the complaint." *Id.* In reaching its decision, the Court considered our legislature's intent in drafting Rule 9(j), and the purpose of the rule itself. The Court stated:

> The legislature specifically drafted Rule 9(j) to govern the initiation of medical malpractice actions and to require physician review as a condition for filing the action. The legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint. Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.

Id. at 203-04, 558 S.E.2d at 166.

In *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), our Supreme Court addressed the situation in which a plaintiff failed to comply with the Rule 9(j) certification requirement. In *Brisson*, the plaintiffs took a voluntary dismissal per Rule 41(a), and re-filed their action within one year of the expiration of the statute of limitations. No 120-day extension was involved. The court in *Brisson* held that the proposed amended complaint was filed within the one-year extension granted by Rule 41(a), and thus should have been allowed. *Id.* at 597, 528 S.E.2d at 573.

While neither the plaintiffs in *Brisson* nor the present case sought the 120-day extension, the facts of the present case are distinguishable from those in *Brisson*. With respect to Duke defendants, plaintiff's last date of injury was 10 March 2000, and the three-year statute of limitations ran on 10 March 2003. Had plaintiff filed a motion seeking the 120-day extension, the statute of limitations would have been extended to 8 July 2003. With respect to defendant Douglas-Lewis and Broadhead defendants, plaintiff's last date of injury was 13 July 1999, and the three year-statute of limitations expired 13 July 2002. Had plaintiff filed a motion seeking the 120-day extension, the statute of limitations would have been extended to 11 November 2002, which was Veteran's Day, thus the extension would have run on Tuesday, 12 November 2002. Plaintiff recommenced the civil action as to all defendants on 19 November 2003—clearly beyond the statute of limitations and 120-day extensions in each case.

In the instant case, plaintiff admits that the initial complaint failed to contain the required certification. In addition, plaintiff's responses to defendants' Rule 9 interrogatories state that all of the expert witnesses who reviewed the medical care rendered by defendants did so in January or February 2003, well after the filing of the initial complaint in March 2002. Thus, there was no expert review prior to the commencement of the original action, which our Supreme Court has held would be contrary to the legislature's intent in enacting Rule 9(j). *See Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166 ("The legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint.").

The effects of a Rule 41(a) voluntary dismissal are well-settled in our state. " 'A Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d)[,] which authorizes the court to enter specific orders appor-

tioning and taxing costs.' " *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570 (quoting *Walker Frames v. Shively*, 123 N.C. App. 643, 646, 473 S.E.2d 776, 778 (1996)). A Rule 41(a) voluntary dismissal " 'leave[s] the plaintiff exactly where he [or she] was before the action was commenced.' " *Id.* (quoting *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965)). Once a court has granted a Rule 41(a) dismissal, " '[t]here is nothing the defendant can do to fan the ashes of that action into life[,] and the court has no role to play.' " *Id.* (quoting *Universidad Cent. Del Caribe, Inc. v. Liaison Comm. on Med. Educ.*, 760 F.2d 14, 18 n.4 (1st Cir. 1985)).

When plaintiff took her voluntary dismissal in December 2002, she was left in the same position she would have been in had she never commenced the civil action in the first place. She would have been left with the remaining portion of the statute of limitations with regards to her claims against Duke defendants. However, at the point at which she took the voluntary dismissal, the statute of limitations, along with any potential 120-day extension, had run with respect to her claims against Broadhead defendants and defendant Douglas-Lewis. In addition, her original complaint was not properly filed, as it failed to comply with Rule 9(j), and thus it did not suffice to toll the statute of limitations with regards to any of her claims.

Therefore, based on the precedents in *Brisson* and *Bass*, we hold that since plaintiff failed to file a complaint in compliance with the requirements of Rule 9(j) within the prescribed statute of limitations, or within the time which would have been allowed had a 120-day extension been sought, plaintiff's complaint filed 18 November 2003 was not timely filed. Thus the trial court acted properly in granting defendants' motions to dismiss.

[2] Plaintiff also asserts that at the time the original complaint was filed in March 2002, it was not required to comply with Rule 9(j) based on our holding in *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001), *vacated in part and appeal dismissed*, 356 N.C. 415, 572 S.E.2d 101 (2002), and therefore the original complaint should be found to have been timely filed such that the statute of limitations was tolled.

Our opinion in *Anderson v. Assimos*, filed 2 October 2001, held that Rule 9(j) was unconstitutional and void, and therefore plaintiffs were not obligated to meet the pleading requirements of Rule 9(j). *Anderson*, 146 N.C. App. at 346, 553 S.E.2d at 69. On 22 November 2002, the Supreme Court vacated our ruling in *Anderson*, to the

extent that we concluded Rule 9(j) was unconstitutional. *Anderson*, 356 N.C. at 417, 572 S.E.2d at 103. Our original ruling in *Anderson* was controlling in plaintiff's case at the time the original complaint was filed, however, so plaintiff was not required to comply with Rule 9(j) at that time. However, the Supreme Court's decision was filed prior to plaintiff's taking a voluntary dismissal on 9 December 2002. Once the Supreme Court's decision became controlling, plaintiff was required to comply with the Rule 9(j) requirements, and had the opportunity to amend its complaint to include the Rule 9(j) certification, and to have the amendment relate back to the original filing date. *See Rupe v. Hucks-Follis*, 170 N.C. App. 188, 611 S.E.2d 867 (2005). Plaintiff failed to do so. We therefore do not find plaintiff's argument to be persuasive, and hold that plaintiff was required to comply with the Rule 9(j) certification requirement.

Because we find plaintiff's complaint filed 18 November 2003 was not timely filed within the applicable statute of limitations, we hold the trial court did not err in dismissing plaintiff's claims pursuant to Rule 12(b)(6).

Affirmed.

Judges McGEE and McCULLOUGH concur.

GLENN I. HODGE, JR., Plaintiff v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant

No. COA04-1657

(Filed 20 December 2005)

1. Public Officers and Employees— reinstatement to former position—Whistleblower Act—employee grievance matters

The trial court did not err by concluding the Whistleblower Act does not apply to plaintiff employee's 1998 suit seeking reinstatement to his former position even though plaintiff contends it constitutes reporting to "another appropriate authority" the violation of a rule or regulation under the Whistleblower Act, because: (1) the lawsuit did not concern matters affecting general public policy; (2) the definition of a protected activity is

not extended to individual employment actions that do not implicate broader matters of public concern; and (3) the General Assembly did not intend N.C.G.S. § 126-84 to protect a State employee's right to institute a civil action concerning employee grievance matters.

2. Public Officers and Employees— unlawful retaliation and discrimination—legitimate nonretaliatory reasons

The trial court did not err by granting summary judgment in favor of defendant employer North Carolina Department of Transportation (NCDOT) based on its conclusion that there was no genuine issue of material fact in a suit where plaintiff employee alleged unlawful retaliation and discrimination by NCDOT based on plaintiff's reporting and litigating unlawful and improper actions and seeking injunctive relief, damages, payment of back wages, full reinstatement of fringe benefits, costs, and attorney fees, because: (1) assuming arguendo that plaintiff engaged in a protected activity, NCDOT presented legitimate nonretaliatory reasons for all of the actions it has taken; and (2) plaintiff acknowledged in his deposition testimony that there were legitimate explanations for the actions he alleged were retaliatory.

3. Public Officers and Employees— employer retaliation—failure to submit position for upgrade

Although plaintiff employee contends the trial court erred by dismissing plaintiff's claim regarding defendant employer's failure to submit the Chief Internal Auditor position for upgrade, this assignment of error is overruled because: (1) plaintiff was not a state employee when the position was not submitted for upgrade, and thus, he cannot seek relief under the Whistleblower statute; and (2) it is not logical to believe that NCDOT failed to seek a necessary upgrade of the position in order to retaliate against plaintiff who did not occupy the position at the time of the upgrades in other State government agencies on the chance that plaintiff would again occupy that position at some point in the future.

Appeal by plaintiff from judgments entered 16 and 17 September 2004 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 October 2005.

Biggers & Hunter, PLLC, by John C. Hunter, for plaintiff-appellant.

Roy A. Cooper, III, Attorney General, by Alexandra M. Hightower, Assistant Attorney General, for the North Carolina Department of Justice Transportation Section.

MARTIN, Chief Judge.

Plaintiff was originally employed by the North Carolina Department of Transportation (DOT) in January 1992 as an internal auditor and was promoted to Chief of the Internal Audit section in May of that year. In May of 1993, the position was reclassified, pursuant to N.C. Gen. Stat. § 126-5(d), as policy making exempt, and plaintiff challenged the reclassification through a contested case hearing with the Office of Administrative Hearings (OAH) in November of 1993. On 3 December 1993, plaintiff was terminated from his position, but not informed of his eligibility for priority re-employment pursuant to N.C. Gen. Stat. § 126-5(e).

Following proceedings before the OAH, State Personnel Commission, Wake County Superior Court, and this Court, in March of 1998, the North Carolina Supreme Court determined that the position had been improperly classified as policy making exempt. *N.C. Dept. of Transportation v. Hodge*, 347 N.C. 602, 607, 499 S.E.2d 187, 190 (1998). On 2 May 1998, DOT reinstated plaintiff in a new position, Internal Auditor II in the External Audit branch, paying him at his previous pay rate because someone else had been employed in his former position. Plaintiff was also awarded back pay.

On 24 July 1998, plaintiff filed suit in Wake County Superior Court seeking to compel his reinstatement as Chief Internal Auditor. The trial court granted summary judgment, ordering that plaintiff be reinstated as Chief Internal Auditor. DOT appealed, and a divided panel of this Court reversed. *Hodge v. N.C. Dep't of Transp.*, 137 N.C. App. 247, 254, 528 S.E.2d 22, 27 (2000). The Supreme Court, however, reversed this Court on 6 October 2000, and effectively granted injunctive relief in plaintiff's favor. *Hodge v. N.C. Dep't of Transp.*, 352 N.C. 664, 535 S.E.2d 32 (2000) (per curiam). Plaintiff was reinstated as Chief Internal Auditor on 30 October 2000.

The present appeal concerns a complaint filed by plaintiff on 4 June 2003, in which he claims unlawful retaliation and discrimination by DOT due to his "reporting and litigating unlawful and improper

actions," and seeking "injunctive relief, damages, payment of back wages, full reinstatement of fringe benefits, costs and attorney's fees." The retaliatory actions alleged in the complaint begin at plaintiff's termination, when plaintiff alleges DOT denied him the opportunity to priority re-employment by not posting vacancies until after his rights to such re-employment had expired. After he was reinstated, plaintiff alleges that a pattern of retaliation continued, including not being given the following: 1) an adequate work space; 2) a computer with up-dated software; 3) training regarding either the procedures or computer equipment in the unit he was working in; and 4) an access number to the DOT database to gain information useful to complete assignments. DOT contends that it provided plaintiff with office space, computer equipment, and training comparable to others in plaintiff's division. Moreover, DOT maintains that plaintiff did not notify his supervisor, Robert Clevenger, that he did not have an access number until after his work performance was criticized, and immediately after plaintiff notified Clevenger that he needed such a number, Clevenger provided it. In his deposition, plaintiff conceded that his space and equipment were similar to others in his position and adequate to perform his duties.

Plaintiff alleged that he did not receive any indication of unsatisfactory work performance until appearing in court on 24 August 1998 for his complaint seeking reinstatement as Chief Internal Auditor. On 4 November 1998, Clevenger noted in an "interim" review of plaintiff's work plan that plaintiff was having difficulty turning in his assignments on time; plaintiff contends he informed Clevenger this was a result of the adverse conditions. Plaintiff did not submit any complete audits to Clevenger for review subsequent to 11 November 1998 because he determined it was in his best interest not to submit work until the adverse conditions were eliminated.

Ostensibly due to plaintiff's failure to submit work after 11 November, he received an unsatisfactory performance rating on 26 April 1999. As a result, plaintiff was denied a three percent pay increase and the associated benefit increases which would have been effective 1 July 1999, and he received a formal written warning notifying him of the need to improve and informing him that further disciplinary action could include dismissal. Plaintiff received an additional written warning on 30 June 1999, and participated in another counseling session on 18 August 1999 regarding his poor performance. He maintains that he continued to ask that the discriminatory conditions be remedied, but that his supervisors took no action.

Plaintiff was placed on paid administrative leave following a pre-disciplinary conference on 14 October 1999. On 28 October plaintiff received another written warning for unsatisfactory performance via certified mail, which informed him that C. Wayne Stallings, Chief Financial Officer, had directed Clevenger and Clevenger's supervisor, Bruce Dillard, to place him in computer classes, review his job description and processes, investigate options regarding office space, and establish a mutually agreed-upon work plan, with expected completion dates for his assignments. The prior unsatisfactory performance rating was not removed, however, so that plaintiff remained at risk of being terminated for cause.

On 14 April 2000, plaintiff had a second unsatisfactory performance review and was denied a two percent pay increase. On 1 July 2000, plaintiff received a cost of living pay increase, and on 5 August 2000, the salary range for plaintiff's position was revised, so that he received a 4.16 percent salary increase. Plaintiff also received the bonuses and cost of living increases granted to all State employees by the General Assembly.

Plaintiff alleges that, due to his action in reporting violations of state law and regulations and pursuing litigation against DOT, defendant 1) denied cumulative pay increases of three percent and two percent; 2) devised a scheme to rate plaintiff's work unsatisfactory and to have such a rating entered in plaintiff's permanent personnel record; 3) filled his personnel record with numerous written warnings and counseling notices due to alleged unsatisfactory performance; 4) attempted to discharge him; and 5) made false allegations to plaintiff's coworkers that his job performance was unsatisfactory and that he was about to be terminated. DOT notes that the warnings for unsatisfactory job performance in plaintiff's personnel folder are no longer active, and plaintiff admitted in his deposition that they were no longer in effect.

Plaintiff further alleges that the position of Chief Internal Auditor, which, due to its complexity, had historically been graded above Chief Internal Auditor positions in other State government agencies, was now graded below Chief Internal Auditor positions in those agencies. He maintains defendant's failure to upgrade the position was a deliberate attempt to limit his back pay. He contends that these allegations illustrate a pattern and practice of retaliating against employees who report improper activities to the appropriate authorities.

On 16 September 2004, the trial court granted partial summary judgment in favor of DOT, dismissing the entire complaint with the exception of the allegations regarding plaintiff's unsatisfactory performance rating for the year ending March 31, 1999, allegedly in retaliation for the suit filed on 24 July 1998. The trial court limited evidence on that claim to "acts and events occurring and arising on or after January 20 1999, which is one year prior to the filing of Plaintiff's previous suit" citing N.C. Gen. Stat. § 126-86 (2003), requiring claims under N.C. Gen. Stat. § 126-85 be brought within one year of the violation.

Then on 17 September 2004, the trial court granted defendant summary judgment on the remaining claims because:

> **First**, the Court finds and concludes as a matter of law, that the institution of civil actions by State Employees to secure their employment rights allegedly violated by a state agency such as the NCDOT, or the institution of administrative proceedings in the Office of Administrative Hearings, are **NOT** acts which trigger the right to sue for retaliation under The Whistleblower Act, particularly G.S. 126-84. This determination also applies to any claims arising prior to January 21, 1999.
>
> **Second**, assuming[] ***arguendo*** that The Whistleblower Act would be triggered by the filing of a civil action or an administrative proceeding relating to the terms and conditions of employment under the State Personnel Act, the record does not support any of plaintiff's alleged claims for retaliation in violation of G.S. 126-84, et seq. from January 21, 1999 forward.

Plaintiff appeals.

Plaintiff presents three arguments on appeal: 1) the trial court erred in concluding the Whistleblower Act does not apply; 2) the trial court erred in concluding there was no genuine issue of material fact; and 3) the failure to upgrade his position was a continuing adverse effect of DOT's retaliation and, therefore, the trial court erred in concluding those claims were barred by the statute of limitations. We have carefully considered plaintiff's arguments in light of the record and affirm the judgment of the trial court.

"Summary judgment is properly entered when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists and that the movant is

entitled to judgment as a matter of law." *Evans v. Cowan*, 132 N.C. App. 1, 5, 510 S.E.2d 170, 173 (1999); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). Section 126-84 of our General Statutes (the Whistleblower Act)

> requires plaintiffs to prove, by a preponderance of the evidence, the following three essential elements: (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.

Newberne v. Department of Crime Control & Pub. Safety, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005).

[1] By his first argument, plaintiff contends that his 1998 suit seeking reinstatement into his former position constitutes reporting to "another appropriate authority" the violation of a rule or regulation under the Whistleblower Act. He contends that DOT violated N.C. Admin. Code tit. 25 r. 1B.0428 (September 1987), which requires a dismissed employee be returned to employment "in the same or similar position, at the same pay grade and step." Thus, he maintains that DOT retaliated against him for protected conduct under the Whistleblower Act. We disagree.

The Whistleblower Act establishes that it is state policy to encourage its employees to report violations of state or federal law, rules or regulation; fraud; misappropriation of state resources; "[s]ubstantial and specific danger to the public health and safety; or [g]ross mismanagement, a gross waste of monies, or gross abuse of authority;" and it further protects State employees from intimidation or harassment when they report on "matters of public concern." N.C. Gen. Stat. § 126-84 (2003). Employees who report activities under this statute are protected from retaliation under N.C. Gen. Stat. § 126-85 (2003).

This Court has applied Whistleblower protection to employees who bring suit alleging sex discrimination, *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 313, 567 S.E.2d 803, 808 (2002) (plaintiff sought protection from retaliation after reporting sexual harassment); who allege retaliation after cooperating in investigations regarding misconduct by their supervisors, *Caudill v. Dellinger*, 129 N.C. App. 649, 655, 501 S.E.2d 99, 103 (1998) (employee terminated after cooperating with State Bureau of Investigation regarding misconduct by her supervisor was able to make out a *prima facie* case

under N.C. Gen. Stat. § 126-84), *aff'd* 350 N.C. 89, 511 S.E.2d 304 (1999); *see also Minneman v. Martin*, 114 N.C. App. 616, 617, 442 S.E.2d 564, 565 (1994) (plaintiff alleged retaliation due to her participation in investigation of supervisor's mis-treatment of dental patients at a state hospital); and who allege police misconduct, *Newberne*, 359 N.C. at 797, 618 S.E.2d at 211 (plaintiff reported to his supervisor that fellow troopers exercised gross abuse of authority in the apprehension and arrest of a suspect); *see also Swain v. Elfland*, 145 N.C. App. 383, 385, 550 S.E.2d 530, 533 (plaintiff alleged that adverse employment actions were taken against him due to his reporting of improper police procedures and obstruction of justice), *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001).

The Act has also been raised when "alleged whistleblowing" related to misappropriation of governmental resources. *See Hanton v. Gilbert*, 126 N.C. App. 561, 564, 486 S.E.2d 432, 435 (a dispute over the policy regarding the use of equipment purchased with federal grant money), *disc. review denied*, 347 N.C. 266, 493 S.E.2d 454 (1997); *see also Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 582, 448 S.E.2d 280, 281 (1994) (employee claimed violation of Whistleblower Act due to her transfer to a different position after reporting misuse and misappropriation of state property, the library's audio-visual equipment), *overruled in part by Newberne*, 359 N.C. at 790, 618 S.E.2d at 207; *Aune v. University of North Carolina*, 120 N.C. App. 430, 431, 462 S.E.2d 678, 680 (1995) (plaintiff sought protection under Whistleblower Act after reporting possible conflicts of interest among staff members and potential appropriation of state resources for private gain), *disc. review denied*, 342 N.C. 893, 467 S.E.2d 901 (1996).

In all of these cases, the protected activities concerned reports of matters affecting general public policy. In this case, plaintiff's "report" was his 1998 lawsuit seeking reinstatement to his former position. The central allegations of the 1998 lawsuit related only tangentially at best to a potential violation of the North Carolina Administrative Code. As such, the lawsuit did not concern matters affecting general public policy. We decline to extend the definition of a protected activity to individual employment actions that do not implicate broader matters of public concern. We do not believe the General Assembly intended N.C. Gen. Stat. § 126-84 to protect a State employee's right to institute a civil action concerning employee grievance matters. This assignment of error is overruled.

[2] Plaintiff's second argument, that summary judgment was inappropriate because there was a genuine issue of material fact, also fails. Assuming *arguendo* that plaintiff engaged in a protected activity, DOT presented legitimate, non-retaliatory reasons for all of the actions it has taken, *Wells*, 152 N.C. App. at 317, 567 S.E.2d at 811, and in his deposition testimony, plaintiff acknowledged that there were legitimate explanations for the actions he alleged were retaliatory. For example, he conceded that his office space and equipment when he returned to work were not less than others occupying the same position. He admitted that he was not denied training after he requested it, nor did his computer equipment or lack of computer classes inhibit his ability to do his job. He also admitted that he had been warned about his missing work prior to the counseling memo but that he assumed his supervisor was "out to get him;" therefore, he stopped turning in work.

[3] By his final argument, plaintiff contends the trial court erroneously limited him to presenting evidence "occurring or arising on or after January 20 1999" one year prior to the filing of his previous suit, which he submitted to a voluntary dismissal. We note that plaintiff's brief only argues that DOT's failure to submit the Chief Internal Auditor position for upgrade constitutes continuing harm; he does not contend that the other allegations excluded by the partial summary judgment order were erroneously dismissed. Therefore, we only examine whether the trial court erred in dismissing the claim regarding the position upgrade. N.C. R. App. P. 28 (b)(6).

Section 126-86 provides, in pertinent part, that State employees who are retaliated against for reporting activities enumerated in the Whistleblower Act "may maintain an action in superior court for damages, an injunction, or other remedies provided in this Article against the person or agency who committed the violation within one year after the occurrence of the alleged violation of this Article. . . ." N.C. Gen. Stat. § 126-86 (2003). Since plaintiff was not a State employee when the position was not submitted for upgrade, he cannot seek relief under the statute. It is not logical to believe that DOT failed to seek a necessary upgrade of the position in order to retaliate against plaintiff, who did not occupy the position at the time of the upgrades, on the chance that plaintiff would again occupy that position at some point in the future. Accordingly, this argument is overruled.

After our careful review of the record, we hold that there is no genuine issue of material fact regarding the alleged retaliatory acts. Moreover, plaintiff has failed to show a causal connection between

the filing of his suit and DOT's alleged retaliation. Accordingly, we affirm the trial court's grant of summary judgment.

Affirmed.

Judges HUNTER and STEELMAN concur.

STATE OF NORTH CAROLINA v. KEVIN MICHAEL CROW

No. COA05-253

(Filed 20 December 2005)

1. Motor Vehicles— driving while impaired—sufficiency of evidence—motorized scooter

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired even though defendant contends there was insufficient evidence to show a violation of N.C.G.S. § 20-138.1 when the motorized scooter with two wheels arranged in tandem that defendant was riding could not be considered a vehicle within the meaning of the statute, because: (1) by its express terms, the statute does not apply to horses, bicycles, or lawnmowers, but encompasses all other vehicles defined by N.C.G.S. § 20-4.01(49), and defendant does not fall under any of the exceptions; (2) there is no evidence that defendant was using the scooter for anything other than strictly recreational purposes, and adding the term "mobility enhancement" in the statute was a technical change that did not substantively expand the existing mobility impairment exception to the term "vehicle"; (3) defendant's scooter was not self-balancing, and the wheels on the scooter were arranged one behind the other, or in tandem, thus foreclosing the possibility that it may be considered an electric personal assistive mobility device; and (4) the evidence at trial showed that defendant's breath alcohol concentration following arrest was 0.13 which was well over the 0.08 limit found in N.C.G.S. § 20-138.1(a)(2).

2. Motor Vehicles— driving while impaired—sufficiency of evidence—fair notice of prohibited acts

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired based on the

grounds that N.C.G.S. § 20-138.1 and its associated statutory scheme fail to give fair notice of acts to be prohibited, because: (1) based on the language and purpose of N.C.G.S. § 20-138.1 to protect the lives of motorists and pedestrians, an average person exercising common sense should have known that operating a motorized scooter while impaired would subject him to the penalties of the statute; (2) both N.C.G.S. §§ 20-138.1 and 20-4.01(49) are broadly applicable to "any vehicle" with only narrow explicit exceptions; (3) the statutory scheme makes clear that a person riding something other than one of the enumerated exceptions to the term vehicle is engaged in conduct prohibited by N.C.G.S. § 20-138.1, and the conclusion also follows from the purpose of the statute to protect human life on the roadways of this state; (4) defendant's behavior subjected a hundred pedestrians in the immediate area, along with automobile traffic, to a high degree of danger; and (5) the absence of a motorized scooter from the list of exceptions is indicative of the General Assembly's intent to include such devices in the statutory definition of vehicle.

3. Motor Vehicles— driving while impaired—instructions—redacted version—vehicle

The trial court did not err in a driving while impaired case by submitting a redacted version of the statutory definition under N.C.G.S. § 20-4.01(49) of the term "vehicle" as part of the court's instructions to the jury which excluded the exceptions for mobility impairment and electric personal assistive mobility devices, because: (1) the omission was not likely to mislead the jury when the redacted portions were not relevant to defendant's case; (2) there was no evidence presented at trial that defendant suffered from a mobility impairment or was using the scooter for mobility enhancement; and (3) defendant's scooter does not fall within the definition of "electric personal assistive mobility device" found in N.C.G.S. § 20-4.01(7a).

Appeal by defendant from judgment entered 14 September 2004 by Judge Thomas D. Haigwood in Hyde County Superior Court. Heard in the Court of Appeals 14 November 2005.

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

Bass, Bryant & Fanney, P.L.L.C., by John K. Fanney and James K. Jackson, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was found guilty by a jury of driving while subject to an impairing substance in violation of N.C. Gen. Stat. § 20-138.1 (2003) and sentenced to a term of nine months imprisonment. The execution of the sentence was suspended, and defendant was placed on supervised probation for twelve months. As a condition of probation, defendant was required to serve fourteen days in the custody of the sheriff. He appeals from the judgment.

The evidence at trial tended to show that on 24 May 2003, Officer Shane Bryan of the Hyde County Sheriff Department was traveling south in a marked patrol vehicle on Ocracoke Island and observed defendant and another individual run a stop sign. At the time, both defendant and his companion were riding "stand-up scooters." Each scooter was powered by an electric motor and was likened at trial to a skateboard with handlebars on the front. The scooters had two wheels, each approximately six to eight inches in diameter and arranged in tandem much like the wheels of a bicycle. Officer Bryan observed defendant traveling at approximately ten miles per hour.

After running the stop sign, defendant and the other individual were observed weaving erratically within their lane of traffic. Officer Bryan followed them for about a block and a half, and then used his patrol vehicle's public address system to advise the pair to pull over. Defendant's companion complied, but defendant ignored the request and continued riding. Officer Bryan pursued defendant and asked him to pull over some six blocks down the highway. Defendant exited into a parking lot. Officer Bryan followed and got out of his car to speak to defendant.

During their conversation, Officer Bryan noticed a strong odor of alcohol. In addition, defendant had glassy, bloodshot eyes and slurred speech, and he was unsteady on his feet. Based on his observations, Officer Bryan asked defendant to submit to a field sobriety test, which he refused. Officer Bryan then took defendant into custody and called for assistance.

Trooper Brandon Craft of the North Carolina Highway Patrol arrived on the scene approximately five to ten minutes later and placed defendant in the back of his car. He noticed the same glassy eyes, slurred speech, and odor of alcohol that Officer Bryan had observed. After refusing to submit to an alcosensor test, defendant was arrested and transported to the Hyde County Sheriff's Office, where he eventually agreed to be tested by an Intoxilyzer 5000

machine. The test reported a breath alcohol concentration of 0.13 grams of alcohol per 210 liters of breath.

At the close of the State's evidence, defendant's motion to dismiss the charge for a constitutional violation and for insufficiency of the evidence was denied. Defendant offered no evidence, and the jury subsequently found him guilty of driving while impaired.

Defendant argues on appeal that the trial court erred in (1) denying his motion to dismiss for insufficiency of the evidence; (2) denying his motion to dismiss on the grounds that N.C. Gen. Stat. § 20-138.1 and its associated statutory scheme fail to give fair notice of acts to be prohibited; and (3) submitting a redacted version of the statutory definition of the term "vehicle" as part of the court's instructions to the jury. For the reasons which follow, we find no error.

[1] Defendant first argues the trial court erred in denying his motion to dismiss the DWI charge 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 (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The evidence is considered in the light most favorable to the State, and the State is entitled to every reasonable inference arising from it. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. The trial court does not weigh the evidence or determine witnesses' credibility. *Id.* "It is concerned 'only with the sufficiency of the evidence to carry the case to the jury.' " *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005) (quoting *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983)).

Defendant contends there was insufficient evidence of a violation of N.C. Gen. Stat. § 20-138.1 because the motorized scooter he was riding cannot be considered a "vehicle" within the meaning of the statute. We disagree. Under N.C. Gen. Stat. § 20-138.1(a), "[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 . . . or . . . [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or

more." N.C. Gen. Stat. § 20-138.1(a)(1) (2003). By its express terms, the statute does not apply to horses, bicycles, or lawnmowers. *Id.* § 20-138.1(e). The statutory provision encompasses all other "vehicles" as defined in N.C. Gen. Stat. § 20-4.01(49) (2003):

> Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application. This term shall not include a device which is designed for and intended to be used as a means of transportation for a person with a mobility impairment, or who uses the device for mobility enhancement, is suitable for use both inside and outside a building, including on sidewalks, and is limited by design to 15 miles per hour when the device is being operated by a person with a mobility impairment, or who uses the device for mobility enhancement. This term shall not include an electric personal assistive mobility device as defined in G.S. 20-4.01(7a).

Id. § 20-4.01(49).

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). If the language of a statute is clear, then the Court must implement the statute according to the plain meaning of its terms. *Id.*

In the instant case, defendant was riding a motorized scooter with two wheels arranged in tandem, and the exclusionary provisions for horses, bicycles, and lawnmowers under N.C. Gen. Stat. § 20-138.1(e) have no application. Defendant's scooter does meet the definition of a "device in, upon, or by which any person or property is or may be transported or drawn upon a highway" under N.C. Gen. Stat. § 20-4.01(49). However, the scooter does not fall into either of that statute's two exceptions. First, "vehicle" does not include devices "designed for and intended to be used as a means of transportation for a person with a mobility impairment, or who uses the device for mobility enhancement." N.C. Gen. Stat. § 20-4.01(49) (2003). Defendant neither argued nor relied upon the theory at trial that he suffered from a mobility impairment. On the contrary, the evidence tended to show defendant was a healthy twenty-five-year-old

man riding the scooter for recreational purposes on a holiday weekend at a popular coastal destination.

Defendant, nonetheless, argues that "mobility enhancement" should be construed broadly in light of the dearth of legal precedent concerning the definition of that term. We reject this construction for two reasons. First, although "mobility enhancement" is not specifically defined in the statute, its placement within the sentence discussing "mobility impairment" leads us to conclude that the two terms are closely related and contravenes ascribing the broad definition urged by defendant. Indeed, there is no evidence that defendant was using the scooter other than for strictly recreational purposes. Second, the exception for devices being used for "mobility enhancement" was added to the sentence concerning "mobility impairment" in 2001 as part of "An Act to Make Technical Corrections and Conforming Changes to the General Statutes as Recommended by the General Statutes Commission." *See* Act of Dec. 6, 2001, ch. 487, § 51, 2001 N.C. Sess. Laws 2725, 2806 (codified at N.C. Gen. Stat. § 20-4.01(49) (2003)). In a memorandum, the General Statutes Commission explained that "[t]his bill makes corrections of a *technical nature* to various sections of the General Statutes." Memorandum from the Gen. Statutes Comm'n to Sen. Fletcher L. Hartzell & Rep. Bill Culpepper, N.C. Gen. Assembly (Dec. 3, 2001) (on file with the North Carolina Supreme Court Library) (emphasis added). Therefore, adding the term "mobility enhancement" was a technical change that did not substantively expand the existing mobility impairment exception to the term "vehicle."

Secondly, N.C. Gen. Stat. § 20-4.01(49) excludes "electric personal assistive mobility device[s]" from the definition of "vehicle." An "electric personal assistive mobility device" is "[a] self-balancing nontandem two-wheeled device, designed to transport one person, with a propulsion system that limits the maximum speed of the device to 15 miles per hour or less." *Id.* § 20-4.01(7a). The State notes that the "Segway Human Transporter" is an example of such a device. Here, the trial court noted that defendant's scooter was not self-balancing. Furthermore, the wheels on the scooter were arranged one behind the other, or in tandem, thus foreclosing the possibility that it may be considered an "electric personal assistive mobility device."

Since defendant's scooter falls within the legislature's definition of "vehicle" in N.C. Gen. Stat. § 20-4.01(49) and does not meet the requirements of any of the exceptions to that definition, we conclude

that it is a "vehicle" for purposes of N.C. Gen. Stat. § 20-138.1(a)(1). Defendant does not argue there was insufficient evidence of any other element of impaired driving. The evidence at trial showed that his breath alcohol concentration following arrest was 0.13, well over the 0.08 limit found in N.C. Gen. Stat. § 20-138.1(a)(2). Accordingly, there was sufficient evidence to carry the case to the jury on the charge of impaired driving.

[2] Defendant next argues that the trial court erred in denying his motion to dismiss on the grounds that, as applied to this case, N.C. Gen. Stat. § 20-138.1 and its associated statutory scheme fail to give fair notice of the acts they prohibit. The United States and North Carolina Constitutions require that the terms of a criminal statute must be sufficiently clear and explicit to inform those subject to it what acts it is their duty to avoid or what conduct will render them liable to its penalties. Individuals may not be required to speculate as to the meaning of a penal statute at the peril of their life, liberty, or property. *Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 211, 125 S.E.2d 764, 768 (1962); *see also State v. Sparrow*, 276 N.C. 499, 509, 173 S.E.2d 897, 904 (1970); *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969), *aff'd*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971). A statute violates these principles when its terms cannot be understood and complied with by an average person exercising common sense. *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 578, 37 L. Ed. 2d 796, 816 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 608, 37 L. Ed. 2d 830, 837 (1973); *State v. Lowry* and *State v. Mallory*, 263 N.C. 536, 539, 139 S.E.2d 870, 873 (1965), *cert. denied* and *appeal dismissed sub nom. Mallory v. North Carolina*, 382 U.S. 22, 15 L. Ed. 2d 16 (1965); *State v. Hales*, 256 N.C. 27, 33, 122 S.E.2d 768, 772 (1961).

Based on the language and purpose of N.C. Gen. Stat. § 20-138.1 to protect the lives of motorists and pedestrians, *see State v. Stewardson*, 32 N.C. App. 344, 350, 232 S.E.2d 308, 312 (1977), *cert. denied*, 292 N.C. 643, 235 S.E.2d 64 (1977), an average person exercising common sense should have known that operating a motorized scooter while impaired would subject him to the penalties of the statute. As discussed above, both N.C. Gen. Stat. § 20-138.1 and 20-4.01(49) are broadly applicable to "any vehicle" with only narrow, explicit exceptions. The statutory scheme, accordingly, makes clear that a person riding something other than one of the enumerated exceptions to the term vehicle is engaged in conduct prohibited by N.C. Gen. Stat. § 20-138.1.

This conclusion also follows from the purpose of N.C. Gen. Stat. § 20-138.1, which is to protect human life on the roadways of this State. By imposing criminal penalties for operating a vehicle while under the influence of an impairing substance, the statute aims to prevent the very behavior defendant was engaged in on 24 May 2003. He was operating a self-propelled vehicle traveling erratically down a busy highway at a speed of at least ten miles per hour. Testimony at trial indicated there were approximately one hundred pedestrians in the immediate area, along with automobile traffic. Defendant's behavior subjected these pedestrians and motorists to a high degree of danger. Defendant had fair notice of the acts prohibited by our DWI laws, and his due process rights were not violated by its application.

Defendant asserts that, in light of the express exception for bicycles and electric personal assistive mobility devices, an average person might infer that small, lightweight, low-speed devices such as scooters would also fall outside the reach of the statute. Although we are wary of requiring the legislature to be overly specific in drafting exceptions to the statute, *see In re Banks*, 295 N.C. 236, 240, 244 S.E.2d 386, 389 (1978) (noting that "the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions"), we believe the decision as to whether to exclude scooters is best left in the hands of the General Assembly. In the case of N.C. Gen. Stat. § 20-138.1 and its associated scheme, the legislature has made an effort over time to define a small number of very specific exceptions. Rather than provide a general exception for all small, lightweight, and low-speed devices, the legislature has specifically excepted, in relevant part, bicycles, electric personal assistive mobility devices, and devices used by individuals with a mobility impairment or for mobility enhancement. *See* N.C. Gen. Stat. §§ 20-4.01(49), 138.1(e) (2003). Following the principle of *expressio unius est exclusio alterius* ("to express or include one thing implies the exclusion of the other," Black's Law Dictionary 620 (8th ed. 2004); *see also State v. Jones*, 359 N.C. 832, 835, 616 S.E.2d 496, 497 (2005)), the absence of a motorized scooter from the list of exceptions is indicative of the General Assembly's intent to include such devices in the statutory definition of vehicle. Here, in a situation in which the legislature has allowed a limited number of very specific exceptions to a statute, it would be inappropriate for this Court to create another. The legislature may choose to make an exception for electric scooters such as the one in this case. Until that time, we apply the statutory scheme as it has been enacted.

[3] Finally, defendant assigns error to the trial court's submission of a redacted version of the definition of the term "vehicle" found in N.C. Gen. Stat. § 20-4.01(49) as part of the court's charge to the jury. Over defendant's objection, the trial court instructed the jury that "[f]or the purposes of this charge, a vehicle is defined as every device in, upon, or by which any person is or may be transported upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks." This is essentially the first clause of N.C. Gen. Stat. § 20-4.01(49), omitting the exception for devices

> designed for and intended to be used as a means of transportation for a person with a mobility impairment, or who uses the device for mobility enhancement, is suitable for use both inside and outside a building, including on sidewalks, and is limited by design to 15 miles per hour when the device is being operated by a person with a mobility impairment, or who uses the device for mobility enhancement.

The definition given by the trial judge also omits the exception for "electric personal assistive mobility devices."

On appeal, this Court reviews jury instructions contextually and in their entirety. *Jones v. Development Co.*, 16 N.C. App. 80, 86, 191 S.E.2d 435, 439-40, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). If the instructions "present[] the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed," then they will be held to be sufficient. *Id.* at 86-87, 191 S.E.2d at 440. The appealing party must demonstrate that the error in the instructions was likely to mislead the jury. *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988).

In this case, we do not believe the omission of this material was likely to mislead the jury. As discussed above, there was no evidence presented at trial that defendant suffered from a mobility impairment or was using the scooter for mobility enhancement. Moreover, defendant's scooter does not fall within the definition of "electric personal assistive mobility device" found in N.C. Gen. Stat. § 20-4.01(7a). These exceptions were irrelevant to defendant's case, and there was no evidence to support their inclusion in the charge to the jury. Since the redacted portions of the statute were not applicable to the case, there is no reason to believe the jury was misled by their omission.

No error.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA v. WILLIAM DONOVAN WESTBROOK, DEFENDANT

No. COA05-149

(Filed 20 December 2005)

1. Evidence— prior crimes or bad acts—driving while impaired—malice—remoteness

The trial court did not err in a prosecution for second-degree murder, driving while impaired and other offenses by admitting evidence of defendant's prior conviction for driving while impaired on 24 April 1995, because: (1) our case law reveals that prior driving convictions of a defendant are admissible to show malice, and the showing of malice in a second-degree murder case is a proper purpose within the meaning of N.C.G.S. § 8C-1, Rule 404(b); and (2) although defendant contends the nine-year-old conviction was too remote to be relevant, the Court of Appeals has found older convictions to be admissible.

2. Evidence— medical records—proper administration of justice

The trial court did not err in a prosecution for second-degree murder, driving while impaired and other offenses by admitting defendant's medical records, because: (1) it was within the trial court's discretion to determine what is necessary for the proper administration of justice; and (2) the trial court did not abuse its discretion. N.C.G.S. § 8-53.

3. Homicide— second-degree murder—motion to dismiss—sufficiency of evidence—malice

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder even though defendant contends there was insufficient evidence of malice, because: (1) it is only necessary for the State to prove that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind; and (2) there was substantial

evidence from which the jury could infer malice, including that defendant drove with an alcohol concentration of 0.156, sped seventy-five to eighty miles per hour in a forty-five miles per hour zone, traveled in the opposite direction lane, ran a red light without attempting to brake or stop, and had notice as to the serious consequences of driving while impaired as a result of his nine-year-old driving while impaired conviction.

4. 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 5 August 2004 by Judge W. Allen Cobb, Jr. in Superior Court, Onslow County. Heard in the Court of Appeals 1 November 2005.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, for the State.

Sofie W. Hosford, for defendant-appellant.

WYNN, Judge.

" 'Second-degree murder is defined as the unlawful killing of a human being with malice but without premeditation and deliberation.' " *State v. Rick*, 342 N.C. 91, 98, 463 S.E.2d 182, 186 (1995) (quoting *State v. Phipps*, 331 N.C. 427, 457-58, 418 S.E.2d 178, 194 (1992)). In this case, Defendant contends that the State failed to prove the element of malice to support a conviction of second-degree murder. Because the evidence showed that Defendant drove with an alcohol concentration of 0.156; sped seventy-five to eighty miles per hour in a forty-five miles per hour zone; traveled in the opposite direction lane; ran a red light without attempting to brake or stop; and had notice as to the serious consequences of driving while impaired as a result of his nine-year-old driving while impaired conviction; we uphold his conviction for second-degree murder.

This matter arose out of a five-car collision resulting in the death of Bernadette Whitsett and serious injuries to several other individuals. The accident occurred at the intersection of Country Club Road and Western Boulevard in Jacksonville, North Carolina. In the first vehicle at the intersection, Mrs. Whitsett and her husband, Kenneth, stopped at a red light in the left turn lane. In the second vehicle,

Daniel Lewis stopped at the red light in the right lane. In the third vehicle, Samuel Cheatham stopped at the red light in the center lane. In the fourth vehicle, taxicab driver, Nathan Scott with a front-seat passenger traveled on Western Boulevard, and made a right turn on a green light to Country Club Road.

The fifth vehicle was described by Crystal Williams as she drove South on Country Club Road toward Western Boulevard. She testified that, a red pickup "came out of nowhere, and [] got pretty close to the back of the car, so it kind of startled me, and then he shot over into—there's really not a middle lane, but I guess you would say he made one and he went flying down Country Club." She testified that the red pickup was going seventy-five to eighty miles per hour in a forty-five miles per hour zone. Thereafter, she heard a collision but did not observe it, came to the intersection of Country Club Road and Western Boulevard, observed the accident and called 911.

Andrea Richmond also observed the fifth vehicle as she stopped for gas and drove onto Western Boulevard toward Country Club Road. At the intersection of Western Boulevard and Country Club Road, Ms. Richmond was in the left lane, next to the center turn lane, and had a green light. Approximately twenty to thirty-five feet from the intersection, she saw a red truck directly in front of her in the intersection. She testified that the red truck made no effort to stop at the red light, was going at least sixty miles per hour, went over a raise in the intersection, lost control, and "slammed into" the Whitsett vehicle which was "pushed several feet, yards, backwards and also spun backwards." The Whitsett vehicle then collided with the vehicles driven by Cheatham and Lewis.

Mr. Lewis also saw the red truck approach the intersection, very fast, and then "felt a jolt" as something hit his vehicle. Mr. Scott saw the red truck, in his rearview mirror, go "airborne" and hit his taxicab in the rear. The impact broke the driver's seat, and Mr. Scott lost control of the car.

Paramedics William Pollock and John Smith arrived on the scene at 11:29 p.m., assessed the scene, and called for two additional paramedic trucks, two helicopters, and fire department vehicles with extrication equipment.

Mrs. Whitsett was dead upon the paramedics' arrival. Mr. Whitsett sustained a corneal abrasion to his left eye and abrasions on his face. Mr. Cheatham sustained a hole through the side of his face from

under his right eye to the corner of his mouth, on the left side, collapsed lungs, and a dislocated left shoulder.

The paramedics found Defendant William Donovan Westbrook in the driver's seat of the red pickup with his legs trapped due to the extensive damage to the front of the truck. Paramedic Smith described Defendant as "somewhat combative, not completely belligerent . . . he sort of fought us[.]" Defendant was removed from the vehicle, and Smith asked him if he had been drinking. Defendant responded in the affirmative and said he had "a lot" to drink.

Upon arrival at Onslow Memorial Hospital, emergency room nurse Linda Royston testified that Defendant was combative, uncooperative, and complained that "his family jewels were hurting." She asked him if he had been drinking and he stated he "had a lot to drink." She took a blood sample from Defendant, and then he was transferred via helicopter to Pitt Memorial Hospital.

Officer Earl Burkhart, an accident reconstructionist with the Jacksonville Police Department, testified that he observed no braking or skid marks for any of the vehicles. The State also introduced a 1995 conviction of Defendant for driving while impaired.

A jury found Defendant guilty of second-degree murder, driving while impaired, failing to stop for red light, reckless driving to endanger, driving left of center, and exceeding the posted speed. The trial court sentenced Defendant to imprisonment terms of 189 to 236 months imprisonment for the second-degree murder charge, twenty-four months for the driving while impaired charge, and thirty days for the remaining charges.

On appeal to this Court, Defendant argues that the trial court erred in: (1) admitting evidence of his prior conviction; (2) admitting his medical records; and (3) denying his motion to dismiss the second-degree murder charge. We disagree.

[1] First, Defendant argues that the trial court erred in admitting evidence of his prior conviction for driving while impaired because it is not probative evidence of malice. We disagree.

Section 8C-1, Rule 404(b) of the North Carolina General Statutes provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in

> conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2004). "[E]vidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Stager*, 329 N.C. 278, 302, 406 S.E.2d 876, 889 (1991) (quoting *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (emphasis omitted)).

The trial court admitted, over Defendant's objection, a certified copy of Defendant's judgment and conviction for driving while impaired, with a conviction date of 24 April 1995. The trial court also admitted testimony of the Onslow County Deputy Clerk of Superior Court establishing Defendant's convictions on file. The State argued that the evidence of Defendant's driving while impaired conviction was relevant to show intent, i.e. malice, to support the second-degree murder charge. Defendant contends that the convictions alone, without evidence of the facts and circumstances supporting them, are not relevant to malice under Rule 404(b).

Under our caselaw, "prior driving convictions of a defendant are admissible to show malice, and the showing of malice in a second-degree murder case is a proper purpose within the meaning of Rule 404(b)." *State v. Goodman*, 149 N.C. App. 57, 72, 560 S.E.2d 196, 206 (2002) (Greene, J., dissenting), *rev'd*, 357 N.C. 43, 577 S.E.2d 619 (2003) (per curium as stated in dissenting opinion); *see, e.g.*, *State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 307 (2000) (trial court properly admitted the defendant's driving record containing previous convictions because this evidence was relevant to establish the defendant's "depraved mind" on night of collision); *State v. Edwards*, 170 N.C. App. 381, 384-86, 612 S.E.2d 394, 396-97 (2005) (trial court properly admitted the defendant's driving record listing prior convictions for driving while impaired and driving while license revoked as this evidence was relevant to establish malice for a second-degree murder charge). Thus, this contention is without merit.

Defendant also argues that the nine-year-old conviction was too remote to be relevant. As this Court has found older convictions to be admissible, this argument is without merit. *See, e.g.*, *Rich*, 351 N.C. at 400, 527 S.E.2d at 307 (prior conviction dating back nine years admissible); *State v. Miller*, 142 N.C. App. 435, 440, 543 S.E.2d 201, 205

(2001) (prior convictions over fifteen years old admissible); *State v. McAllister*, 138 N.C. App. 252, 258, 530 S.E.2d 859, 863, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000) (seven year-old conviction for driving while intoxicated admissible to establish malice); *State v. Grice*, 131 N.C. App. 48, 53-54, 505 S.E.2d 166, 169-70 (1998), *disc. review denied*, 350 N.C. 102, 533 S.E.2d 473 (1999) (prior convictions over ten years old admissible).

[2] Next, Defendant argues that the trial court erred in admitting his medical records, as he did not waive his doctor-patient privilege. We disagree.

Section 8-53 of the North Carolina General Statutes provides in pertinent part:

> Confidential information obtained in medical records shall be furnished only on the authorization of the patient . . . . Any resident or presiding judge in the district, either at the trial or prior thereto, . . . may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.

N.C. Gen. Stat. § 8-53 (2004). The statute affords the trial judge wide discretion in determining what is necessary for a proper administration of justice. *State v. Efird*, 309 N.C. 802, 806, 309 S.E.2d 228, 231 (1983); *State v. Sisk*, 123 N.C. App. 361, 367, 473 S.E.2d 348, 353 (1996), *aff'd in part*, *appeal dismissed in part*, 345 N.C. 749, 483 S.E.2d 440 (1997). In overruling Defendant's objection to the admission of his medical records, the trial court stated "I'm going to compel the disclosure of the records, because I think it's necessary for the proper administration of justice." It was in the trial court's discretion to determine what is necessary for the proper administration of justice. *Id.* As we find no abuse of discretion, we overrule Defendant's assignment of error.

[3] Lastly, Defendant argues that the trial court erred in denying his motion to dismiss the second-degree murder charge, as the State failed to prove the element of malice. We disagree.

When reviewing a motion to dismiss, we view "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004) (citing *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986)), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 79 (2005). If we find that "sub-

stantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to [have denied] the motion." *Id.* (citing *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citing *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)).

" 'Second-degree murder is defined as the unlawful killing of a human being with malice but without premeditation and deliberation.' " *Rick*, 342 N.C. at 98, 463 S.E.2d at 186 (quoting *Phipps*, 331 N.C. at 457-58, 418 S.E.2d at 194). Whether the State has carried its burden of proof of malice depends on the factual circumstances of each case. *State v. Locklear*, 159 N.C. App. 588, 591, 583 S.E.2d 726, 729 (2003), *aff'd per curiam*, 359 N.C. 63, 602 S.E.2d 359 (2004); *State v. McBride*, 109 N.C. App. 64, 67, 425 S.E.2d 731, 733 (1993). In *Rich*, our Supreme Court addressed the precise issue of malice as raised by Defendant. 351 N.C. 386, 527 S.E.2d 299. Our Supreme Court adopted the position that, ". . . wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief . . ." are examples, any one of which may provide the malice necessary to convict a defendant of second-degree murder. *Id.* at 391, 527 S.E.2d at 302 (citation omitted).

Our Supreme Court has approved the following definition of "deliberately bent on mischief," one of the attitudinal indices of legal malice:

> [The term deliberately bent on mischief] connotes conduct as exhibits conscious indifference to consequences wherein probability of harm to another within the circumference of such conduct is reasonably apparent, though no harm to such other is intended. [It] connotes an entire absence of care for the safety of others which exhibits indifference to consequences. It connotes conduct where the actor, having reason to believe his act may injure another, does it, being indifferent to whether it injures or not. It indicates a realization of the imminence of danger, and reckless disregard, complete indifference and unconcern for probable consequences. It connotes conduct where the actor is conscious of his conduct, and conscious of his knowledge of the existing conditions that injury would probably result, and that, with reckless indifference to consequences, the actor con-

> sciously and intentionally did some wrongful act to produce injurious result.

Locklear, 159 N.C. App. at 591-92, 583 S.E.2d at 729 (quoting *Rich*, 351 N.C. at 394, 527 S.E.2d at 303). Further, our Supreme Court announced that any one of the descriptive phrases provided in the malice instruction helps define malice and does not constitute "elements" of malice. *Id.* at 592, 583 S.E.2d at 729. Thus, the jury may infer malice from any one of those attitudinal examples. *Rich*, 351 N.C. at 393, 527 S.E.2d at 303. It is necessary for the State to prove only that Defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind. *See Locklear*, 159 N.C. App. at 592, 583 S.E.2d at 729.

In the instant case, the State's evidence on the issue of malice tended to show that Defendant was driving while impaired with an alcohol concentration of 0.156, which is above the legal limit, and that Defendant was on notice as to the serious consequences of driving while impaired as a result of his prior driving while impaired conviction which occurred nine years earlier. Also, the State's evidence tended to show that Defendant was speeding, traveling seventy-five to eighty miles per hour in a forty-five miles per hour speed zone, crossing the center lane, traveling in a lane in the opposite direction, and running a red light without attempting to brake or stop.

Defendant contends that his speeding and driving under the influence do not establish depravity of the mind. But the State also presented evidence that Defendant crossed the center lane and ran a red light without attempting to stop. Examining the evidence in the light most favorable to the State, there was substantial evidence presented from which the jury could find malice and each of the other essential elements of second-degree murder. *See*, *e.g.*, *State v. Snyder*, 311 N.C. 391, 392-93, 317 S.E.2d 394, 395 (1984) (second-degree murder charge proper where the defendant was driving while impaired with an alcohol concentration of 0.24, passed in a no passing zone, and ran a red light); *Locklear*, 159 N.C. App. at 592, 583 S.E.2d at 729 (second-degree murder charge proper where the defendant was driving while impaired with an alcohol concentration of 0.08, and the defendant was on notice as to the serious consequences of driving while impaired as a result of his four-year-old driving while impaired conviction); *State v. McDonald*, 151 N.C. App. 236, 243, 565 S.E.2d 273, 277, *disc. review denied*, 356 N.C. 310, 570 S.E.2d 892 (2002) (second-degree murder charge proper where the defend-

ant was driving while impaired with an alcohol concentration of 0.156, had a prior conviction of consuming alcohol while under the age of twenty-one, and was driving without looking at the road in order to pick up a lit cigarette he had dropped). Thus, the trial court did not err in denying Defendant's motion to dismiss the charge of second-degree murder.

[4] Defendant failed to argue his remaining assignments of error; therefore, they are deemed abandoned. N.C. R. App. P. 28(b).

Affirmed.

Judges McGEE and GEER concur.

RONALD L. WHITE, AS EXECUTOR OF THE ESTATE OF GUNHILDE G. BRANDT, PLAINTIFF v. DORIS CARVER, TERRY MURPHY, BRANDT ANIMAL CARE FUND, INC., RONALD L. WHITE, AND DUKE UNIVERSITY, DEFENDANTS

No. COA05-326

(Filed 20 December 2005)

Appeal and Error— appealability—interlocutory order—appellate rules violations

Defendant Brandt Animal Care Fund Inc.'s (Fund) appeal from the trial court's 19 October 2004 order requiring an organizational meeting of the Fund's Board of Directors with the participation of plaintiff executor is dismissed, because: (1) the Fund failed to demonstrate why the Court of Appeals should consider its interlocutory appeal when the off-hand, after-the-fact statement of the trial court relied upon by the Fund does not in any way approach the certification requirements of N.C.G.S. § 1A-1, Rule 54(b), identification of any substantial right denied the Fund by compliance with the order and working consequent injury to it if not immediately corrected on appeal would be merely speculative and thus not properly before the Court of Appeals, and the fact that the parties do not like each other is an inherent characteristic of the judicial process which hardly constitutes a recognized basis for consideration of an interlocutory appeal under the substantial right exception; and (2) the appeal was not properly filed under the rules since there is no indication

the Fund filed for judicial settlement of the record within the time period prescribed by N.C. R. App. P. 11.

Appeal by Brandt Animal Care Fund, Inc. from order entered 19 October 2004 by Judge Russell J. Lanier in Carteret County Superior Court. Heard in the Court of Appeals 15 November 2005.

Young Moore and Henderson, P.A., by Marvin M. Spivey, Jr. and Anne E. Croteau, and Harvell & Collins, P.A., by Wesley A. Collins and Cecil Harvell, for plaintiff-appellee.

Allen and Pinnix, P.A., by M. Jackson Nichols, for defendant-appellant Brandt Animal Care Fund, Inc.

JOHN, Judge.

Defendant Brandt Animal Care Fund, Inc. ("the Fund") appeals the trial court's 19 October 2004 order requiring an organizational meeting of the Fund's Board of Directors with the participation of Plaintiff Executor Ronald L. White ("White"). For the reasons discussed herein, the Fund's appeal is dismissed.

Pertinent procedural and factual background information includes the following: Gunhilde G. Brandt ("Brandt") died testate in Carteret County, North Carolina, on 10 June 2003. Brandt's will named White as Executor, and several provisions of the will directed White to distribute assets to the Fund. On 26 February 2004, White filed the instant declaratory judgment action against the Fund and several other defendants, asserting, *inter alia*, that the Fund was not properly organized and thus a justiciable controversy existed regarding whether the Fund should receive a "sizeable contribution" from Brandt's estate.

At a 29 July 2004 hearing, evidence introduced by the parties tended to show that Brandt filed Articles of Incorporation regarding the Fund in December 2002; that paragraph 9 of the Articles of Incorporation named Brandt and Leonard Jones ("Jones"), Brandt's former accountant, as initial directors of the Fund; and that, following Brandt's death, Jones held a purported organizational meeting of the Fund, during which his wife was appointed as a director of the Fund and filing of amended Articles of Incorporation reflecting her appointment was approved. On 19 August 2004, the trial court ruled the Fund was not properly organized under N.C. Gen. Stat. § 55A-2-05 (2003) (if initial directors "named in the articles of incorporation, the

initial directors shall hold an organizational meeting at the call of a majority of the directors"). After further determining White might act in the place of Brandt at a properly called organizational meeting of the Fund, the court also ordered White and Jones to hold such a meeting and declared any action taken by the Fund prior to said meeting void *ab initio*. The Fund subsequently filed a motion requesting reconsideration and amendment of the trial court's directives.

On 19 October 2004 and in response to the Fund's motion, the trial court entered an amended order ("the Order") which contained the following conclusions of law:

1. The [o]rder dated August 19, 2004 . . . is reconsidered.

2. As named in the original Articles of Incorporation, the initial Board of Directors of the Fund, [Brandt] and [Jones], could not hold an initial organizational meeting pursuant to N.C.G.S. § 55A-2-05 because [of] the death of [Brandt].

3. Pursuant to N.C.G.S. § 28A-13-3(a)(21), [White] shall be allowed to participate in the organizational meeting of [the Fund]. He shall be given at least ten (10) days notice[] of the time and place of the meeting.

Based upon these conclusions of law, the trial court ordered as follows:

II. The [o]rder dated August 19, 2004 . . . is stricken in its entirety[.]

II. [White] and Jones shall now have a valid organizational meeting of the Board of Directors of [the Fund] on or before October 29, 2004 pursuant to the requirements of N.C.G.S. § 55A-2-05.

III. Once the Fund is properly organized pursuant to the requirements of N.C.G.S. § 55A-2-05, the [claim of relief regarding the Fund] in the Declaratory Judgement Action is dismissed.

Notwithstanding, the Fund held a second purported organizational meeting on 26 October 2004, during which Jones again appointed his wife a director. Although invited to the meeting and in attendance, White was neither allowed to participate nor appointed a director. On 28 October 2004, White moved that the trial court dissolve the Fund and void the actions taken by it at the 26 October 2004 meeting.

At an 8 November 2004 hearing, the trial court determined that, by refusing to appoint White a director and allow him to participate in the 26 October 2004 meeting, the Fund had failed to comply with the Order. The court thereafter orally reiterated its directive that the Fund appoint White director in place of Brandt and stated the Fund was to conduct an organizational meeting within one week with the participation of White.

Subsequently, the Fund filed Notice of Appeal of the Order. On 15 August 2005, White filed a motion with this Court to dismiss the Fund's appeal, asserting the appeal is interlocutory and further that the Fund failed to properly file the Record on Appeal. White's motion is on point in both regards.

In the case *sub judice*, the Order is directed only at issues involving the Fund set out in White's fifth claim for relief and leaves undisturbed multiple claims against the remaining defendants. Therefore, the Order is interlocutory. *See Howerton v. Grace Hospital, Inc.*, 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996) (trial court 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 entire controversy") (citation omitted). Interlocutory orders may be appealed only "where there has been a final determination of at least one claim [] and the trial court certifies there is no just reason to delay the appeal, [or] if delaying the appeal would prejudice a 'substantial right.' " *Liggett Group v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993) (citations omitted). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218 (citation omitted), *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985). Accordingly, we proceed to consider whether appeal of the Order may properly be considered under the "no just reason to delay" or "substantial right" exceptions. *See id.*

In maintaining the propriety of its appeal under the "no just cause to delay" exception, the Fund points to a remark by the trial court at the 8 November hearing to the effect that "the way to get rid of what I've done is to appeal. You can handle it that way." The Fund insists the trial court's off-hand comment "is tantamount to a certification for appeal." This argument falls woefully short of the mark.

Initially, we note parenthetically that the trial court's 8 November 2004 oral directives were not included in the Fund's Notice of Appeal, which dealt exclusively with the Order dated 19 October 2004. This is significant in that the record is at best unclear as to whether the trial court was referencing the Order with the comments noted above.

Of far greater importance, however, is the fact that the Order itself contains no statement by the trial court that there was "no just reason for delay" of the appeal. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2003) ("When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties *only if there is no just reason for delay and it is so determined in the judgment.*") (emphasis added); *Brown v. Brown*, 77 N.C. App. 206, 208, 334 S.E.2d 506, 508 (1985) ("Assuming *arguendo* that plaintiff's contention has merit, her appeal is still untimely because the trial court did not certify the action for appeal by finding that there was 'no just reason for delay.' Rule 54(b) expressly requires that this determination be stated in the judgment itself.") (citation omitted), *cert. denied*, 315 N.C. 389, 338 S.E.2d 878 (1986). In short, we do not believe the off-hand, after-the-fact statement of the trial court relied upon by the Fund in any way approaches the certification requirements of Rule 54(b).

Moreover, assuming *arguendo* some merit to the Fund's claim that the trial court's comments might somehow be construed as certification of the Order for appeal under Rule 54(b), we observe that a

> trial court's determination that there is "no just reason for delay" of appeal, while accorded great deference, *see DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998), cannot bind the appellate courts because "ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court[.]" *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984); *see also McNeil v. Hicks*, 111 N.C. App. 262, 264, 431 S.E.2d 868, 869 (1993), *disc. review denied*, 335 N.C. 557, 441 S.E.2d 118 (1994) (Rule 54(b) certification "is not dispositional when the order appealed from is interlocutory").

Anderson v. Atlantic Casualty Ins. Co., 134 N.C. App. 724, 726, 518 S.E.2d 786, 788 (1999). Suffice it to state that, for purposes of ruling

on the interlocutory nature of the instant appeal, we decline to accord any binding effect to the 8 November 2004 comments of the trial court relied upon by the Fund. *See id.*

Turning to the substantial right exception, we note at the outset that "[t]he appealability of interlocutory orders pursuant to [such] exception is determined by a two-step test. '[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgment.' " *Miller v. Swann Plantation Development Co.*, 101 N.C. App. 394, 395, 399 S.E.2d 137, 138-39 (1991) (citation omitted). "Whether a substantial right is affected usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from." *Estrada v. Jaques*, 70 N.C. App. 627, 642, 321 S.E.2d 240, 250 (1984) (citation omitted). Most pertinently, it is "the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal," *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994), and not the responsibility of this Court to "construct arguments for or find support for [the] appellant's right to appeal from an interlocutory order." *Id.* at 380, 444 S.E.2d at 254.

The Fund's assertions of the "substantial right" exception in the case *sub judice* have been advanced in its appellate brief, its response to White's motion to dismiss the appeal, and at oral argument. We consider each *ad seriatim*.

The Fund's appellate brief merely contains the bald assertion that "this matter[] affects a substantial right of Defendant Fund." We reiterate that it is not our responsibility to extrapolate from this simple claim any possible arguments in support thereof. *See id.*

The Fund is somewhat more detailed in its response to White's motion to dismiss its appeal. In summary, the Fund insists that "[b]ecause of [the] Order, every action taken by the . . . Fund since its date of incorporation is now subject to legal challenge[,]" and that a substantial right of the Fund has thus been impacted by the Order. We find these further claims by the Fund unpersuasive.

Interestingly, the Fund specifies no particular action it has taken that is threatened by the Order. Indeed, the record reflects no action yet taken by the Fund. The Order requires the Fund to hold an organizational meeting in which White is to be appointed a director and allowed to participate, and further provides that White's claims

against the Fund are to be dismissed upon organization of the Fund. However, the Fund has chosen to file its appeal prior to conducting the organizational meeting mandated by the Order. Identification of any substantial right denied the Fund by compliance with the Order and working consequent injury to it if not immediately corrected on appeal, *see Miller*, 101 N.C. App. at 395, 399 S.E.2d at 138-39, would therefore be merely speculative and thus not properly before this Court. *See Telerent Leasing Corp. v. Barbee*, 102 N.C. App. 129, 130, 401 S.E.2d 122, 123 (1991) ("Our function as an appellate court is not to determine idle, speculative questions of no immediate benefit to anyone.").

Finally, in response to inquiry by this Court at oral argument, counsel for the Fund asserted that White and Jones "did not like each other" and would be unable to settle their differences, thereby implying that the Fund's appeal should be entertained under the "substantial right" exception so as to expedite resolution of White's declaratory judgment action. Although we may take notice that nearly all litigation entails at best a modicum of implied disagreement and perhaps personal hostility, this inherent characteristic of the judicial process hardly constitutes a recognized basis for our consideration of an interlocutory appeal under the "substantial right" exception.

The Fund's appeal is also subject to dismissal for failure to comply with the North Carolina Rules of Appellate Procedure ("the Rules"). "The time schedules set out in the [Rules] are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner." *Ledwell v. County of Randolph*, 31 N.C. App. 522, 523, 229 S.E.2d 836, 837 (1976). The parties are not permitted to decide for themselves when to "take [the] next step in the appellate process." *Id.* "The Rules [] are mandatory," *Richardson v. Bingham*, 101 N.C. App. 687, 690, 400 S.E.2d 757, 760 (1991), and an appeal is subject to dismissal for noncompliance with filing deadlines required by the Rules. *See, e.g.*, *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 519 S.E.2d 316 (1999) (per curiam) (appeal dismissed for noncompliance with Rules).

Rule 12(a) of the Rules requires an appellant to file the Record on Appeal within fifteen days of settlement of the record. N.C.R. App. P. 12(a) (2005). The appellant must serve a proposed record on appeal upon the appellee who, within thirty days, may submit amendments, objections, or a proposed alternative record to the appellant. N.C.R. App. P. 11(c). Where the parties agree to the proposed record offered

by the appellant or the amendments, objections, or proposed alternative record offered by the appellee, the agreed-upon record constitutes the settled Record on Appeal. *Id.* However, should the parties disagree as to the inclusion of certain materials, the appellant must either (i) file the disputed items concurrent with the proposed record within fifteen days, or (ii) file for judicial settlement of the record within ten days of expiration of the period for serving amendments, objections, and alternative proposed records. *See id.*; N.C.R. App. P. 12(a).

In the case *sub judice*, White served the Fund with amendments and objections to the proposed record on 18 January 2005. Although it appears the Fund thereafter corresponded with White and agreed to some of the latter's amendments and objections, there is no indication the Fund filed for judicial settlement of the record within the time period prescribed by Rule 11. By operation of Rules 11 and 12, therefore, the Record on Appeal was settled and the Fund was required to file it within the time limitations set out in the Rules. *See* N.C.R. App. P. 11, 12. However, the Fund continued to discuss contents of the record with White, who attempted to cooperate while expressly reserving the right to assert "untimely docketing of this record." Concurrence on composition of the record appears to have been reached in early March 2005. The Fund thereafter filed the Record on Appeal with this Court on 9 March 2005, a date, as discussed above, well outside the time period prescribed by the Rules. *See id.*

In conclusion, the Fund has failed to demonstrate why this Court should consider its interlocutory appeal, and further, said appeal has not been properly filed under the Rules. The Fund's purported appeal is therefore dismissed.

Appeal Dismissed.

Judges WYNN and STEELMAN concur.

WALTER JAMES FUCITO, PLAINTIFF v. FRANCINE MARIA FRANCIS, DEFENDANT

No. COA04-1641

(Filed 20 December 2005)

Divorce— incorporated settlement agreement—declaratory judgment action—subject matter jurisdiction

The district court lacked subject matter jurisdiction over a declaratory judgment action seeking an interpretation of the parties' obligations arising from their separation agreement that was incorporated into a consent divorce judgment. A consent judgment is not one of the instruments a court can interpret pursuant to a declaratory judgment action; however, there may be a remedy through a contempt proceeding.

Appeal by defendant from order entered 24 June 2004 by Judge Gregory R. Hayes in Caldwell County District Court. Heard in the Court of Appeals 15 June 2005.

Lucy R. McCarl for plaintiff-appellee.

Nick Galifianakis & Associates, by Nick Galifianakis and David Krall, for defendant-appellant.

ELMORE, Judge.

Francine Maria Francis was married to Walter James Fucito for nearly twenty-four years before the two voluntarily signed a separation and property settlement agreement on 30 September 1992. As of 10 March 1993, the parties' agreement was incorporated into their divorce judgment. This case involves the trial court's interpretation of a distributive award provision in that incorporated agreement.

Within the agreement Mr. Fucito and Ms. Francis expressly waived alimony, noting "that he or she is not dependent upon or in need of maintenance and support from the other party," and also entered into a property settlement "for the purpose of dividing the marital property consistent with the concept of equitable distribution, and pursuant to the provisions of the North Carolina General Statutes, Section 50-20(d)[.]" The couple's consent divorce judgment states that Mr. Fucito shall have possession of the marital home and be responsible for the mortgage payments, utilities, maintenance, and *ad valorem* taxes from the date of the agreement. According to the property settlement section of the agreement entitled "Real

Property," within 48 hours of Ms. Francis moving from the marital home, Mr. Fucito:

> shall pay to [Ms. Francis] the sum of $125,000.00, which represents the first installment pursuant to the marital property distribution plan . . . [in the distributive award section] of this Agreement. After all the terms of said plan have been fully complied with, [Ms. Francis] shall execute a warranty deed conveying her interest in said residence to [Mr. Fucito], vesting sole ownership of said residence in [Mr. Fucito] alone.

The agreement further provides for a distributive award to Ms. Francis. This award provision reiterates that the first $125,000.00 payment to Ms. Francis shall be made within 48 hours of her vacating the residence, and then Mr. Fucito will make scheduled payments toward achieving full ownership of the property.

> (a) The sum of $125,000.00 (the first $125,000.00 installment of this distributive award) shall be paid to [Ms. Francis] within 48 hours of her moving from the marital residence, or on January 7, 1993, whichever first occurs.
>
> (b) Thirty-six monthly payments shall be paid to [Ms. Francis] in the amount of $1,500.00 per month, beginning on the month [Ms. Francis] moves from the residence, or beginning in January, 1993, whichever occurs first. Said payments are payable on the first day of each month.
>
> (c) After the thirty-sixth payment has been paid to [Ms. Francis], the Wife shall elect in writing one of the two following options:
>
> > (i) [Mr. Fucito] shall, on the first day of the month following the thirty-sixth payment, pay to [Ms. Francis] an additional sum of $125,000.00 (the second $125,000.00 installment of this distributive award), or
> >
> > (ii) [Mr. Fucito] shall continue to be obligated to make monthly payments of $1,500.00 per month to [Ms. Francis] until one of the following shall occur:
> >
> > > (A) [Ms. Francis] instructs [Mr. Fucito] to immediately pay her the second $125,000.00 installment as mentioned above, or
> > >
> > > (B) [Ms. Francis] dies . . ., or
> > >
> > > (C) [Mr. Fucito] dies . . . .

According to the agreement, should Ms. Francis die before receiving the second $125,000.00 installment, any of the thirty-six monthly installments of $1,500.00 remaining would be paid to Ms. Francis's estate and the second $125,000.00 installment would be immediately payable upon completion of the last monthly payment. Should Mr. Fucito die before payment of the second $125,000.00 installment, and should Ms. Francis receive at least a $200,000.00 life insurance benefit payable to her as a beneficiary by reason of Mr. Fucito's death, then "[Mr. Fucito's] estate is not liable for the payment of any balance due to [Ms. Francis] under this distributive award." However, in the event that Ms. Francis did not receive at least $200,000.00 in life insurance proceeds, then Mr. Fucito's "estate shall be liable for the payment of any balance due to [Ms. Francis] under this distributive award."

Mr. Fucito paid the first $125,000.00 installment in October 1992. He also completed payment of the thirty-six monthly installments of $1,500.00 on 13 September 1995. Just prior to receiving her thirty-sixth monthly payment, Ms. Francis wrote a letter to Mr. Fucito electing to forego immediate payment of the second $125,000.00 installment and instead continue receiving the $1,500.00 monthly installments. Realizing that as of January 2003 he would have paid Ms. Francis a second $125,000.00 in $1,500.00 installments, in December 2002 Mr. Fucito sent a warranty deed to Ms. Francis for her to sign pursuant to the settlement. Ms. Francis refused, stating that the plain language of her election obligated Mr. Fucito to continue making payments until she requested a $125,000.00 payment or one of them died. Since none of those triggering events had happened, she was not obligated to sign the deed.

On 2 June 2003 Mr. Fucito instituted a declaratory judgment action asking the district court to interpret the parties' rights and obligations under the incorporated settlement agreement. He contended that he had fully paid the distributive award and was now entitled to have Ms. Francis sign the deed. He further argued that any interpretation to the contrary, in particular Ms. Francis's interpretation of his obligation, was contrary to law, the parties' intent, and inconsistent with the settlement agreement as a whole. He asked the court to determine whether the distributive award had been paid in full; whether he had fully complied with the conditions set out in the "Real Property" section of the agreement; whether Ms. Francis had a duty to sign a deed to him transferring her interest in the former marital home; and whether he had a continuing duty to pay the distribu-

tive award. In turn, Ms. Francis filed a motion for summary judgment, a motion to dismiss for failure to state a claim upon which relief could be granted, and a motion for judgment on the pleadings.

In its order entered 24 June 2004, the district court interpreted the parties' incorporated agreement and agreed with Mr. Fucito. The district court found that if the parties intended the monthly payments to be a distributive award—thus having no tax consequences—and also intended to waive alimony, then Ms. Francis's election to receive a monthly payment of $1,500.00 must be read as spreading the second $125,000.00 installment over a number of months rather than having it paid all at once. The district court found that under Ms. Francis's interpretation of the agreement the monthly payments were indefinite, were not necessarily related to her interest in the home, and under North Carolina law could not be considered a distributive award. Since the parties agreed to waive alimony, agreed to a property settlement "consistent with the concept of equitable distribution", intended to have no adverse tax consequences, and also intended to have the agreement interpreted according to the laws of this state, then the only interpretation consistent with the parties' intent was that the continued monthly payments were credits toward the second $125,000.00 installment. Accordingly, the district court found that Mr. Fucito had paid a total distributive award of $304,000.00 and that was the extent of his obligation under the settlement agreement. Further, the district court denied all of Ms. Francis's motions and ordered her to convey her interest in the former marital home to Mr. Fucito within ten days. Ms. Francis appeals.

Since Ms. Francis raises the issue that the district court lacked subject matter jurisdiction to hear the declaratory judgment action, we will address it first. She argues that when the separation agreement, a contract, was incorporated into the consent divorce judgment, the resulting judgment could not fall under any category enumerated in section 1-254, which lists the subject matters of which a court may hear a declaratory judgment action.

While a "contract or other writings constituting a contract" is enumerated as one of the instruments a court can interpret pursuant to a declaratory judgment action, Ms. Francis is correct that a consent judgment is not so listed.

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordi-

> nance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2003). However, our Supreme Court has long held that "a judgment by consent is but a contract between the parties put upon the record with the sanction and approval of the Court . . . ." *Yount v. Lowe*, 288 N.C. 90, 96, 215 S.E.2d 563, 567 (1975). In fact, in *Hemric v. Groce*, this Court held that a consent judgment is a contract and a party to a consent judgment may file an independent action for a declaratory judgment regarding the interpretation of the contract underlying the judgment. 154 N.C. App. 393, 397-98, 572 S.E.2d 254, 257 (2002) (citing *Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C. App. 257, 262, 362 S.E.2d 870, 873 (1987)); *see also Ibele v. Tate*, 163 N.C. App. 779, 782, 594 S.E.2d 793, 795 (2004). But the facts of this case involve a consent divorce judgment with an incorporated settlement agreement, a situation set out as an exception to the general rule noted in *Hemric*. *See id.*, 154 N.C. App. at 397 n.3, 572 S.E.2d at 257.

In *Walters v. Walters*, 307 N.C. 381, 386-87, 298 S.E.2d 338, 342 (1983), for practical considerations, our Supreme Court fashioned a "one-size fits all" rule applicable to incorporated settlement agreements in the area of domestic law, holding that when parties present their separation agreement to the court for approval, the agreement will no longer be considered a contract between the parties, but rather a court-ordered judgment. Ms. Francis argues that since their settlement agreement is a court-ordered judgment, the district court did not have jurisdiction to "modify" it under the auspices of a declaratory judgment action. Instead, Mr. Fucito should have sought an action for contempt. *See Walters*, 307 N.C. at 386, 298 S.E.2d at 342 (enforcement shall be by contempt).

While we may disagree with Ms. Francis that the district court "modified," in the legal sense, any aspect of the parties' agreement rather than "interpreted" it, we nonetheless agree with her claim. In *Doub v. Doub*, 68 N.C. App. 718, 719-20, 315 S.E.2d 732, 734 (1984), *aff'd as modified*, 313 N.C. 169, 326 S.E.2d 259 (1985), this Court reviewed a breach of contract action and held that although *Walters* did not apply to the parties' incorporated separation agreement, even if it did, plaintiff still had an election under *Walters* to bring independent actions under contract. Our Supreme Court affirmed the holding of *Doub* in a *per curiam* opinion but disavowed the language

regarding an election of remedies under *Walters*. Instead the Court stated, "[t]he parties to a consent judgment controlled by *Walters* do *not* have an election to enforce such judgment by contempt or to proceed in an independent action in contract." *Doub v. Doub*, 313 N.C. 169, 171, 326 S.E.2d 259, 260-61 (1985) (emphasis in original). Rather, "[t]hese court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case." *Id.* at 170-71, 326 S.E.2d at 260 (quoting *Walters*, 307 N.C. at 386, 298 S.E.2d at 342). While the Court did not specifically exclude the remedy of a declaratory judgment action, we find the Court's language persuasive.

The Supreme Court in *Doub* specifically prohibited "independent action[s] in contract." This Court in *Hemric* and *Ibele* referred to a declaratory judgment action as "an independent action," one that arises out of contract. *See Hemric*, 154 N.C. App. at 398, 572 S.E.2d at 257; *Ibele*, 163 N.C. App. at 782, 594 S.E.2d at 795; *see also Home Health*, 88 N.C. App. at 262, 362 S.E.2d at 873 (1987) ("A declaratory judgment is a separate and independent action to have the court 'declare rights, status, and other legal relations, whether or not further relief is or could be claimed.' " (quoting N.C. Gen. Stat. § 1-253 (2003)). Were we to allow Mr. Fucito to bring an independent declaratory judgment action to "interpret" the parties' consent divorce judgment, at best we would be adding an unnecessary nuance to a now settled area of the law, and at worst we would violate the mandate of the Supreme Court in *Doub*.

Thus, Mr. Fucito can bring an action for contempt, arguing that according to the judgment Ms. Francis is under an obligation to sign the deed. However, on these specific facts, it is unclear if that remedy will be adequate for the parties. For if the previous judgment of the court is ambiguous, as Mr. Fucito contends, then

> the law with respect to ambiguous judgments is not very well-developed in our State. What little law there is can be summarized as follows: Where a judgment is ambiguous, and thus susceptible to two or more interpretations, our courts should adopt the interpretation that is in harmony with the law applicable to the case.

Blevins v. Welch, 137 N.C. App. 98, 101-02, 527 S.E.2d 667, 670 (2000) (citation omitted). And further, "[i]f the prior order is ambiguous such that a defendant could not understand his respective rights and obli-

gations under that order, he cannot be said to have 'knowledge' of that order for purposes of contempt proceedings." *Id.* at 103, 527 S.E.2d at 671.

Nonetheless, in light of *Walters* and *Doub*, we are compelled to resolve some ambiguity regarding the power of the court on contempt proceedings to construe or interpret a prior consent divorce judgment in Mr. Fucito's favor. This Court held in *Home Health* that a court had no authority on contempt proceedings to construe or interpret a prior consent judgment. 88 N.C. App. at 262, 362 S.E.2d at 873 ("A declaratory judgment action may not be commenced by a motion in the cause, any more than can an action to modify or reform a consent judgment.") (citing *Holden v. Holden*, 245 N.C. 1, 95 S.E.2d 118 (1956)). However, in *Blevins* the Court seemingly rejected a similar argument.

> [D]efendants contend the trial court impermissibly transformed the contempt action that was before it into a declaratory judgment action by considering whether the easement awarded in the 1983 judgment included both the Mountain and Center roads. We find this argument to be without merit. A contempt proceeding requires willful violation of a prior court order or judgment. *Hancock v. Hancock*, 122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996). As such, an interpretation of the prior court order in this case was required.

Blevins, 137 N.C. App. at 100-01, 527 S.E.2d at 670. With the limitation of remedies stated in *Walters* and *Doub* for disputes arising from settlement agreements incorporated into consent divorce judgments, we agree with the Court in *Blevins* and hold that the trial court has the authority under those circumstances to construe or interpret an ambiguous consent judgment. When doing so, however, it is appropriate to consider normal rules of interpreting or construing *contracts*. *See Holcomb v. Holcomb*, 132 N.C. App. 744, 513 S.E.2d 807 (1999); 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 14.32e (5th ed. 2002).

Having determined that the district court lacked subject matter jurisdiction over a declaratory judgment action to interpret the parties' obligations arising from their incorporated settlement agreement, we vacate the district court's order. We note, though, that the parties are not without further remedy regarding their perceived obligations under the agreement.

Vacated.

Judges CALABRIA and GEER concur.

EUGENE TUCKER BUILDERS, INC., AND EUGENE TUCKER, PLAINTIFFS V. FORD MOTOR COMPANY, DEFENDANT

No. COA05-72

(Filed 20 December 2005)

Motor Vehicles; Warranties— breach of express warranty— vehicle lease

The trial court did not err by granting summary judgment in favor of defendant lessor on plaintiff lessee's claim seeking remedies under N.C. Gen. Stat. § 20-351 et seq. of the New Motor Vehicles Warranties Act, because: (1) plaintiff has not forecast evidence that his vehicle failed to conform to the express warranty, and thus, his claim is lacking in an essential element; (2) defendant has established that a non-Ford part was installed on plaintiff's vehicle, that this part is excluded from coverage under the express warranty, and the damage to the vehicle was caused by the non-Ford part; (3) plaintiff's affidavit does not create an issue of material fact regarding whether the manufacturer of the anti-theft device, DEI, was a Ford-authorized manufacturer when the affidavit does not satisfy the personal knowledge requirement of N.C.G.S. § 1A-1, Rule 56(e), and thus, it could not have been considered by the trial court in ruling on the summary judgment motion; and (4) both of defendant's two affidavits state that the information is based on the affiant's personal knowledge of Ford-authorized manufacturers through employment positions.

Judge HUDSON dissenting.

Appeal by plaintiffs from order entered 19 July 2004 by Judge Robert P. Johnston in Lincoln County Superior Court. Heard in the Court of Appeals 15 September 2005.

Sigmon, Sigmon & Isenhower, by W. Gene Sigmon, for plaintiffs-appellants.

Maupin Taylor, P.A., by M. Keith Kapp and Kevin W. Benedict, for defendant-appellee.

ELMORE, Judge.

Eugene Tucker Builders, Inc. and Eugene Tucker (plaintiff) appeal an order of the trial court granting summary judgment in favor of Ford Motor Company (defendant). On 2 January 2001 plaintiff leased a new Lincoln Navigator from Town Square, an authorized Ford dealership in Lincolnton, North Carolina. Defendant provided the vehicle with an express warranty, the "New Vehicle Limited Warranty." This warranty applied for four years or 50,000 miles, whichever occured first, and covered all parts except tires that are defective in factory-supplied materials or workmanship. The warranty stated that it did not cover damage caused by "non-Ford parts installed after the vehicle leaves Ford's control."

At the time of the lease, on 2 January 2001, plaintiff requested that Town Square install a remote start system in the vehicle. On 3 January 2001 Southland Dealer Services (Southland) sold and delivered a remote start system and an anti-theft bypass, which is a device that connects the remote start system to the vehicle. Southland is an authorized Ford parts distributor located in Charlotte. Southland did not install either the remote start system or the anti-theft bypass. Instead, Mobile Environment, Inc. (Mobile Environment) installed the remote start system shipped by Southland. Mobile Environment also installed an anti-theft bypass, but this device was not the one manufactured by Ford and shipped by Southland. The anti-theft device was manufactured by Directed Electronics, Inc. (DEI).

Within one week of accepting delivery of the vehicle, plaintiff began experiencing problems with the vehicle's electrical system. Plaintiff alleged that the vehicle alarm began to go off every thirty minutes and that the vehicle would suddenly stall while driving on the road. Plaintiff also alleged that he returned the vehicle to Town Square on eight or nine occasions for repair, most recently in December of 2002. By letter dated 7 March 2003 plaintiff informed defendant of his intention to pursue remedies under N.C. Gen. Stat. § 20-351 *et seq.*, the New Motor Vehicles Warranties Act. In compliance with the statute, plaintiff requested that defendant cure the alleged defects within 15 days of receipt of the letter.

During this cure period, the vehicle was transported to an authorized Ford dealership in Fort Mill, South Carolina. Technicians at the Fort Mill dealership removed the remote start system and the anti-theft bypass. After removal of these accessories, the vehicle was transported back to Town Square. A Ford Service Engineer at Town

Square inspected the vehicle and declared it to be in compliance with defendant's express limited warranties.

Plaintiff filed the instant action on 11 July 2003. Defendant filed its Answer on 16 September 2003 and moved for summary judgment on 8 March 2004. Following a hearing, the trial court granted defendant's motion for summary judgment and dismissed plaintiff's action with prejudice. From this order entered 19 July 2004, plaintiff appeals.

The New Motor Vehicles Warranties Act provides that:

> When consumer is a lessee, if the manufacturer is unable, after a reasonable number of attempts, to conform the motor vehicle to any express warranty by repairing or correcting, or arranging for the repair or correction of, any defect or condition or series of defects or conditions which substantially impair the value of the motor vehicle to the consumer, and which occurred no later than 24 months or 24,000 miles following original delivery of the vehicle, the manufacturer shall, at the option of the consumer, replace the vehicle with a comparable new motor vehicle or accept return of the vehicle from the consumer and refund the following:
>
> (1) To the consumer:
>
> a. All sums previously paid by the consumer under the terms of the lease;
>
> b. All sums previously paid by the consumer in connection with entering into the lease agreement, including, but not limited to, any capitalized cost reduction, sales tax, license and registration fees, and similar government charges; and
>
> c. Any incidental and monetary consequential damages.

N.C. Gen. Stat. § 20-351.3(b) (2003). As such, a lessee seeking recovery under this Act must show "(1) the terms of the manufacturer's express warranty, (2) that the vehicle failed to conform to those terms in the warranty, and (3) that after a reasonable number of attempts to remedy that breach of the warranty (4) the vehicle still failed to conform." *Taylor v. Volvo North America Corp.*, 339 N.C. 238, 245, 451 S.E.2d 618, 622 (1994).

Plaintiff assigns error to the trial court's grant of summary judgment on the basis that issues of material fact exist which should be

presented to a jury. Specifically, plaintiff contends that the remote start system and the anti-theft bypass installed on the vehicle were Ford parts covered by the express warranty. Defendants argue, in contrast, that the anti-theft bypass was not manufactured by a Ford-authorized manufacturer and was not installed by a Ford-authorized installer.

Initially, we note the parties agree that a Ford-authorized parts distributor, Southland, sold and shipped the accessory parts to Town Square. The dispute involves the question of whether the company that manufactured the anti-theft bypass, DEI, is a Ford-authorized manufacturer such that this part was covered by defendant's express warranty. Defendant contends that summary judgment was properly granted because it is undisputed that a non-Ford part was installed in the vehicle and the plain language of the express warranty excludes damage caused by non-Ford parts.[1] The express warranty provides, in pertinent part:

> WHAT IS NOT COVERED?
>
> Damage Caused By:
>
> . . .
>
> • non-Ford parts installed after the vehicle leaves Ford's control. For example, but not limited to, cellular phones, alarm systems, and automatic starting systems
>
> . . .
>
> Other Items and Conditions Not Covered
>
> Your New Vehicle Limited Warranty does not cover:
>
> • non-Ford parts of your vehicle, for example, parts (including glass) installed by body builders or manufacturers other than Ford, or damage to Ford components caused by installation of non-Ford parts

Defendant cites to a case in another jurisdiction, *Malone v. Nissan Motor Corp.*, 526 N.W.2d 841 (Wis. Ct. App. 1994), in which an appellate court determined that an after-market added accessory did not come within a new vehicle express limited warranty. In *Malone*, the plaintiff argued that a spoiler added to a new vehicle by the dealer

1. Defendant also notes that an unauthorized modification by the consumer is an affirmative defense to a claim under the New Motor Vehicles Warranties Act. *See* N.C. Gen. Stat. § 20-351.4 (2003).

was covered by Nissan's new vehicle limited warranty. However, the court determined that there was no evidence that Nissan manufactured the spoiler and, since Nissan's warranty covered only parts supplied by Nissan, that the warranty did not include the defective spoiler. *Id.* at 843. We also determine that under the express warranty here, damage caused by non-Ford parts are excluded from Ford's express warranty coverage and thus cannot be the basis of relief under the New Motor Vehicles Warranties Act. If the part was not manufactured by Ford, then summary judgment was proper in favor of defendant. Thus, we now consider whether there is evidence in the instant case that DEI, the manufacturer of one of the accessory parts installed, was a Ford-authorized manufacturer.

Both parties filed affidavits in connection with the summary judgment hearing. Defendant submitted to the trial court the affidavit of Brett Little, who is employed by Ford Motor Company as an Office Operations Specialist and previously held a position as Ford Service Engineer. Mr. Little stated that these positions required his familiarity with Ford-manufactured parts and accessories. Mr. Little stated that, upon his inspection, the remote start system was a Ford part but the anti-theft bypass was a cheaper non-Ford part. Mr. Little further stated that plaintiff experienced problems with the remote start system because the anti-theft bypass was not a Ford part.

Plaintiff submitted to the court the affidavit of James R. Rhyne, a former manager of the Charlotte, North Carolina office of Mobile Environment. Mr. Rhyne testified that Mobile Environment installed the anti-theft bypass device in plaintiff's vehicle and that Mobile Environment is an authorized service and installation representative of Ford Motor Company. He also stated that the manufacturer of the bypass device, DEI, is an authorized manufacturer of Ford Motor Company electronic systems.

Thereafter, defendant submitted the affidavit of Jim Cooper, an employee of Visteon Corporation, a parts supplier for Ford Motor Company. Mr. Cooper stated that he had reviewed the affidavit of James R. Rhyne. Mr. Cooper stated that, contrary to Mr. Rhyne's statement, Mobile Environment was not affiliated with Ford in any way prior to 25 February 2004. Mr. Cooper also stated that DEI manufactures an anti-theft bypass that is compatible with Ford vehicles but that DEI does not have any relationship with Ford and does not manufacture an anti-theft bypass device for Ford.

After carefully reviewing the record, we conclude that plaintiff's affidavit does not create an issue of material fact regarding whether the manufacturer of the anti-theft device, DEI, was a Ford-authorized manufacturer. "[W]hen affidavits are offered in opposition to a motion for summary judgment, they must 'be made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein.' " *Weatherford v. Glassman*, 129 N.C. App. 618, 623, 500 S.E.2d 466, 469 (1998) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)). Here, Mr. Rhyne's affidavit does not indicate how he had personal knowledge that DEI is an authorized Ford parts manufacturer. It appears that the source of Mr. Rhyne's information is an exhibit attached to his affidavit, which is a diagram published by DEI illustrating how to wire an anti-theft bypass to a Ford vehicle. This document does not establish that DEI is a Ford-authorized manufacturer. The document was not published by Ford, and Mr. Rhyne avers no other affiliation with Ford Motor Company or Ford-authorized manufacturers. Also, Mr. Rhyne does not assert that his knowledge is based upon business records that he reviewed in the course of his employment. *Cf. Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 396, 499 S.E.2d 772, 777 (1998) (affiant's statements based upon review of his employer's business records in course of his employment satisfied personal knowledge requirement of Rule 56(e)). As the content of the Rhyne affidavit does not satisfy the personal knowledge requirement of Rule 56(e), it could not have been considered by the trial court in ruling on the summary judgment motion. *See Strickland v. Doe*, 156 N.C. App. 292, 295-96, 577 S.E.2d 124, 128-29 (trial court may not consider portions of affidavit which were not made on affiant's personal knowledge), *disc. review denied*, 357 N.C. 169, 581 S.E.2d 447 (2003); *Hylton v. Koontz*, 138 N.C. App. 629, 634, 532 S.E.2d 252, 256 (2000) ("content and context [of Rule 56 affidavit] must show its material parts are founded on the affiant's personal knowledge"), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001).

In contrast, both the Cooper and Little affidavits submitted by defendant state that the information is based on the affiant's personal knowledge. Moreover, the content of each affidavit reveals that the affiant has personal knowledge of Ford-authorized manufacturers through employment positions. As the moving party, defendant has established that a non-Ford part was installed on plaintiff's vehicle and that this part is excluded from coverage under the express warranty. Also, defendant has shown that the damage to the vehicle was

caused by the non-Ford part. Brett Little stated in his affidavit that plaintiff experienced problems with the remote start system because the anti-theft bypass was not a Ford part. Plaintiff provides no argument or forecast of evidence on this point, and thus has not placed this fact in dispute. As plaintiff has not forecast evidence that his vehicle failed to conform to the express warranty, his claim is lacking in an essential element. *See Taylor*, 339 N.C. at 245, 451 S.E.2d at 622 (lessee must show that vehicle failed to conform to manufacturer's express warranty). Accordingly, we hold that the trial court properly granted summary judgment to defendant.

Affirmed.

Judge LEWIS concurs.

Judge HUDSON dissents.

HUDSON, Judge, dissenting.

Having carefully reviewed the affidavits submitted to the trial court, I do not agree that plaintiff has failed to forecast an issue of fact as to whether DEI was a Ford-authorized manufacturer. As the majority accurately notes, Mr. Rhyne's affidavit clearly states that "Mobil Environment installed the bypass device, which is a piece known as a 555F made by Directed Electronics, Inc., or DEI, also an authorized manufacturer of Ford Motor Company electronic systems." The majority rejects these assertions in the affidavit, on the basis that the affidavit does not show how Mr. Rhyne had personal knowledge of these facts. I believe that the additional statements in the affidavit and the documents attached, which show that Mr. Rhyne "was the Manager of the Charlotte, North Carolina office of Mobile Environment, Inc.," which company installed the parts referred to above, sufficiently showed a basis for his personal knowledge and created an issue of fact regarding whether DEI was a Ford-authorized manufacturer. Thus, I would reverse the grant of summary judgment on this basis, and I respectfully dissent.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES EX REL. AUDREY F. JONES, PLAINTIFF v. MICHAEL P. JONES, DEFENDANT

No. COA04-1066

(Filed 20 December 2005)

Child Support, Custody, and Visitation— support—URESA—inconsistent orders

A 1995 North Carolina child support order did not preclude enforcement of a 1994 Florida order, despite inconsistencies, and a North Carolina court erred in this proceeding by dismissing a subsequent Florida request for enforcement of the 1994 order. Under URESA, there may be more than one valid order even though the orders are inconsistent; the failure to appeal the 1995 North Carolina order was immaterial because the 1994 Florida order remained valid and Florida could again seek its enforcement. The North Carolina court was required to give full faith and credit to the Florida order with respect to past-due amounts under that order since the child support due under the Florida order vested when it became due. However, if ongoing child support is an issue, the trial court must apply the Uniform Interstate Family Support Act and determine whether the North Carolina or the Florida order controls and the amount of support due.

Appeal by plaintiff from order entered 13 May 2004 by Judge Alexander Lyerly in Avery County District Court. Heard in the Court of Appeals 14 April 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Joseph W. Seegers for defendant-appellee.

GEER, Judge.

The North Carolina Department of Health and Human Services ("DHHS"), on behalf of Audrey F. Jones, appeals from an order of the trial court dismissing a petition to enforce a child support order entered in the State of Florida and registered in North Carolina. We reverse and remand for further proceedings because the Florida order is still valid, has not been lawfully superceded, and must be afforded full faith and credit, at least with respect to past-due child support owed under that order.

Facts

Michael Jones and Audrey Jones divorced in Florida in 1994. They had five children. The Marion County Circuit Court of Florida entered a Final Judgment and Dissolution of Marriage on 26 September 1994 ("the 1994 Florida order") that provided for child custody, child support, alimony, and equitable distribution of property. Mr. Jones was given custody of three of the children, while Ms. Jones received custody of the other two children. The 1994 Florida order also ordered Mr. Jones to "pay child support to [Ms. Jones] for the minor children in her care in the amount of $500.00 per month."

On 12 July 1995, the State of Florida filed a petition in Avery County, North Carolina, naming Mr. Jones as the respondent and requesting (1) the establishment of an order under the Uniform Reciprocal Enforcement of Support Act ("URESA") for child support, medical coverage, and other unspecified costs and (2) the collection of arrears under URESA. Following a hearing on 25 October 1995, the district court entered an order on 12 December 1995 ("the 1995 North Carolina order") addressing the request for "establishment of an order for child support, medical coverage and 'other costs', as well as collection of arrearage in the amount of $2,087.00." After applying the North Carolina Child Support Guidelines to the parties' incomes, the district court found "that [Ms. Jones] would in fact owe [Mr. Jones] child support" and, therefore, concluded that "[Mr. Jones] shall not be required to pay child support to [Ms. Jones]." With respect to arrearages, the court observed that the 1994 Florida order establishing the amount of arrearages was on appeal and determined that resolution of the question of arrearages should be held in abeyance until after the Florida Court of Appeals ruled on the appeal.

On 5 March 1997, Mr. Jones filed a motion requesting that the district court address the arrearages issues. In its order filed on 26 March 1997 ("the 1997 North Carolina order"), the district court noted that the 1994 Florida order finding arrearages of $2,087.00 had been affirmed on appeal, but ruled that Mr. Jones was entitled to a set off in the amount of $4,591.44—the amount that Ms. Jones owed Mr. Jones for payment of medical and dental expenses.

On 19 August 2003, the State of Florida, on behalf of Ms. Jones, filed a Notice of Registration of Foreign Support Order in Avery County District Court, stating that the 1994 Florida order was being registered for enforcement. The Notice indicated that Mr. Jones owed $51,520.77 in arrearages as of 29 July 2003. On 6 January

2004, the district court entered an order confirming the registration based in part on the representation of Mr. Jones' counsel that he did not contest the registration. The order directed that Ms. Jones recover from Mr. Jones arrears in the amount of $51,570.20 and that Mr. Jones begin making payments toward the arrears in the amount of $500.00 each month.

On 20 February 2004, the court issued an order directing Mr. Jones to appear and show cause for his failure to comply with the 6 January 2004 order. Subsequently, on 3 March 2004, the district court entered an amended order confirming registration, but noting that while defendant did not contest registration, he did intend to contest the enforcement of the 1994 Florida order. The court found that defense counsel had not been given an opportunity to review the 6 January 2004 order and that the order granted more relief than defense counsel had consented to in open court. The court re-confirmed registration of the 1994 Florida order, but provided that issues of enforcement, modification, wage withholding, and arrears would be determined at a subsequent hearing.

Prior to that hearing, Mr. Jones filed a response to the request for enforcement, seeking dismissal of that request. After a hearing on 23 April 2004, the Avery County district court, on 13 May 2004, filed an order ("the 2004 North Carolina order") dismissing DHHS' request for enforcement on the grounds that DHHS/Ms. Jones did not appeal the 1995 North Carolina order or the 1997 North Carolina order. DHHS has filed a timely appeal from the 2004 North Carolina order.

Discussion

In determining the validity and effect of the 1994 Florida order and the 1995 North Carolina order, we must apply the law in effect at that time: URESA, N.C. Gen. Stat. §§ 52A-1 *et seq.* (1994) (repealed 1996). *See New Hanover County v. Kilbourne*, 157 N.C. App. 239, 244, 578 S.E.2d 610, 614 (2003) ("URESA is still applicable to determine the validity of an order originally entered when URESA was in effect . . . ."). Under URESA, a party who had obtained a child support order in another state had two options if the child support payor was residing in North Carolina: (1) the party could seek establishment of a *de novo* order for child support or (2) the party could seek registration of his or her foreign support order.

Following the filing of a complaint for support pursuant to URESA, if the North Carolina court "[found] a duty of support, it

[could] order the defendant to furnish support or reimbursement therefore and subject the property of the defendant to such order." N.C. Gen. Stat. § 52A-13 (1994). URESA, however, further provided that "[i]f the duty of support is based on a foreign support order, the obligee has *the additional remedies* provided in the following sections." N.C. Gen. Stat. § 52A-25 (1994) (emphasis added). Those additional remedies included registration of the foreign support order, N.C. Gen. Stat. § 52A-26 (1994), and income withholding, N.C. Gen. Stat. § 52A-30.1 (1994). *See also* John L. Saxon, *"Reconciling" Multiple Child Support Orders Under UIFSA and FFCCSOA: The* Twaddell, Roberts, *and* Dunn *Cases*, 11 Fam. L. Bull. (Inst. of Gov't, U.N.C. at Chapel Hill), 18 n.52, June 2000 (observing that rather than registering the foreign support order, a parent could file a petition under URESA "asking the court of a 'responding' state to establish a new ('de novo') child support order").

Thus, as this Court explained in 1997, "[u]nder URESA, a state had jurisdiction *to establish*, vacate, or modify an obligor's support obligation even when that obligation had been created in another jurisdiction." *Welsher v. Rager*, 127 N.C. App. 521, 524, 491 S.E.2d 661, 663 (1997) (emphasis added). *See also Twaddell v. Anderson*, 136 N.C. App. 56, 62-63, 523 S.E.2d 710, 715 (1999) ("Under URESA, a subsequent order [in North Carolina] does not necessarily nullify a prior order [from another state]. . . . [U]nder URESA, more than one state could have simultaneous jurisdiction over a case."), *disc. review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000). As a result, under URESA, "a case may involve more than one valid child support order even though the orders may be inconsistent in their terms." *Kilbourne*, 157 N.C. App. at 245, 578 S.E.2d at 614.

DHHS argues that, regardless of URESA, the Full Faith and Credit for Child Support Orders Act ("FFCCSOA"), 28 U.S.C. § 1738B (2000), effective 20 October 1994, deprived a North Carolina court of subject matter jurisdiction to enter an order inconsistent with a foreign state's child support order. The 1994 version of the FFCCSOA required "that state courts afford 'full faith and credit' to child support orders issued in other states and refrain from modifying or issuing contrary orders except in limited circumstances." *State ex rel. Harnes v. Lawrence*, 140 N.C. App. 707, 710, 538 S.E.2d 223, 225 (2000). The FFCCSOA thus presumes that a party has sought to enforce a foreign state's child support order. As a leading North Carolina family law commentator has pointed out, "The FFCCSOA applies only to child support orders and deals only with recognizing

and enforcing foreign child support orders, not with establishing them." Suzanne Reynolds, 2 *Lee's North Carolina Family Law* § 11.58 (5th ed. 1999).

In this case, in 1995, Florida did not seek registration of the 1994 Florida order. Instead, it sought "*establishment* of an order (URESA)" for child support, medical coverage, and other costs. (Emphasis added.) Left unchecked were the boxes in the form petition for "enforcement of existing order" and "registration of foreign support order." Since Florida sought establishment of a *de novo* order, the FFCCSOA had no bearing on the North Carolina court's jurisdiction in 1995.

The fact that the North Carolina court had jurisdiction in 1995 under URESA to enter the *de novo* child support order does not, however, answer the question whether the 1995 North Carolina order precluded enforcement of the 1994 Florida order. As this Court has previously held, "[u]nder URESA, a subsequent [child support] order does not necessarily nullify a prior order." *Twaddell*, 136 N.C. App. at 62, 523 S.E.2d at 715. "This Court has previously determined that a subsequent URESA order nullifies a prior order only if it specifically so provides." *Kilbourne*, 157 N.C. App. at 245, 578 S.E.2d at 614. *See also* N.C. Gen. Stat. § 52A-21 (1994) (repealed 1996) (a support order of this State does not nullify a support order by a court of any other state "unless otherwise specifically provided by the court"). While a foreign support order remains in effect, its terms may still later be enforced in other states that have issued contrary orders. *Kilbourne*, 157 N.C. App. at 247-48, 578 S.E.2d at 616 (holding that an Oregon child support order was enforceable in North Carolina despite a previous, inconsistent child support order entered by a North Carolina court); *Twaddell*, 136 N.C. App. at 63-64, 523 S.E.2d at 716 (holding that where the North Carolina order did not supercede a California order under URESA, the California order was still valid and could be enforced in this state).

No language in the 1995 North Carolina order can be construed as specifically providing for nullification of the 1994 Florida order.[1] Accordingly, the 1994 Florida order is still valid and enforceable and the 1995 North Carolina order did not prevent the State of Florida from seeking enforcement of its order in North Carolina at a later date. *See Stephens v. Hamrick*, 86 N.C. App. 556, 559-60, 358 S.E.2d

1. We do not address whether the FFCCSOA would preclude nullification of the prior order because that issue is not presented by this case.

547, 549 (1987) (holding that plaintiff was entitled to enforce a South Carolina child support order in this state and collect arrearages under that order even though a contrary child support order was also in effect in North Carolina). Ms. Jones' failure to appeal from the 1995 North Carolina order is immaterial, since the 1994 Florida order remained valid and in effect after the North Carolina district court issued its *de novo* order. *Id.* (holding that plaintiff's acquiescence in the North Carolina order did not preclude enforcement of the South Carolina order). Accordingly, the trial court erred in dismissing DHHS' request for enforcement of the 1994 Florida order.

Once there is a determination that two valid URESA orders exist, a court "must focus on the relief sought by the plaintiff" in order to determine how next to proceed. *Kilbourne*, 157 N.C. App. at 245, 578 S.E.2d at 614. In this case, DHHS seeks collection of arrearages and also ongoing enforcement of the 1994 Florida order. The two types of relief each require a different analysis.

With respect to arrearages, the trial court need not decide which of the valid URESA orders controls because if the other state (in this case, Florida) has "provided that the past-due child support amounts are vested," then "the court must give full faith and credit to the other state's order and enforce the past-due support obligation" subject to the defense of statute of limitations. *Id.*, 578 S.E.2d at 615. DHHS claims that the arrearages owed under the 1994 Florida order as of 29 July 2003 amount to $51,520.77, including the $2,087.00 that was the subject of the 1997 North Carolina order. Florida law provides that past-due child support is a vested right. *See Kutz v. Fankhanel*, 608 So. 2d 873, 877 (Fla. Dist. Ct. App. 1992) ("[T]he long accepted general rule in Florida is that past due and unpaid child support payments become 'vested' and are unmodifiable retroactively."). Since the child support due under the 1994 Florida order vested when it became due, this State must give full faith and credit to the Florida order and enforce the past-due child support obligation. *Kilbourne*, 157 N.C. App. at 245, 578 S.E.2d at 615.

We hold, however, that Ms. Jones' failure to appeal from the 1997 North Carolina order precludes recovery of the $2,087.00 arrearage. In the 1997 North Carolina order, the district court gave full faith and credit to the $2,087.00 arrearage affirmed on appeal in Florida, but then enforced the terms of the 1994 Florida order that required Ms. Jones to pay for half of the children's medical expenses. The district court offset the amount Ms. Jones owed Mr. Jones for medical expenditures against the arrearages then owed by Mr. Jones. Since the

amount owed by Ms. Jones exceeded the child support arrearages of Mr. Jones, the court ruled that Ms. Jones was not entitled to recover any portion of the $2,087.00. This order was never appealed and is, therefore, final and binding with respect to the $2,087.00 in arrearages previously sought.

DHHS appears also to seek ongoing enforcement of the 1994 Florida order. With respect to ongoing child support obligations, the district court must apply the current law—the Uniform Interstate Family Support Act ("UIFSA")—to determine whether the North Carolina or Florida order controls and the amount of support due.

> If the case involves, in full or in part, the question of prospective payment of child support, then the court must apply UIFSA and FFCCSOA to the URESA orders for the purpose of reconciling the orders and determining which one order will control the obligor's prospective obligation.

Id. at 246, 578 S.E.2d at 615. Thus, on remand the trial court should determine whether ongoing child support is an issue, and, if so, determine the amount of any prospective child support obligation in accordance with UIFSA and the FFCCSOA.

Reversed and remanded.

Judges WYNN and CALABRIA concur.

ABL PLUMBING AND HEATING CORPORATION, PLAINTIFF-APPELLANT v. BLADEN COUNTY BOARD OF EDUCATION, AND SHULLER FERRIS LINDSTROM & ASSOCIATES, DEFENDANTS-APPELLEES

No. COA05-14

(Filed 20 December 2005)

1. Statutes of Limitation and Repose— contract claim by subcontractor—accrual

A contract claim by a subcontractor accrued when plaintiff became aware of its injury and was barred by the statute of limitations. Plaintiff's policy argument for changing the accrual date to substantial completion is better addressed to the General Assembly.

2. Warranties— breach of implied warranty claim by subcontractor—statute of limitations—accrual of claim

Any damage suffered after the accrual of a plumbing subcontractor's claim for breach of implied warranty merely aggravated the original injury, and the statute of limitations barred the claim.

Appeal by plaintiff from order dated 27 October 2004 by Judge Ola M. Lewis in Superior Court, Bladen County. Heard in the Court of Appeals 14 September 2005.

Safran Law Offices, by Perry R. Safran and Brian J. Schoolman, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Michael Crowell and Rod Malone, for defendant-appellee Bladen County Board of Education.

Womble Carlyle Sandridge & Rice, PLLC, by Matthew S. Healey, and Allison B. Schafer for the North Carolina School Board Association; and James B. Blackburn for the North Carolina Association of County Commissioners, amicus curiae.

McGEE, Judge.

ABL Plumbing & Heating Corporation (plaintiff) entered into a contract with the Bladen County Board of Education (the Board of Education) on 15 December 1999. Under the contract, plaintiff agreed to perform plumbing work on the East Bladen High School construction project (the project) for the Board of Education. Sigma Construction Company (Sigma) was the original general contractor for the project. Shuller Ferris Lindstrom & Associates (Shuller) was the architect for the project and the Board of Education's representative throughout the project.

Sigma filed a petition in bankruptcy and defaulted on its obligations as general contractor on 1 March 2001. The Board of Education declared Sigma to be in default in April 2001. Plaintiff continued to work on the project through 13 April 2001, when the Board of Education halted work on the project. Plaintiff submitted its first claim to the Board of Education on 24 April 2001 in the amount of $223,252.37. The claim was for damages allegedly suffered as a result of Sigma's default and was to be submitted to Sigma's surety. Plaintiff did not receive a response to its claim.

The Board of Education directed plaintiff to resume work on the project on 11 June 2001. However, plaintiff informed the Board of

Education on 18 June 2001 that it would not resume work until issues concerning "the job completion date, schedule and change order amount for damages incurred" by plaintiff were resolved by the Board of Education or by Sigma's surety.

Plaintiff and the Board of Education entered into a remobilization agreement on 31 July 2001. The remobilization agreement stated that "[plaintiff] intend[ed] to file a claim against [the Board of Education] regarding the alleged damages" incurred by plaintiff "as a result of Sigma's default on the [p]roject and the subsequent suspension of work." Paragraph seven of the remobilization agreement specified that if plaintiff wished to pursue a claim related to Sigma, it would submit a formal claim to the Board of Education by 31 August 2001. The remobilization agreement also provided that "[t]his agreement shall not be construed as a release of any claims or defenses [the Board of Education] and [plaintiff] have or may have in the future relating to damages incurred on the [p]roject." Plaintiff resumed work on the project in August 2001.

Plaintiff submitted a second claim to the Board of Education in the amount of $261,456.83, on 31 August 2001. The amount of plaintiff's 31 August 2001 claim differed in amount from the 24 April 2001 claim. However, the categories of the damages in the two claims were the same. The Board of Education rejected plaintiff's second claim on 28 September 2001.

Plaintiff filed a complaint on 26 August 2003 alleging various claims against the Board of Education and Shuller. However, plaintiff voluntarily dismissed its claims against Shuller on 28 October 2004.

Plaintiff alleged the Board of Education breached its contract with plaintiff by failing to properly supervise Sigma. Specifically, plaintiff alleged that

> [the Board of Education] and Shuller . . . were aware that [Sigma] was in breach of its contract with [the Board of Education] and that said breach included but was not limited to abandoning the project schedule, performance of its work without plan or coordination, and the presence of project-wide evidence of defective workmanship.

Plaintiff further alleged "[the Board of Education] and Shuller . . . failed to respond to [Sigma's] Breach of Contract in a timely manner by allowing [Sigma's] material breach to continue." Plaintiff also alleged the Board of Education breached its contract

by failing to pay the contract balance to plaintiff in June 2002. Plaintiff also alleged that "[p]rior to and after [Sigma's] bankruptcy filing, the [Board of Education] . . . failed to adequately monitor the project's progress. . . . Such failures includ[ed] . . . [a] failure to provide adequate contract drawings and specifications." Accordingly, plaintiff alleged that the Board of Education breached an implied warranty because the "drawings, plans, specifications and bidding documents furnished by [the Board of Education] were not sufficient for their intended purpose."

The Board of Education filed a motion for summary judgment dated 15 October 2004. In support of its motion, the Board of Education argued, *inter alia*, that plaintiff's claims were barred by the applicable statute of limitations. The trial court granted partial summary judgment for the Board of Education on plaintiff's breach of contract claim. The trial court noted that "[w]ith respect to Plaintiff's Breach of Contract Claim, the sole issue remaining for trial [was] whether Plaintiff [was] entitled to its contract balance." The trial court granted summary judgment for the Board of Education on plaintiff's entire breach of warranty claim. Plaintiff appeals.

I.

[1] Plaintiff argues the trial court erred in granting partial summary judgment for the Board of Education on plaintiff's breach of contract claim to the extent the trial court ruled that plaintiff's claim was barred by the applicable statute of limitations. The parties do not dispute the applicable statute of limitations period was two years. *See* N.C. Gen. Stat. § 1-53(1) (2003) (stating that a two-year limitations period applies to "[a]n action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied"). The parties disagree as to the accrual date of plaintiff's breach of contract claim.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). On an appeal from a grant of summary judgment, our Court must determine "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). We must view the evidence in the light most favorable to the

nonmoving party. *Id.* If a plaintiff's claim is barred by the running of the applicable statute of limitations, summary judgment in favor of a defendant is appropriate. *McCutchen v. McCutchen*, 170 N.C. App. 1, 5, 612 S.E.2d 162, 165 (2005).

It is a well-settled rule in North Carolina that a cause of action for breach of contract accrues, and the statute of limitations period begins to run, "[a]s soon as the injury becomes apparent to the claimant or should reasonably become apparent[.]" *Liptrap v. City of High Point*, 128 N.C. App. 353, 355, 496 S.E.2d 817, 819, *disc. review denied*, 348 N.C. 73, 505 S.E.2d 873 (1998) (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 493, 329 S.E.2d 350, 354 (1985)). Further damage incurred after the date of accrual is only an aggravation of the original injury and does not restart the statutory limitations period. *Id.*

Plaintiff asks this Court to adopt a new rule applicable to actions on construction contracts, under which a cause of action would not accrue until substantial completion of performance. Plaintiff cites public policy reasons for this requested change. Specifically, plaintiff argues that a change in the accrual date of actions on construction contracts would encourage completion of construction projects and avoid abandonment and litigation. Plaintiff also argues that a change in the law would encourage nonjudicial resolutions of controversies. However, plaintiff's policy arguments are more appropriately addressed to the General Assembly.

In the present case, plaintiff claimed the Board of Education breached its contract with plaintiff as a result of the Board of Education's failure to adequately supervise Sigma. Sigma defaulted on its obligations as general contractor for the project on 1 March 2001. Therefore, any breach of contract arising out of Sigma's actions or omissions should have accrued by 1 March 2001. Also, the record tends to show that plaintiff was aware of its injury at least by 24 April 2001 when plaintiff submitted its first claim to the Board of Education for damages allegedly suffered as a result of Sigma's default. Accordingly, plaintiff's cause of action for breach of contract accrued at the latest by 24 April 2001. Any subsequent damage allegedly suffered by plaintiff merely aggravated plaintiff's original injury. *See Liptrap*, 128 N.C. App. at 355, 496 S.E.2d at 819. Because plaintiff did not file its action until 26 August 2003, plaintiff's breach of contract claim was barred by the applicable two-year statute of limitations. Accordingly, the trial court did not err in granting partial summary judgment for the Board of Education. Be-

cause we hold that plaintiff's claim was statutorily barred, we need not address the other potential grounds for the trial court's grant of partial summary judgment.

II.

[2] Plaintiff also argues the trial court erred by granting summary judgment for the Board of Education on plaintiff's breach of warranty claim. "[A] construction contractor who has followed plans and specifications furnished by the owner, or his architect or engineer, will not be responsible for consequences of defects in those plans or specifications." *Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. 350, 362, 328 S.E.2d 849, 857, *disc. review denied*, 314 N.C. 329, 333 S.E.2d 485 (1985). The rationale for the rule is that "there is an implied warranty by the owner that the plans and specifications are suitable for the particular purpose, and that if they are complied with[,] the completed work will be adequate to accomplish the intended purpose." *Id.* at 363, 328 S.E.2d at 857. A party asserting such a claim must show that "the plans and specifications were adhered to, that they were defective, and that the defects were the proximate cause of the deficiency in the completed work." *Id.*

In *Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 160, 587 S.E.2d 426, 429 (2003), *disc. review denied*, 358 N.C. 233, 594 S.E.2d 191 (2004), our Court noted that "plans and specifications constitute 'positive representations upon which [a contractor is] justified in relying.' " *Id.* (quoting *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 638, 217 S.E.2d 682, 692, *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975)). We further recognized that " 'a contracting agency which furnishes inaccurate information as a basis for bids may be liable on a breach of warranty theory[.]' " *Id.* (quoting *Lowder, Inc.*, 26 N.C. App. at 638, 217 S.E.2d at 692).

In the present case, plaintiff alleged the following:

> 15. Prior to and after [Sigma's] bankruptcy filing, [the Board of Education] through [its] architect representative, Shuller . . . failed to adequately monitor the project's progress. Such failures include, but were not limited, to: failure to timely review change orders, failure to monitor project progression, and failure to provide adequate contract drawings and specifications. All such failures of [the Board of Education] operated to hinder the work of [plaintiff] on the [p]roject.
>
> . . . .

37. [The Board of Education] had a duty to provide [p]laintiff . . . with drawings, plans, specification[s], bidding documents and other information free of defects and omissions. [Plaintiff] was entitled to rely and did rely upon the adequacy of the bidding documents, plans and specification[s]. The drawings, plans, specifications and bidding documents furnished by [the Board of Education] were not sufficient for their intended purpose.

38. [The Board of Education], despite [its] awareness that the Designer/Engineer failed to perform his contract, failed to make allowances to [plaintiff] and has unreasonably and unjustly failed to extend the time for [plaintiff's] performance on the contract and provide payment for [plaintiff's] expenses suffered on the project.

39. As a result of the above mentioned defects and omissions, [the Board of Education] breached its duty and as a result of said breach of warranty, [p]laintiff . . . has incurred costs and expenses and has been damaged in an amount in excess of Ten Thousand Dollars ($10,000.00) in an amount to be proven at trial at the highest interest rate allowed by law with interest accruing from the date of breach, plus court costs and attorneys' fees where applicable.

Assuming *arguendo*, without deciding, that plaintiff stated a claim for breach of an implied warranty of plans and specifications, plaintiff's claim was barred by the applicable statute of limitations. Plaintiff's breach of warranty claim was also governed by a two-year statute of limitations period pursuant to N.C.G.S. § 1-53(1) because the claim was "[a]n action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied." As we noted earlier, a cause of action accrues, and the statute of limitations period begins to run, when a plaintiff is, or should have been, aware of its injury. *Liptrap*, 128 N.C. App. at 355, 496 S.E.2d at 819. Further damage incurred after the accrual of a cause of action only aggravates the original injury and does not restart the running of the statutory limitations period. *Id.*

Plaintiff alleged in its complaint that its breach of warranty claim arose out of alleged deficiencies in the "drawings, plans, specifications and bidding documents" provided to plaintiff by the Board of Education. The record includes only the original plans set forth in

the 15 December 1999 contract. The record shows that plaintiff was aware of its injury at least by 24 April 2001 when plaintiff submitted its first claim to the Board of Education. Accordingly, plaintiff's cause of action for breach of warranty accrued by 24 April 2001. Any damage allegedly suffered by plaintiff after that date merely aggravated plaintiff's original injury. *See Liptrap*, 128 N.C. App. at 355, 496 S.E.2d at 819. However, plaintiff did not file its complaint until 26 August 2003, more than two years after plaintiff's cause of action had accrued. Therefore, the trial court properly granted summary judgment for the Board of Education on the ground that plaintiff's breach of warranty claim was statutorily barred, and we overrule these assignments of error.

Affirmed.

Judges McCULLOUGH and JACKSON concur.

STATE OF NORTH CAROLINA v. DAMIEN RAY STANLEY

No. COA05-147

(Filed 20 December 2005)

Search and Seizure— motion to suppress—probable cause—informant's description

The trial court did not err in a possession of cocaine with intent to sell or deliver case by denying defendant's motion to suppress evidence of cocaine found pursuant to a search of his person, because: (1) the information upon which the officers acted came from an informant with over fourteen years of personal dealings with one of the officers whose past information consistently had been corroborated by officers and had led to over 100 arrests and numerous convictions; (2) defendant did not challenge the trial court's finding of fact that defendant was the only individual at the location wearing clothing that matched the description provided by the informant, nor did defendant assign error to the trial court's conclusion that despite the lack of detail the informant's description was sufficient to allow the officers to identify defendant, confirm his presence at the location, and exclude others who were in the immediate vicinity as the subject

described by the informant; and (3) although defendant contends his testimony showed that the clothing he was wearing differed from that described by the informant, it is the duty of the trial court to weigh and resolve any conflicts in the evidence.

Appeal by defendant from judgment entered 8 December 2004 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 October 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Martin T. McCracken, for the State.

Gary C. Rhodes, for defendant-appellant.

JACKSON, Judge.

On 17 December 2003, defendant was arrested, charged, and indicted for possession of cocaine with intent to sell or deliver. Defendant filed a Motion to Suppress evidence discovered during a search of his person on the date of his arrest on 2 September 2004. The Honorable Albert Diaz heard the motion in Mecklenburg County Superior Court on 8 December 2004. Defendant's Motion to Suppress was denied and defendant entered a plea of guilty to the charge. Defendant preserved his right to appeal the denial of his Motion to Suppress.

Pursuant to his guilty plea, defendant was sentenced to a term of eight to ten months confinement on 8 December 2004. Defendant's sentence was suspended and defendant was placed on thirty-six months of supervised probation and also received an intermediate punishment of sixty days confinement. Defendant was credited with sixty days spent in custody awaiting trial. Defendant timely filed notice of appeal from this judgment, contending that his motion to suppress should have been granted.

At the hearing on defendant's motion to suppress, the State's evidence tended to show that on 17 December 2003, Sergeant W. A. Boger ("Sgt. Boger") of the Charlotte-Mecklenburg Police Department ("CMPD") received a call from a confidential informant ("informant") regarding an individual selling drugs outside a local convenience store. Sgt. Boger testified that he had worked with the informant for fourteen years and that the informant's information had proven to be reliable, leading to at least 100 arrests and convictions. The information provided to Sgt. Boger was that a black male wearing a blue ski hat, dark jacket, and blue jeans, standing beside the

Citgo gas station on Sugar Creek Road, had crack cocaine in his possession and was selling it.

Approximately thirty to forty-five minutes after first receiving the phone call from the informant, Sgt. Boger and another CMPD officer, Officer Martin, met the informant a short distance from the gas station where the defendant was located. The informant told Sgt. Boger and Officer Martin that the individual, whom he did not know, was still at the location. Sgt. Boger and Officer Martin, accompanied by a patrol officer, went to the Citgo and observed an individual, later identified as defendant, matching the description provided by the informant. Sgt. Boger testified that, although there were two or three other individuals in the parking lot, defendant was the only person who matched the description provided by the informant.

When the officers approached the Citgo one of the other individuals in the parking lot ran away and was pursued by the patrol officer. Defendant and another individual remained where they were when approached by Sgt. Boger and Officer Martin. Sgt. Boger told defendant that he had received information that he was selling drugs from the location. Defendant denied selling drugs and claimed that he worked at the gas station. Sgt. Boger testified that he then asked defendant for consent to conduct a pat down search of defendant's person, and defendant consented. Sgt. Boger had defendant place his hands on top of his head and began to pat him down. When Sgt. Boger began to search the area of defendant's pants pockets defendant dropped his hands from atop his head. Sgt. Boger told him to place his hands back on top of his head. Defendant initially complied with Sgt. Boger's instructions, but again dropped his hands when the search approached his pants pockets. At that time Sgt. Boger attempted to handcuff defendant in order to maintain control of the situation, but defendant attempted to pull away from Sgt. Boger. Eventually, Sgt. Boger got defendant on the ground and handcuffed him. After handcuffing defendant, Sgt. Boger continued his search of defendant's person and located a plastic baggie in his pants pocket which contained a white, rock-like substance that appeared to be crack cocaine. The substance later tested positive for cocaine.

Sgt. Boger and Officer Martin both testified that defendant was wearing a toboggan, or knit winter hat. The officers' descriptions of the hat varied slightly in that Officer Martin described it as having a short bill on the front similar to that on a baseball cap, while Sgt. Boger did not mention a bill on the hat. Both officers testified that defendant wore a dark coat and blue jeans.

Defendant testified at the hearing on his Motion to Dismiss that he was working at the gas station when he was approached, in an aggressive manner, by Sgt. Boger who demanded to know where the drugs were. Defendant testified that he told Sgt. Boger repeatedly that he worked at the Citgo, but Sgt. Boger continued to ask about drugs. Defendant claimed that, after already searching him twice, Sgt. Boger took him to the ground and handcuffed him and then picked up the cocaine from the ground. Defendant denied consenting to a search of his person. Defendant further testified that when the officers approached there were approximately twelve to fourteen people in and around the store, some of whom ran off or walked quickly around the building. Finally, defendant testified that at the time of his arrest he had a black jacket,—which he had taken off and laid down on a pallet outside the gas station—a white tee shirt, blue jogging pants, and a black "do-rag" with a white symbol on the side. Defendant denied that he had been wearing a toboggan.

After hearing all testimony, the trial judge denied defendant's motion to suppress the evidence of the cocaine found pursuant to the search of his person. In a footnote in its order denying the motion, the trial court stated that Sgt. Boger and Officer Martin's testimony regarding defendant's attire at the time of his arrest was more credible than defendants. The trial court found that the testimony regarding whether, initially, defendant voluntarily consented to a search of his person was unclear, but that defendant ultimately refused to consent to the search. The trial court concluded that the informant's description of the individual selling drugs was sufficient to constitute probable cause for the officers to arrest defendant and conduct a search incident to arrest. Defendant appeals from the denial of his motion to suppress.

Defendant's only assignment of error on appeal is that the trial court erred in denying the motion as the evidence was obtained as the result of an illegal search in violation of his Fourth Amendment rights.

"[T]he scope of appellate review of an order [on a motion to suppress evidence] is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Defendant does not challenge any of the trial court's find-

ings of fact in the order denying his motion to suppress. Defendant assigns error solely to the trial court's denial of his motion. Accordingly, the only issues for review are whether the trial court's findings of fact support its conclusions of law and whether those conclusions of law are legally correct. *State v. Coplen*, 138 N.C. App. 48, 52, 530 S.E.2d 313, 317, *cert. denied*, 352 N.C. 677, 545 S.E.2d 438 (2000).

The trial court's findings of fact are as follows:

1. At approximately 3 p.m. on December 17, 2003, Charlotte-Mecklenburg Police Sergeant W. A. Boger ("Boger") received a call from a confidential informant.

2. The informant told Boger that a black male wearing blue jeans, a dark blue jacket, and a blue toboggan (or ski cap) was selling crack cocaine near a Citgo gas station located at 830 E. Sugar Creek Rd. in Charlotte, North Carolina.

3. Boger has been a Charlotte-Mecklenburg police officer for over 17 years. He currently supervises a street crimes unit and has extensive experience in surveillance and undercover drug operations.

4. Boger has worked with the informant in question for over 14 years.

5. Through the years, Boger and other police officers have consistently corroborated information provided by the confidential informant.

6. Information provided by this informant has led to over 100 arrests and numerous convictions.

7. After receiving the tip from the informant, Boger, along with Officers S. M. Martin ("Martin") and S.H. Begley ("Begley") drove to the gas station. They arrived at approximately 3:45 p.m. Before confronting the suspect, Boger and Martin met briefly with the confidential informant approximately ½ mile from the gas station.

8. The confidential informant verified that the suspect was still selling crack at the gas station, and he repeated the description of the suspect's clothing.

9. As Boger and Martin approached the gas station, the Defendant (who is black) and at least two other people were

in the area. One individual fled when he saw the police, prompting Begley to give chase.

10. Only the Defendant, however, was wearing the clothing described by the confidential informant.[1]

11. Boger approached the Defendant and told him that he suspected Defendant was selling drugs. Defendant denied it and insisted that he was an employee of the gas station.

12. Boger then asked for consent to search. Although the testimony is unclear on this point, Defendant eventually refused to give consent.

13. When Defendant attempted to pull away from Boger, he was taken to the ground, handcuffed, and searched.

14. Thereafter, Boger found and seized 6 grams of crack cocaine in Defendant's left pant pocket, 29 grams of marijuana in Defendant's left jacket pocket, $111.00 and a cell phone.

From these findings of fact, the trial court concluded, as a matter of law, that:

9. Given the informant's long history of reliability, once the officers matched the informant's description to the Defendant and confirmed his presence at the named location, they "had reasonable grounds to believe a felony was being committed in [their] presence, which in turn created probable cause to arrest and search [the] [D]efendant." *Wooten*, 34 N.C. App. at 88, 237 S.E.2d at 304.

The sole question before this Court is whether this conclusion of law is supported by the undisputed findings of fact. *Coplen*, 138 N.C. App. at 52, 530 S.E.2d at 317. As the trial court noted in its Conclusions of Law, police officers may arrest, without a warrant, any person whom they have probable cause to believe is committing a felony in their presence or has committed a felony outside of their presence. N.C. Gen. Stat. § 15A-401(b)(1) and (b)(2)(a) (2003); *see also State v. Hunter*, 299 N.C. 29, 34, 261 S.E.2d 189, 193 (1980). Sale and/or possession of cocaine are felonies in North Carolina. N.C. Gen. Stat. § 90-95(a)(1) and (b)(1) (2003).

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1. In a footnote to this finding of fact, the trial court noted that defendant denied wearing the clothing described by the informant, but nonetheless found the testimony of Sgt. Boger and Officer Martin was more credible.

"Probable cause exists when there is 'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.' " *State v. Joyner*, 301 N.C. 18, 21, 269 S.E.2d 125, 128 (1980) (quoting *State v. Streeter*, 283 N.C. 203, 195 S.E.2d 502 (1973) (citation omitted)). Probable cause to make a warrantless arrest may be established by information from a known informant with a history of reliability. *State v. Chadwick*, 149 N.C. App. 200, 203, 560 S.E.2d 207, 209, *disc. review denied*, 355 N.C. 752, 565 S.E.2d 672 (2002). In the case *sub judice*, the information upon which the officers acted came from an informant with over fourteen years of personal dealings with Sgt. Boger whose past information consistently had been corroborated by officers and had led to over 100 arrests and numerous convictions. This past history would seem to satisfy virtually any conceivable test of reliability. Accordingly, we hold that the officers had sufficient probable cause to believe defendant was committing, or had committed, a felony.

Defendant argues in his brief that the informant's description was not sufficient to identify defendant specifically as the person alleged to be in possession of the drugs. Defendant did not, however, challenge the trial court's finding of fact that defendant was the only individual at the location wearing clothing that matched the description provided by the informant. Nor did defendant assign error to the trial court's conclusion that, despite of the lack of detail, the informant's description was sufficient to allow the officers to identify defendant, confirm his presence at the location, and exclude others who were in the immediate vicinity as the subject described by the informant. Defendant's sole basis for this argument is his testimony that the clothing he was wearing differed from that described by the informant.

The trial court found, and noted in its findings of fact, that the officers' testimony on this issue was more credible than defendant's. It is the duty of the trial court to weigh, and resolve any conflicts in, the evidence. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 620. We accord great deference to the trial court's determinations in this regard as the trial court hears the testimony, and thereby observes the witnesses, placing it in a much better position to evaluate the credibility of those witnesses. *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citing *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619 and *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971)). Consequently, the trial

court's conclusion that the informant's description was sufficient to identify defendant and exclude others in the vicinity, is supported by the findings of fact and we conclude that defendant's argument has no merit.

As we have determined that the officers had sufficient probable cause to arrest defendant and the informant's description was sufficient to identify defendant, we hold that defendant's arrest and subsequent search were constitutional and defendant's Motion to Suppress the cocaine was properly denied.

Affirmed.

Judges TYSON and JOHN concur.

RANDY JIRTLE AND WIFE, NANCY JIRTLE, BUDDY BATTEN AND WIFE, THELMA BATTEN, EDWARD GOODWIN AND WIFE, DORIS GOODWIN, PETITIONERS-APPELLANTS v. BOARD OF ADJUSTMENT FOR THE TOWN OF BISCOE, RESPONDENT-APPELLEE

No. COA05-155

(Filed 20 December 2005)

1. Zoning— church's new building—nonconforming parking not expanded

A church's construction of a food pantry on an adjoining vacant lot did not impermissibly expand the church's parking nonconformance because, under the ordinance, there would be no change in the "largest assembly room" in the church and thus no change in the parking requirement.

2. Zoning— new food pantry at church—accessory building or use—not an expansion of nonconforming use

A new food pantry qualified as an accessory building or use for a church under the Biscoe zoning ordinance because the focus is on the size of the buildings rather than the lots, the food pantry would be smaller than the current church buildings, and the provision of food to the hungry is incidental and subordinate to the church's main purpose of worship, although it serves the main purpose and principal use of the church.

3. Churches and Religion— new food pantry—accessory building—not expansion of nonconforming use—issue of religious burden not reached

The issue of whether the denial of a construction permit for a food pantry would impose a substantial burden on the religious exercise of the church was not reached where the food pantry qualified as an accessory building or use of the church and was not an impermissible expansion of a nonconformance.

4. Zoning— appeal to trial court—additional conclusions

The trial court did not make improper additional findings and conclusions in reviewing a board of adjustment decision.

Appeal by petitioners from order entered 30 August 2004 by Judge Melzer A. Morgan, Jr. in Superior Court, Montgomery County. Heard in the Court of Appeals 18 October 2005.

Van Camp, Meacham & Newman, PLLC, by Michael J. Newman, for petitioners-appellants.

Gill & Tobias, LLP, by Douglas R. Gill; and Garner & Williamson, P.A., by Max Garner, for respondent-appellee.

McGEE, Judge.

Page Memorial United Methodist Church (the church) is located at 203 Church Street (the main lot) in Biscoe, North Carolina. The church has been in its current location since approximately 1900. In 1983, the church acquired title to an adjoining tract of land (the adjoining lot).

The church has two buildings situated upon the main lot. The adjoining lot is vacant. Since approximately 1990, the church has operated a food distribution program from the basement of its education building located on the main lot. On Saturdays, church volunteers distributed food from the education building to approximately 200-230 people.

In 1993, the Town of Biscoe (the town) enacted a zoning ordinance (the ordinance). The area around the church, including the main lot and the adjoining lot, was zoned as a R-12 residential district. The ordinance provided that churches were among the "[p]ermitted [u]ses" allowed in the R-12 residential district. The ordinance also defined certain structures and uses as nonconforming, but the ordi-

nance allowed for the continuance of such nonconformances, provided that the structures and uses were not expanded.

In 2003, the church decided to move its food distribution program from its education building to a new structure to be built upon the adjoining lot. The church applied for a permit to construct a food pantry on the adjoining lot on 21 October 2003. The town's zoning administrator granted a zoning permit to the church for the construction of a food pantry on 12 November 2003. Randy Jirtle and wife, Nancy Jirtle; Buddy Batten and wife, Thelma Batten; and Edward Goodwin and wife, Doris Goodwin (petitioners) appealed the decision to the town's Board of Adjustment (the board). Subsequently, the church withdrew its application for a permit.

The church again applied for a permit to construct a food pantry on the adjoining lot on 9 June 2004, which the zoning administrator granted. Petitioners again appealed the decision to the board. The board upheld the decision of the zoning administrator on 9 August 2004.

Petitioners filed a petition for writ of certiorari with the trial court on 9 August 2004. The trial court affirmed the board's decision upholding the grant of the permit to the church in an order entered 30 August 2004. Petitioners appeal.

I.

[1] Petitioners first argue that construction of a food pantry would constitute an impermissible expansion of a nonconformance in violation of the applicable zoning ordinance. A decision of a board of adjustment may be reviewed by a trial court upon the issuance of a writ of certiorari, in which case the trial court sits as an appellate court. *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848, *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). On appeal of a trial court judgment considering a decision of a board of adjustment, our Court reviews the trial court's order for errors of law. *Id.* at 219, 488 S.E.2d at 849.

A question involving the interpretation of a zoning ordinance is a question of law, to which we apply a *de novo* standard of review. *Ayers v. Bd. of Adjust. for Town of Robersonville*, 113 N.C. App. 528, 530-31, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994). Zoning restrictions should be interpreted according to the language used in the ordinance. *Kirkpatrick v. Village*

Council, 138 N.C. App. 79, 85, 530 S.E.2d 338, 342 (2000). Nonconforming uses and structures are not favored under the public policy of North Carolina, and "[z]oning ordinances are construed against indefinite continuation of a non-conforming use." *Forsyth Co. v. Shelton*, 74 N.C. App. 674, 676, 329 S.E.2d 730, 733, *disc. review denied*, 314 N.C. 328, 333 S.E.2d 484 (1985).

Under section 11 of the Biscoe zoning ordinance,

> Upon the effective date of this ordinance, and any amendment thereto, pre-existing structures or lots of record and existing and lawful uses of any building or land which do not meet the minimum requirements of this ordinance for the district in which they are located or which would be prohibited as new development in the district in which they are located shall be considered as nonconforming. It is the intent of this ordinance to permit these nonconforming uses to continue until they are removed, discontinued, or destroyed, but not to encourage such continued use, and to prohibit the expansion of any nonconformance.

Town of Biscoe, N.C., Zoning Ordinance § 11 (1993). More specifically, section 11.3 of the ordinance states: "The nonconforming use of land shall not be enlarged or increased, nor shall any nonconforming use be extended to occupy a greater area of land than that occupied by such use at the time of the passage of this ordinance. . . ." Town of Biscoe, N.C., Zoning Ordinance § 11.3 (1993).

It is not disputed that the church is nonconforming in two respects: (1) inadequate parking and (2) violation of set-back requirements. Since petitioners do not argue that construction of a food pantry would expand the set-back nonconformance, we only determine whether construction of a food pantry would expand the parking nonconformance.

Pursuant to the minimum parking requirements of section 13.6 of the ordinance, places of assembly, including churches, are required to have "[o]ne (1) parking space for each four (4) seats in the largest assembly room." Town of Biscoe, N.C., Zoning Ordinance § 13.6 (1993). The church sanctuary is the "largest assembly room" in the church, seating between 120 and 189 people, which would require between 30 and 47-1/4 parking spaces under section 13.6 of the ordinance. However, the church does not have the requisite number of parking spaces and relies on street parking. Therefore, the church is nonconforming under section 13.6 of the ordinance.

Petitioners argue that construction of a food pantry would impermissibly expand the parking nonconformance. They apparently contend that construction of the food pantry would increase the number of people receiving food at the church and would therefore increase parking demand, which the church could not meet. Petitioners argue that under the plain language of the zoning ordinance, such an increase in unmet parking demand would constitute an impermissible expansion of a nonconformance.

Petitioners concede, however, that construction of the food pantry would not alter the "largest assembly room" in the church for purposes of section 13.6 of the ordinance. The plain language of the ordinance makes clear that parking requirements for churches are determined solely by the number of seats in the "largest assembly room." Accordingly, because the church sanctuary would remain the "largest assembly room" in the church after construction of a food pantry, the parking requirements for the church would remain the same. There would not be a greater nonconformity with the minimum parking requirements after construction of a food pantry; therefore, construction of a food pantry would not impermissibly expand the parking nonconformance.

II.

[2] Petitioners also argue the trial court erred in concluding that a food pantry would constitute an accessory use of the church. In order to qualify as an accessory building or use under section 2.3 of the ordinance, a building or use must be:

> A. Conducted or located on the same zoning lot as the principal building or use served, except as may be specifically provided elsewhere in this Ordinance.
>
> B. Clearly incidental to, subordinate in area and purpose to, and serves the principal use; and
>
> C. Either in the same ownership as the principal use or is clearly operated and maintained solely for the comfort, convenience, necessity, or benefit of the occupants, employees, customers, or visitors of or to the principal use.

Town of Biscoe, N.C., Zoning Ordinance § 2.3 (1993).

Petitioners do not challenge the third requirement for classification as an accessory building or use. Therefore, we examine only the first two requirements. With respect to the first requirement, peti-

tioners argue that because a food pantry would be constructed upon the adjoining lot, it would be located upon a different zoning lot from the church, which is located upon the main lot. However, pursuant to section 2.51 of the ordinance, "the word 'lot' shall be taken to mean any number of contiguous lots or portions thereof, upon which one or more main structures for a single use are erected or are to be erected." Town of Biscoe, N.C., Zoning Ordinance § 2.51 (1993). Under this definition, the main lot and the adjoining lot constitute one zoning lot, in that they are contiguous lots upon which one or more main church structures for a single church use are erected or are to be erected.

Petitioners also argue a food pantry would not satisfy the second requirement for classification as an accessory building or use. Petitioners argue that because the adjoining lot is larger than the main lot, a food pantry is not "subordinate in area" to the church. However, petitioners mistakenly focus upon the relative size of the lots, rather than the size of the buildings, as required by the plain language of the ordinance. A food pantry scheduled to have a gross floor area of 1,000 square feet would clearly be smaller than the current church buildings, which currently occupy approximately 9,390 square feet. Also, the provision of food to the hungry is incidental and subordinate to the church's main purpose of worship, although it serves the main purpose and principal use of the church. Accordingly, a food pantry would qualify as an accessory building or use, and we overrule these assignments of error.

III.

[3] Petitioners next argue the trial court erred by concluding that "a denial of the construction permit for a food pantry would impose a substantial burden on the religious exercise of the [c]hurch" in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). However, because we hold that a food pantry qualifies as an accessory building or use of the church and does not constitute an impermissible expansion of a nonconformance, we need not review this argument.

IV.

[4] Finally, petitioners argue the "trial court erred by making additional findings of fact and conclusions of law not made by the [b]oard, because such a practice is not permissible under North Carolina law." When a trial court issues a writ of certiorari to review the decision of a board of adjustment, "the [trial] court sits as an

appellate court, and not as a trier of facts." *Tate Terrace Realty Investors, Inc.*, 127 N.C. App. at 217, 488 S.E.2d at 848. "The [trial] court . . . may not make additional findings." *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990).

Petitioners specifically assign error to only one of the trial court's findings of fact: "[T]he proposed food pantry building is clearly incidental to, subordinate in area and subordinate in purpose to the church." Petitioners argue the trial court erred by making this finding, which was not previously made by the board. However, because this determination required the application of legal principles to a set of facts, it is more properly labeled a conclusion of law, and we treat it as such. *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000). Petitioners also assign error to four other conclusions of law made by the trial court. As we have already noted, a trial court's role on appeal of a decision of a board of adjustment is to review the record for errors of law. *Tate Terrace Realty Investors, Inc.*, 127 N.C. App. at 218, 488 S.E.2d at 848. The trial court merely fulfilled that duty by making conclusions of law based on the facts as found by the board. Additionally, petitioners do not argue that the trial court's conclusions were not supported by the findings of fact. Accordingly, we overrule these assignments of error.

Affirmed.

Judges WYNN and GEER concur.

FINOVA CAPITAL CORPORATION, PLAINTIFF v. BEACH PHARMACY II, LTD AND STEVEN C. EVANS, DEFENDANTS

No. COA05-404

(Filed 20 December 2005)

1. Statutes of Limitation and Repose— installment contracts—period begins running from time each individual installment due

The trial court erred in a breach of lease agreement case by granting summary judgment in favor of defendant lessees based on the running of the statute of limitations where the lease agree-

ment was modified by a bankruptcy confirmation order, defendants thereafter failed to meet their obligation to make twenty consecutive monthly payments of $530.00 beginning August 1998 and one payment of $289.65 in April 2000, and plaintiff filed the complaint on 13 October 2001, because: (1) the lease in this case is governed by the Uniform Commercial Code and is subject to a four-year statute of limitations, and the statute of limitations for filing this action began to run on 30 June 1998; (2) the general rule regarding the running of the statute of limitations for installment contracts is that the limitations period begins running from the time each individual installment becomes due; and (3) plaintiff is barred from recovering only those installment payments due prior to 14 October 1997, four years preceding the 13 October 2001 date on which it filed suit.

2. Laches— failure to show change in condition of property or in relations of parties—failure to demonstrate prejudice

The trial court erred in a breach of lease agreement case by granting summary judgment in favor of defendant lessees based on the equitable doctrine of laches, because: (1) laches will only be applied where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim; and (2) defendants failed to demonstrate how they were prejudiced by plaintiff's alleged delay in filing the complaint when under the payment plan, the final payment was due in April 2000 and plaintiff filed suit for breach of the lease agreement on 13 October 2001.

3. Leases of Personal Property— modification of lease agreement—breach—summary judgment

The trial court did not err in a breach of lease agreement case by denying plaintiff lessor's motion for summary judgment and its motion for reconsideration even though plaintiff contends the trial court failed to recognize the scope and effect of the bankruptcy court's confirmation order, because while the confirmation order modifies the lease agreement and is binding on the parties, genuine issues of material fact remain regarding whether defendants breached the lease agreement as modified.

Appeal by plaintiff from orders entered 20 September 2004 and 6 January 2005 by Judge William C. Griffin, Jr., in Dare County Superior Court. Heard in the Court of Appeals 17 November 2005.

Smith Debnam Narron Wyche Saintsing & Myers, L.L.P., by Byron L. Saintsing and Connie E. Carrigan, for plaintiff-appellant.

Dixon and Dixon Law Offices, PLLC, by David R. Dixon, for defendants-appellees.

TYSON, Judge.

Finova Capital Corporation ("plaintiff") appeals from order entered denying its motion for summary judgment and granting summary judgment in favor of Beach Pharmacy II, Ltd. and Steven C. Evans ("defendants") and order denying plaintiff's motion for reconsideration. We affirm in part, reverse in part, and remand.

I. Background

International Display Ltd. and its affiliated companies ("Recomm") operated a nationwide network of electronic message boards and kiosks. Recomm marketed and distributed to pharmacists, veterinarians, and optometrists. Recomm's customers ("lessees") acquired the equipment and executed finance leases. Plaintiff is a finance company ("lessor") who provided lease financing to customers such as defendants who leased Recomm's equipment.

On 13 May 1993, plaintiff's predecessor-in-interest, Bell Atlantic TriCon Leasing Corporation, and defendant Beach Pharmacy II, Ltd. entered into a written lease for Recomm's office equipment. Defendant Steven C. Evans guaranteed the lease agreement. In 1996, Recomm and its affiliated companies filed for Chapter 11 bankruptcy protection in United States Bankruptcy Court for the Middle District of Florida. The bankruptcy cases were subsequently consolidated by order dated 1 April 1998.

A debtor's plan of reorganization was filed. The plan proposed a resolution to pending litigation between the lessors, lessees, and Recomm. The bankruptcy court entered an order confirming the plan of reorganization on 13 May 1999. The confirmation order and plan of reorganization modifies the lease agreements between the lessors and the lessees.

The confirmation order releases the lessors from all claims that otherwise may have been raised by the lessees in connection with the matters occurring prior to the 30 June 1998 effective date. It also releases the lessees from all claims that otherwise may have been

raised by the lessors in connection with matters occurring prior to the effective date. The plan of reorganization recalculated the amount of lease payments the lessors were due.

On 30 June 1998, plaintiff sent defendants a letter which advised them of the modifications to their lease agreement and presented them with options to pay the amount owed under the lease as modified. Defendants failed to select a payment option and were deemed to have selected "Option 4," which obligated defendants to pay the balance due over a period of time. Plaintiff alleged defendants failed to pay the amount due and filed a complaint in Wake County Superior Court on 18 October 2001 for breach of the lease agreement.

Defendants filed an answer asserting the affirmative defenses of laches, estoppel, and statute of limitations. Defendants amended their answer to assert their defenses did not relate "to time, conduct and/or events" occurring prior to 30 June 1998 "based on the contracts created by the Middle District of Florida Bankruptcy Court's May 13, 1998 Confirmation Order in the RECOMM bankruptcy case." This case was subsequently removed to the Dare County Superior Court. Plaintiff filed a motion for summary judgment on 6 July 2004. The trial court issued an order granting summary judgment in favor of defendants and denying plaintiff's motion. Plaintiff moved for the trial court to reconsider its order granting summary judgment in favor of defendants. The trial court reaffirmed its earlier order. Plaintiff appeals.

II. Issue

The sole issue on appeal is whether the trial court erred in denying plaintiff's motion for summary judgment and granting summary judgment in favor of defendants and denying its motion for reconsideration.

III. Standard of Review

Summary judgment is proper if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The evidence must be considered in a light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). When reviewing a lower court's grant of summary judgment, our standard of review is *de novo*. *Id.*

We note that the trial court is not required to make findings of fact in an order granting summary judgment. *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975). "There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact." *Id.*

IV. Summary Judgment in Favor of Defendants

A. Statute of Limitations

[1] Plaintiff argues the trial court erred by granting summary judgment in favor of defendants based on the running of the statute of limitations.

Defendants argue "[a]n action for breach of contract must be brought within three years from the time of the accrual of the cause of action." *Penley v. Penley*, 314 N.C. 1, 19-20, 332 S.E.2d 51, 62 (1985) (citations omitted); N.C. Gen. Stat. § 1-52 (2003). Generally, a cause of action accrues when the right to institute a suit arises. *Id.* at 20, 332 S.E.2d at 62. "The statute begins to run on the date the promise is broken." *Id.* Plaintiff contends the lease in this case is governed by the Uniform Commercial Code and subject to a four-year statute of limitations. We agree.

The Uniform Commercial Code provides, "[a]n action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four years after the cause of action accrued." N.C. Gen. Stat. § 25-2A-506(1) (2003). The Uniform Commercial Code recites the definition of a lease:

> "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease. The term includes a motor vehicle operating agreement that is considered a lease under § 7701(h) of the Internal Revenue Code.

N.C. Gen. Stat. § 25-2A-103(j) (2003).

The lease agreement entered into on 13 May 1993 was originally structured with a four-year lease term. The final payment, prior to modification, was due on 13 April 1997. An injunction was entered in the Recomm bankruptcy action in March 1996, which stayed collection efforts pursuant to the lease agreements and tolled the statute of

limitations period. The bankruptcy court's confirmation order was docketed on 30 June 1998 and the stay imposed by the injunction was lifted.

The parties' obligations under the lease were modified by the confirmation order. The statute of limitations for filing this action began to run on 30 June 1998. After the lease agreement was modified, defendants were obligated to make twenty consecutive monthly payments of $530.00 beginning August 1998 and one payment of $289.65 in April 2000. Plaintiff filed the complaint on 13 October 2001.

"The general rule regarding the running of the statute of limitations for installment contracts is that the limitations period begins running from the time each individual installment becomes due." *Vreede v. Koch*, 94 N.C. App. 524, 527, 380 S.E.2d 615, 617 (1989) (citation omitted). Plaintiff is barred from recovering only those installment payments due prior to 14 October 1997, four years preceding the 13 October 2001 date on which it filed suit. *Id.* at 528, 380 S.E.2d at 617. The trial court erred in granting summary judgment in favor of defendants based on the expiration of the statute of limitations.

B. Laches

[2] Defendants argue the trial court correctly granted summary judgment in their favor based on the equitable doctrine of laches. We disagree.

The equitable doctrine of laches will be applied "where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim[.]" *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938). The facts and circumstances of the case determine whether the delay will constitute laches. *MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209, 558 S.E.2d 197, 198 (2001). "[T]he delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches[.]" *Id.* at 209-10, 558 S.E.2d at 198.

Plaintiff sent a letter to defendants dated 30 June 1998 which set forth defendants' options in making the required payments. The letter stated the first revised monthly payment was due August 1998. Under "Option 4," defendants were required to make monthly payments over a period of twenty-one months. Under this plan, the final payment was due in April 2000. Plaintiff filed suit for breach of the lease agree-

ment on 13 October 2001. Defendants failed to demonstrate how they were prejudiced by plaintiff's alleged delay in filing the complaint. *Id*. The record does not support the trial court's granting of summary judgment in favor of defendants based on the equitable doctrine of laches.

V. Denial of Plaintiff's Motion for Summary Judgment

[3] Plaintiff argues the trial court erred in denying its motion for summary judgment and its motion for reconsideration. We disagree.

Plaintiff is designated as a "participating lessor" and defendants are designated as "participating lessees" under the reorganization plan confirmed by the bankruptcy court. The reorganization plan recalculates the amount the participating lessees owe the participating lessors under their lease agreements. The reorganization plan provides the participating lessors shall deliver a statement to their participating lessees setting forth the balance due, the lessees' options with respect to paying the balance, and instructions for exercising such options. Pursuant to the reorganization plan and confirmation order, plaintiff sent defendants a letter setting forth defendants' payment options. Defendants failed to select a payment option under the modified lease and was deemed to have selected "Option 4."

The bankruptcy court's confirmation order provides that "the Leases as modified are valid and binding as between the Released Lessor Parties and Participating Lessees only in accordance with their terms . . . ." Plaintiff argues the trial court failed to recognize the scope and effect of the bankruptcy court's confirmation order in denying its motion for summary judgment. While the confirmation order modifies the lease agreement and is binding on the parties, genuine issues of material fact remain regarding whether defendants breached the lease agreement as modified. The trial court did not err in denying plaintiff's motion for summary judgment and its motion for reconsideration. This assignment of error is overruled.

VI. Conclusion

The trial court erred in granting summary judgment in favor of defendants based on the expiration of the statute of limitations and the equitable doctrine of laches. Because genuine issues of material fact exist regarding defendants' alleged breach of the lease agreement, the trial court properly denied plaintiff's motion for summary judgment and its motion for reconsideration.

That portion of the trial court's order granting summary judgment to defendants is reversed. That portion of the trial court's order denying plaintiff's motion for summary judgment and plaintiff's motion for reconsideration is affirmed.

Affirmed in part, Reversed in part, and Remanded.

Judges HUDSON and LEVINSON concur.

THE ESTATE OF JANICE SPELL, WILLIE E. SPELL, ADMINISTRATOR, AND THE ESTATE OF WILLIE R. SPELL, WILLIE E. SPELL, ADMINISTRATOR, PLAINTIFFS v. FIRAS GHANEM, TARBORO CLINIC, P.A., JAMES EUGENE KENDALL, JR., DAVID W. LEE, MALANA K. MOSHESH, ELIZABETH M. REINOEHL, TARBORO WOMEN'S CENTER, P.A., EAST CAROLINA HEALTH-HERITAGE, INC., D/B/A HERITAGE HOSPITAL, DEFENDANTS

No. COA05-353

(Filed 20 December 2005)

Appeal and Error— appealability—amendment of complaint—interlocutory order—sanctions

An appeal from a pretrial order allowing an amended complaint was dismissed, and sanctions were imposed under Appellate Procedure Rule 34, where the order was clearly interlocutory and the substantial rights cited by defendant were either required to be raised first at the trial level (estoppel, the statute of limitations, and Rule 9(j)) or were not substantial rights (avoiding trial). Sanctions were awarded because a final resolution of the matter was needlessly delayed, the resources of the Court of Appeals needlessly wasted, and piecemeal appeals were created.

Appeal by defendant from order entered 5 October 2004 by Judge Milton F. Fitch, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 3 November 2005.

Faison & Gillespie, by John W. Jensen, and Kristen L. Beightol, for plaintiffs-appellees.

Harris, Creech, Ward and Blackerby, P.A., by R. Brittain Blackerby, Marie C. Moseley, and Charles E. Simpson, Jr., for defendant-appellant.

LEVINSON, Judge.

Defendant East Carolina Health Heritage, Inc., d/b/a Heritage Hospital (the hospital), appeals from a pretrial order allowing plaintiffs to amend their complaint. We dismiss.

On 13 October 2003 plaintiffs (estates of Janice Spell and Willie R. Spell, by administrator Willie E. Spell) filed suit against several physicians and medical institutions. Plaintiffs alleged that in 2001 Janice Spell was pregnant, with a predicted delivery date in February 2002. On 13 November 2001 Janice was admitted to the hospital for treatment of various symptoms. Her symptoms worsened, and on 15 November 2001 Janice's unborn child, Willie R. Spell, died *in utero*. Janice died on 16 November 2001, and an autopsy determined the cause of death to be thrombotic thrombocytopenic purpura (TTP). Plaintiffs' complaint alleged that a proximate cause of the deaths of Janice and Willie R. Spell was defendants' negligent failure to properly diagnose and treat Janice's TTP. Plaintiffs sought damages from individual defendant physicians for medical malpractice, and from defendant hospital on the grounds that the hospital was liable for the negligence of its employees and agents under the doctrines of *respondeat superior* or agency.

On 1 July 2004 plaintiffs filed a motion to amend their complaint to include additional allegations in their claim against defendant hospital. Plaintiffs asked to add allegations of negligence by the nurses and nursing staff of defendant hospital as part of the basis for liability under the doctrines of *respondeat superior* or agency. Plaintiffs submitted a proposed amended complaint with their motion, in which such allegations were added. On 5 October 2004 the trial court granted plaintiffs' motion to amend their complaint, and ordered that "[d]efendants shall have twenty-five (25) days from September 1, 2004, the date on which they were made aware of the Court's ruling on Plaintiff's Motion to Amend Complaint, to file their Answers to the Amended Complaint." From this order defendant appeals.

Preliminarily we address plaintiffs' motion for dismissal and for sanctions. Plaintiff argues first that defendant's appeal should be dismissed as interlocutory. We agree.

An order "is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2003). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by

the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 354, 362, 57 S.E.2d 377, 381 (1950) (citations omitted). "[A]n interlocutory order is immediately appealable only under two circumstances. . . . [One] situation in which an immediate appeal may be taken from an interlocutory order is when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (citation omitted); *see* N.C. Gen. Stat. § 1-277(a) (2003) ("appeal may be taken from every judicial order . . . which affects a substantial right"); N.C. Gen. Stat. § 7A-27(d)(1) (2003) (granting appeal of right from "any interlocutory order . . . [a]ffect[ing] a substantial right").

In the instant case, the parties agree that the order allowing amendment of plaintiffs' complaint is interlocutory, and that the dispositive issue is whether defendant's appeal implicates any substantial right that will be lost without immediate review. "The appealability of interlocutory orders pursuant to the substantial right exception is determined by a two-step test. '[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.' " *Miller v. Swann Plantation Development Co.*, 101 N.C. App. 394, 395, 399 S.E.2d 137, 138-39 (1991) (quoting *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)).

Defendant argues that, without immediate review, it will lose the right to avoid trial altogether by (1) raising the statute of limitations as an affirmative defense; (2) raising "estoppel by laches" as an affirmative defense; or (3) having plaintiffs' amended complaint dismissed for failure to comply with the pleading requirements of N.C. Gen. Stat. § 1A-1, Rule 9(j) (2003). On this basis, defendant contends that "not one, but three substantial rights will be lost absent immediate review." We disagree.

First, these are issues that are properly raised at the trial level. "A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 472 S.E.2d 778 (1996) (citing *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994)).

In addition, defendant's legal premise, that an amended complaint must always be filed within the statute of limitations, is unsound. Under N.C. Gen. Stat. § 1A-1, Rule 15(c) (2003), an amended com-

plaint "is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." The North Carolina Supreme Court has held that relation back is not defeated by the statute of limitations:

> We hold that the determination of whether a claim asserted in an amended pleading relates back does not hinge on whether a time restriction is deemed a statute of limitation or repose. Rather, the proper test is whether the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences which formed the basis of the amended pleading. If the original pleading gave such notice, the claim survives by relating back in time without regard to whether the time restraint attempting to cut its life short is a statute of repose or limitation.

Pyco Supply Co. Inc. v. American Centennial Ins. Co., 321 N.C. 435, 440-41, 364 S.E.2d 380, 383 (1988). Thus, even upon a proper motion for dismissal in the trial court, the parties would need to litigate the issue of whether the original complaint gave sufficient notice of the transactions and occurrences alleged in the amended complaint.

We also disagree with defendant's assertion that the only way to challenge plaintiffs' purported failure to comply with Rule 9(j) is by immediate appellate review of the court's order allowing plaintiffs to file an amended complaint. Rule 9 provides that a claim alleging medical malpractice "shall be dismissed unless" certain requirements are met. A defendant's motion to dismiss based on failure to comply with Rule 9(j) should be brought at the trial level. *See Thigpen v. Ngo*, 355 N.C. 198, 199, 558 S.E.2d 162, 163 (2002) (upholding "order of the trial court dismissing plaintiff's complaint alleging medical malpractice because of plaintiff's failure to comply with Rule 9(j)").

Estoppel also should be litigated at the trial level. Indeed, N.C. Gen. Stat. § 1A-1, Rule 8 (2003) requires that affirmative defenses such as laches, estoppel, or the statute of limitations be raised by answer or counterclaim:

> The North Carolina Rules of Civil Procedure require a party to affirmatively set forth any matter constituting an avoidance or affirmative defense, N.C. Gen. Stat. §§ 1A-1, Rule 8(c) [(2005)], and our courts have held the failure to do so creates a waiver of the defense. Neither defendants' original nor amended answer

> include an affirmative defense of estoppel[.] . . . Defendants therefore have waived this defense by failing to affirmatively assert estoppel as to plaintiff.

HSI v. Diversified Fire, 169 N.C. App. 767, 773, 611 S.E.2d 224, 228 (2005) (citing *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998)).

N.C.R. App. P. 10(b)(1) provides in relevant part 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 . . . . [and] obtain[ed] a ruling upon the party's request, objection or motion."

We conclude that defendant's proposed "substantial rights" consist of issues that defendant must raise at the trial level to preserve for review. In the instant case, none of the issues addressed by defendant were brought before the trial court. Consequently, defendant's appeal is not only interlocutory in that it is brought before final judgment has been entered, but also attempts to obtain review of matters that defendant has not even preserved for appellate review were we now reviewing a final judgment. We conclude that no substantial right will be lost by failure to allow immediate review of the trial court's order allowing plaintiffs to amend their complaint. Accordingly, defendant's appeal must be dismissed.

Plaintiffs have also moved for imposition of sanctions against defendant under N.C.R. App. P. Rule 34(a)(1), which provides in pertinent part that this Court may impose sanctions "against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because . . . 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[.]"

Defendant appeals from an order that is clearly interlocutory, and argues that immediate appeal is required to protect its "substantial right" to raise the issues of estoppel, the statute of limitations, and compliance with Rule 9(j). As discussed above, these issues must be raised at the trial level, which defendant has not done. Moreover, defendant argues that pretrial review is necessary because otherwise it will lose forever the "right" to avoid the expense and inconvenience of a trial. However, "avoidance of a trial is not a 'substantial right' that would make such an interlocutory order appealable under G.S. 1-277

or G.S. 7A-27(d)." *Howard v. Ocean Trail Convalescent Center*, 68 N.C. App. 494, 495, 315 S.E.2d 97, 99 (1984) (citing *Davis v. Mitchell*, 46 N.C. App. 272, 265 S.E. 2d 248 (1980)).

We conclude that defendant's appeal was neither based on existing law, nor on a good faith argument for a change in the existing law, and determine that sanctions pursuant to Rule 34 should be awarded. This Court does not frequently award sanctions pursuant to Rule 34, but we conclude it is necessary and appropriate to do so in this case. This appeal has needlessly delayed a final resolution of this matter for all parties; needlessly wasted the resources of this Court; and needlessly created "piecemeal appeals" should defendant be later handed an adverse final judgment from which it seeks appellate review.

The trial court shall determine the reasonable amount of attorneys' fees incurred by plaintiffs in responding to this appeal. The court shall require defendant to pay the same within fifteen (15) days of the entry of its order.

Dismissed.

Judges McCULLOUGH and ELMORE concur.

COUNTY OF JACKSON, PLAINTIFF v. JAMES G. NICHOLS AND WIFE, KIMBERLY DIANE NICHOLS, AND KIMBERLY A. NICHOLS, SINGLE, DEFENDANTS

No. COA05-292

(Filed 20 December 2005)

1. Divorce— property settlement and separation agreement— first refusal provision—intent not to be bound

The trial court did not err by granting summary judgment for James Nichols where his former wife sought to enforce a first refusal provision in their separation agreement when the property in question was to be sold to the county. The separate first refusal agreement contemplated by the separation agreement was never signed, and the parties had conveyed parcels to each other covenanting that the properties were free and clear of encumbrances.

2. Appeal and Error— record on appeal—prior court order not included—collateral estoppel not considered

An assignment of error concerning collateral estoppel was not considered where the prior court order was not included in the record.

Appeal by defendant Kimberly A. Nichols from order entered 2 December 2004 by Judge Dennis J. Winner in Jackson County Superior Court. Heard in the Court of Appeals 2 November 2005.

No brief filed for plaintiff-appellee.

Ball Barden & Bell, P.A., by Thomas R. Bell, for defendants-appellees James G. Nichols and Kimberly Diane Nichols.

Jennifer W. Moore, for defendant-appellant.

TYSON, Judge.

Kimberly A. Nichols appeals from order entered granting summary judgment to James G. Nichols and wife, Kimberly Diane Nichols. We affirm.

I. Background

Kimberly A. Nichols and James G. Nichols were married in 1988 and separated on 12 July 2000. The parties subsequently entered into a separation and property settlement agreement ("separation agreement") on 13 October 2000. The separation agreement was incorporated into a decree of absolute divorce filed 10 September 2001 by the Jackson County District Court.

During their marriage, the parties acquired a 4.81 acre parcel of land from James G. Nichols's father. The separation agreement provided that James G. Nichols would receive the parcel, excepting 0.87 acres to be conveyed to Kimberly A. Nichols. The separation agreement also provided that for a period of ten years following the execution of the separation agreement, neither party could accept an offer to purchase their parcel without first notifying the other party and providing an opportunity to purchase the property on identical terms as the offer they had received. The separation agreement further provided that if either party sold their land in violation of the separation agreement, the seller would be liable to the other party for the purchase price. The separation agreement stated that an express and distinct "right of first refusal agreement" was to be executed on

the same date as the separation agreement. A separate agreement was never executed.

James G. Nichols conveyed his marital interest in the 0.87 acre tract by general warranty deed to Kimberly A. Nichols on 31 October 2000. On 10 November 2000, Kimberly A. Nichols conveyed her marital interest in the 4.81 acre tract by general warranty deed to James G. Nichols, excepting the 0.87 acre tract she had received. On 5 March 2003, Kimberly A. Nichols conveyed the 0.87 acre tract to James G. Nichols for paid consideration of $100,000.00.

On 14 November 2003, James G. Nichols and wife, Kimberly Diane Nichols, entered into a contract with the County of Jackson to sell the entire 4.81 acres of property for 1.5 million dollars. James G. Nichols did not notify his former wife of the County's offer and did not first offer the property to her for purchase under the terms of the separation agreement. Kimberly A. Nichols became aware of the contract and filed an action in the Jackson County District Court, seeking to have James G. Nichols ordered to comply with the terms of the separation agreement. The trial court's order determined that James G. Nichols failed to notify his former wife of the offer. James G. Nichols refused to close the sale of the property with the County of Jackson.

The County of Jackson filed suit in the Jackson County Superior Court on 3 May 2004 seeking specific performance of the contract and joined Kimberly A. Nichols as a party in the suit. Kimberly A. Nichols filed a crossclaim against James G. Nichols, seeking enforcement of the separation agreement. James G. Nichols moved for summary judgment on Kimberly A. Nichols's crossclaim. The trial court granted James G. Nichols's motion for summary judgment on Kimberly A. Nichols's crossclaim. Kimberly A. Nichols appeals.

II. Issues

Kimberly A. Nichols asserts the trial court erred by: (1) making findings of fact unsupported by admissible evidence; (2) making conclusions of law that are unsupported by findings of fact and admissible evidence; and (3) concluding that no genuine issue of material fact exists and that James G. Nichols and Kimberly Diane Nichols are entitled to judgment as a matter of law on the crossclaim.

III. Summary Judgment

Kimberly A. Nichols contends the trial court erred in granting James G. Nichols's motion for summary judgment. We disagree.

This Court reiterated our standard of review of the trial court's grant of summary judgment in *Hoffman v. Great Am. Alliance Ins. Co.*, 166 N.C. App. 422, 601 S.E.2d 908 (2004).

> Our standard to review the grant of a motion for summary judgment is whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

Id. at 425-26, 601 S.E.2d at 911 (internal citations and quotations omitted).

IV. Agreement to Agree

[1] It is well settled that a contract "leaving material portions open for future agreement is nugatory and void for indefiniteness." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974). The reason for this rule "is that if a preliminary contract fails to specify all of its material and essential terms so that some are left open for future negotiations, then there is no way by which a court can determine the resulting terms of such future negotiations." *Bank v. Wallens and Schaaf v. Longiotti*, 26 N.C. App. 580, 583, 217 S.E.2d 12, 15 (1975). If the parties to the contract "manifested an intent not to become bound until the execution of a more formal agreement or document, then such an intent would be given effect." *Id.*

> "In the usual case, the question whether an agreement is complete or partial is left to inference or further proof." "The subsequent conduct and interpretation of the parties themselves may be decisive of the question as to whether a contract has been made even though a document was contemplated and has never been executed."

Id. at 584, 217 S.E.2d at 15 (quoting *Boyce*, 285 N.C. at 734, 208 S.E.2d at 695; 1 Corbin, Contracts, § 30, pp. 107-08 (1963)). Our decision turns on whether a genuine issue of material fact exists if the

parties intended to be bound by the separation agreement when the referenced and separate right of first refusal agreement was never executed.

In *Wallens*, the agreement in question began by stating, "This letter is to serve as a memorandum agreement until proper complete documents can be drawn up to consummate this transaction." 26 N.C. App. at 582, 217 S.E.2d at 14. This Court upheld the agreement because it clearly stated that it would *serve* as an agreement until more complete documents were drawn. *Id.* at 583-84, 217 S.E.2d at 15. Here, the lack of a final agreement, along with the subsequent conduct of the parties, demonstrates an intent by the parties not to be bound by the provisions of the separation agreement until a separate right of first refusal agreement was executed.

By deed dated 5 March 2003, Kimberly A. Nichols reconveyed the 0.87 acres to James G. Nichols. Included in the language of the deed is a statement that the grantor, Kimberly A. Nichols, "does grant, bargain, sell and convey unto the Grantee in fee simple, all that certain lot or parcel of land situated in Cashiers Township, Jackson County, North Carolina, and more particularly described as follows . . . ." The deed further states:

> And the Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable, and free and clear of all encumbrances, and the Grantor will warrant and defend the title against the lawful claims of all persons whomsoever except for the exceptions herein after stated.

Black's Law Dictionary defines an encumbrance as a "claim or liability that is attached to property or some other right and that may lessen its value . . . ." Black's Law Dictionary 547 (7th ed. 1999).

A right of first refusal, also termed as a "preemptive right," "requires that, before the property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person." *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610 (1980) (quoting 6 American Law of Property § 26.64 at 506-07 (1952)).

A preemptive provision creates the right in the holder to buy the property before the seller can convey it to another. *Id.* at 61, 269 S.E.2d at 610-11. A right of first refusal is a restraint on alienation. *Id.*

at 61, 269 S.E.2d at 610. In spite of the fact that a right of first refusal provision constitutes a restraint of alienability, our Supreme Court has held such agreements are enforceable if "carefully limited in duration and price" and are "reasonable." *Id.*

Kimberly A. Nichols covenanted in her deed to James G. Nichols that the property was free and clear of all encumbrances. A right of first refusal provision constitutes an encumbrance and creates a liability attached to the property. Our courts have held a right of first refusal to be a restraint on alienation. *Smith*, 301 N.C. at 61, 269 S.E.2d at 610. The 5 March 2003 conveyance of the 0.87 acres from Kimberly A. Nichols to James G. Nichols demonstrates that the parties did not intend to be bound by the provisions in the separation agreement absent the execution of a more formal and final right of first refusal, which was never executed. *Wallens*, 26 N.C. App. at 583, 217 S.E.2d at 15. As no genuine issue of material fact exists, James G. Nichols was entitled to summary judgment. The trial court did not err in granting James G. Nichols's motion for summary judgment.

V. Collateral Estoppel

[2] Kimberly A. Nichols argues that in an order entered by the trial court on 26 April 2004, the court found that James G. Nichols failed to notify her of the offer to purchase the real property, and he is collaterally estopped from relitigating the same issue in the action pending in the Superior Court. Kimberly A. Nichols, as appellant, failed to include a copy of the district court's order in the record on appeal.

Rule 9 of the North Carolina Rules of Appellate Procedure limits this Court's review to matters contained in the record on appeal. Rule 9(a) provides that "copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors" should be included in the record on appeal. N.C.R. App. 9(a)(1)(j) (2005). As Kimberly A. Nichols failed to include a copy of the district court's order in the record on appeal, we do not address this issue. *State v. Brown*, 142 N.C. App. 491, 492-93, 543 S.E.2d 192, 193 (2001) (noting that it is the appellant's duty to ensure that the record before this Court is complete). This assignment of error is dismissed.

VI. Conclusion

The trial court did not err in concluding no genuine issue of material fact existed with regard to Kimberly A. Nichols's crossclaim

against James G. Nichols. The trial court's order granting summary judgment in favor of James G. Nichols and wife, Kimberly Diane Nichols is affirmed.

Affirmed.

Judges JACKSON and SMITH concur.

STATE OF NORTH CAROLINA v. JOEL MARK DURHAM, DEFENDANT

No. COA05-286

(Filed 20 December 2005)

1. Constitutional Law— right to remain silent—refusal to talk to police—evidence of sanity

The trial court erred in a first-degree murder case by allowing the State to argue that the jury could use defendant's silence while in custody as evidence of his sanity, and defendant is entitled to a new trial, because: (1) the prosecutor's statements referred repeatedly to defendant's silence, not merely his behavior, and urged the jury to infer that defendant was sane enough to know that remaining silent was in his best interest; and (2) the error was not harmless beyond a reasonable doubt when the only real issue at trial was whether defendant was legally insane at the time of the murder since defendant admitted firing the shots that killed the victim.

2. Evidence— testimony—pretrial sanity hearing—impeachment—blanket prohibition

The trial court erred in a first-degree murder case by allowing the State to cross-examine experts using testimony from defendant's pretrial sanity hearing even though the State asserts that N.C.G.S. § 15A-959 does not bar the use of pretrial testimony for the purpose of impeaching the experts with prior inconsistent statements, because: (1) the statutory language does not limit the bar on using testimony or evidence to substantive evidence, but instead states a blanket prohibition; and (2) it cannot be said that the improper admission of an expert's statements from the pretrial hearing was harmless when the only issue at trial was defendant's sanity at the time of the murder, and substantial

evidence including the testimony of all three expert witnesses showed that defendant was insane.

3. Evidence— exclusion of testimony—sanity

The trial court did not abuse its discretion in a first-degree murder case by excluding evidence allegedly supporting the expert testimony that defendant was insane at the time of the crime, because: (1) although the trial court refused to allow an expert to testify that in ten prior cases she had never found a defendant insane at the time of the crime, it cannot be said that the court's determination was manifestly unsupported by reason; and (2) although the trial court excluded testimony from defendant's brother about the brother's own mental illness which was similar to defendant's, two experts had previously testified that mental illnesses tended to run in families and one expert specifically testified that mental illness ran in defendant's family.

Appeal by defendant from judgment entered 16 March 2004 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 19 October 2005.

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

Glover & Peterson, P.A., by Ann B. Peterson, for defendant-appellant.

HUDSON, Judge.

On 3 September 2002, the grand jury indicted defendant Joel Mark Durham the first-degree murder of Ralph Gaiser. After defendant gave notice of his intent to rely on an insanity defense, the court held a pretrial hearing. Following the hearing, Judge Melzer A. Morgan denied defendant's motion to have the charge of first-degree murder dismissed pretrial on the basis of a defense of insanity. The case came on for trial at the 8 March 2004 criminal session. On 16 March 2004, the jury found defendant guilty of first-degree murder. The court sentenced defendant to life in prison and defendant appeals. As described below, we conclude that defendant is entitled to a new trial.

Defendant admitted that he shot his friend Ralph Daniel Gaiser to death on Gaiser's birthday, 3 July 2002. Defendant had known Gaiser for twenty-five years, though their relationship had deteriorated in recent years. As Gaiser and his friend Don Whitaker sat in Gaiser's

living room, defendant entered the house and spoke with them briefly. Defendant then stated that he had left his car lights on and left. He returned a few minutes later and shot Gaiser four times in the head and chest with a rifle. Whitaker asked defendant not to shoot him and said he wanted to leave. Defendant responded, "This doesn't concern you. It is a CIA hit." Defendant then left the house.

The evidence tended to show that defendant believed that the CIA had removed his eyes and replaced them with cameras. He also believed that the CIA was controlling him and was behind a variety of plots, including the 11 September 2001 attacks. Concerned about defendant's behavior and thoughts, his family took him to the Guilford County Mental Health Center in January 2000, where he was diagnosed as psychotic with paranoid delusional disorder. Defendant began taking anti-psychotic medication which improved his symptoms. After his arrest, three mental health experts, including Dr. Karla de Beck, who had been retained by the State, examined defendant and found that he was legally insane at the time of the crime. The State offered several lay witnesses who testified that they believed defendant was sane at the time of the crime. The jury convicted defendant of first-degree murder.

[1] Defendant first argues that the court erred in allowing the State to argue that the jury could use his silence while in custody as evidence of defendant's sanity, in violation of his constitutional rights. We agree.

During his closing statement to the jury, the prosecutor argued the following, quoting Dr. de Beck:

> Okay he's been arrested now. The burden has been lifted. He's no longer uncertain, if you believe him, what's going to happen. "Detective Spagnola presented him with a waiver of rights and explained his rights to him. Mr. Durham had no questions and would not look up. He would not speak."

Over defendant's objection, the court allowed the State to continue this argument, again quoting Dr. de Beck:

> He said he attempted to talk to him for thirty minutes without any murmur from [defendant]. It was noted that the only personal acknowledgement of my presence I received from Mr. Durham from our interview was in showing him a picture of Danny Gaiser, the victim. He briefly looked up at the photograph, nodded his

> head, said "yes," and looked back at his shoes, where his eyes continued to stare for the rest of the interview.
>
> If the burden has been lifted and he's relieved, why does he not tell the police what happened? Why does he wait until he talks to his experts when he knows they're interviewing him to determine whether he's insane or not? Why didn't he tell the police then, if we are going to talk about the truth? I guess the same reason why we don't know where the gun was on the day of the murder.
>
> The fact is the defendant knew the difference between right and wrong.

Defendant contends that this argument from the State implies that defendant must have been sane and known right from wrong based on his refusal to talk to the police once he was in custody.

> In our legal system, it is axiomatic that a criminal defendant is entitled under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, to remain silent and to refuse to testify. *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106 (1965). This right is also guaranteed under Article I, Section 23 of the North Carolina Constitution. *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). It is equally well settled that when a defendant exercises his right to silence, it 'shall not create any presumption against him,' N.C.G.S. § 8-54 (1999), and any comment by counsel on a defendant's failure to testify is improper and is violative of his Fifth Amendment right, [*State v.*] *Mitchell*, 353 N.C. [309,] 326, 543 S.E.2d [830,] 840 [2001].

State v. Ward, 354 N.C. 231, 250-51, 555 S.E.2d 251, 264 (2001), *cert. denied*, 359 N.C. 197, 605 S.E.2d 472 (2004). The State contends that the prosecutor's remarks were merely a permissible comment on defendant's behavior and demeanor during the interview. We find this argument unpersuasive. The prosecutor's statements referred repeatedly to defendant's silence, not merely to his behavior, and clearly urged the jury to infer that defendant was sane enough to know that remaining silent was in his best interest. As the Supreme Court made clear in *Ward*, this the State may not do.

Every comment "implicating a defendant's right to remain silent, although erroneous, is not invariably prejudicial." *Id.* at 251, 555 S.E.2d at 265; *see also State v. Shores*, 155 N.C. App. 342, 351, 573 S.E.2d 237, 242 (2002), *disc. review denied*, 356 N.C. 690, 578 S.E.2d

592 (2003). "Indeed, such error will not earn the defendant a new trial if, after examining the entire record, this Court determines that the error was harmless beyond a reasonable doubt." *Ward*, at 251, 555 S.E.2d at 265

In *Ward*, a capital murder case, the challenged argument came at the close of the sentencing phase, when the prosecutor argued the following:

> [Defendant] started out that he was with his wife and child or wife and children or something that morning. We know he could talk, but he decided just to sit quietly. He didn't want to say anything that would 'incriminate himself.' So he appreciated the criminality of his conduct all right.
>
> He was mighty careful with who [sic] he would discuss that criminality, wasn't he? He wouldn't discuss it with the people at [Dorothea] Dix [Hospital].

Id. at 266, 555 S.E.2d at 273. Defendant Ward did not object. The Supreme Court held that the argument invited such a clear violation of defendant's right to silence that it required the trial court to intervene *ex mero motu*. *Id.* Since the trial court had not done so, the Supreme Court ordered a new sentencing hearing, noting that it "cannot conclude that this omission had no impact on the jury's sentencing recommendation." *Id.* Here, the defendant admitted firing the shots that killed Gaiser, so the only real issue at trial was whether defendant was legally insane at the time of the murder. Three mental health experts testified that they believed defendant was legally insane. Lay witnesses and circumstances presented the only evidence of defendant's sanity. We are unable to distinguish *Ward* in a meaningful way. Given this evidence, we are unable to say that this error was harmless beyond a reasonable doubt. Defendant is entitled to a new trial.

Although we award defendant a new trial on the grounds above, we address his remaining arguments as they could arise in a new trial.

[2] Defendant argues that the court erred in allowing the State to cross-examine experts using testimony from his pretrial sanity hearing. We agree.

N.C. Gen. Stat. § 15A-959 provides for pretrial sanity hearings and states that:

> (c) Upon motion of the defendant and with the consent of the State the court may conduct a hearing prior to the trial with regard to the defense of insanity at the time of the offense. If the court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it may dismiss that charge, with prejudice, upon making a finding to that effect. The court's denial of relief under this subsection is without prejudice to the defendant's right to rely on the defense at trial. If the motion is denied, no reference to the hearing may be made at the trial, and recorded testimony or evidence taken at the hearing is not admissible as evidence at the trial.

N.C. Gen. Stat. § 15A-959(c) (2003) (emphasis supplied). The State asserts that the statute does not bar the use of pretrial testimony for the purpose of impeaching the experts with prior inconsistent statements. Prior inconsistent statements are not admissible as substantive evidence, but may be used for impeachment purposes. *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989). However, the statutory language quoted above does not limit the bar on using hearing testimony or evidence to "substantive evidence," but rather states a blanket prohibition. *Cf. State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998) (where the Court found no error in allowing the prosecutor to cross-examine defendant's expert using testimony from prior competency hearing (as opposed to an insanity hearing)). The court erred in allowing evidence taken at the pretrial insanity hearing to be admitted as impeachment evidence at defendant's trial. "The admission of technically incompetent evidence is harmless unless it is made to appear that defendants were prejudiced thereby and that a different result likely would have ensued had the evidence been excluded." *State v. Logner*, 297 N.C. 539, 549, 256 S.E.2d 166, 172 (1979). Because the only issue at trial was defendant's sanity at the time of the murder, and because substantial evidence including the testimony of all three expert witnesses tended to show that defendant was insane, we cannot say that the improper admission of Dr. de Beck's statements from the pretrial hearing was harmless.

[3] Defendant also argues that the court erred in excluding evidence supporting the expert testimony that defendant was insane at the time of the crime. We do not agree.

"[A] trial court's decision to admit evidence under Rule 403 will not be grounds for relief on appeal unless it is 'manifestly unsupported by reason or is so arbitrary it could not have been the result of

a reasoned decision.' " *State v. Love*, 152, N.C. App. 608, 614-15, 568 S.E.2d 320, 325 (2002), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 66 (2003), (quoting *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993)). Here, the court refused to allow Dr. de Beck to testify that in ten prior cases she had never found a defendant insane at the time of his crime. Although the court might properly have admitted such evidence, we cannot say that the court's determination to exclude such testimony was manifestly unsupported by reason.

The court also excluded testimony from defendant's brother about the brother's own mental illness, which was similar to defendant's. Two experts had previously testified that mental illnesses tended to run in families and Dr. de Beck specifically testified that mental illness ran in defendant's family. Defendant maintained that the brother's testimony was more compelling evidence that this type of mental illness in fact ran in defendant's family, and bolstered defendant's claim of insanity. We see no abuse of discretion and thus we overrule this assignment of error.

New trial.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. ELIZABETH REBECCA PALMER, DEFENDANT

No. COA05-148

(Filed 20 December 2005)

Embezzlement— motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motions to dismiss embezzlement charges, because: (1) defendant never had lawful possession of the incoming checks at issue nor was she entrusted with the checks by virtue of a fiduciary capacity; (2) defendant acquired the incoming checks through misrepresentation by setting up a post office box, using another employee's name and signature, and directing incoming checks to that address without authorization; (3) even though defendant had access to all incoming checks for both companies, she was not authorized to direct incoming checks to the post office box she

opened, nor was opening the mail or making out deposit slips for incoming checks one of defendant's duties; and (4) the appropriate charges against defendant should have been larceny.

Appeal by Defendant from judgment entered 3 March 2004 by Judge E. Penn Dameron in Superior Court, Buncombe County. Heard in the Court of Appeals 1 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Ann W. Matthews, for the State.

K.E. Krispen Culbertson, for defendant-appellant.

WYNN, Judge.

To be guilty of embezzlement, a defendant "must have been entrusted with and *received into his possession lawfully* the personal property of another[.]" *State v. Weaver*, 359 N.C. 246, 255, 607 S.E.2d 599, 604 (2005) (citation omitted) (emphasis in original). Defendant contends that the State's evidence established the crime of larceny (for which she was not charged), not embezzlement, because the evidence failed to show that she had acquired lawful possession of her employer's property. Since the record shows Defendant neither took lawful possession of her employer's property nor was she entrusted with the property by virtue of a fiduciary capacity, we hold there was insufficient evidence to support the charges of embezzlement.

The evidence at trial tended to show that in June 2002, Palmer Instruments, Inc. and Wahl Instruments, Inc. employed Defendant Elizabeth Rebecca Palmer as an account manager for the two separate companies, owned by Stephen Santangelo, which manufacture temperature measuring devices.

Defendant's duties as account manager included supervising two other employees in accounts payable and accounts receivable, acting as the computer administrator, and conducting payroll duties. Defendant's duties also included seeking out and looking at any financial document—including incoming checks, deposits, bank statements, and other financial documents. Pam Rogers, executive assistant and secretary of Palmer Instruments and Wahl Instruments, testified that Defendant had access to checks that were coming into the business from other companies. Ms. Rogers's duties included opening the mail, processing the checks, and making out deposit slips.

On 3 March 2003, Defendant applied for and opened a post office box under the name of Palmer Instruments. The application listed Pam Rogers, corporate secretary, as the person opening the post office box; Defendant forged Ms. Rogers's signature on the application. The driver's license number on the application matched Defendant's driver's license number on her employment application. Defendant had no authority to open the post office box in the company's name or sign Ms. Rogers's name.

On 5 March 2003, Defendant, without authorization, met with Karen Ferrell (a financial services advisor at Central Carolina Bank) and opened business bank accounts for Palmer Instruments and Wahl Instruments. Ms. Ferrell prepared corporate resolutions, signature cards, and internet banking forms for both companies and gave them to Defendant to acquire the appropriate signatures. All the forms were returned to Ms. Ferrell with purported signatures of Ms. Rogers and Mr. Santangelo; however, both testified at trial that the signatures were not theirs. Palmer Instruments corporate seal was also affixed to the resolutions and signature cards. Mr. Santangelo, who kept the seals, testified that he did not affix the seal to the resolutions or signature cards.

Central Carolina Bank's processing center found that Palmer Instruments corporate seal had been placed on Wahl Instruments resolution and signature card, and returned both to Ms. Ferrell for correction. Ms. Ferrell called Ms. Rogers who said she was not aware of any accounts with Central Carolina Bank. Ms. Rogers transferred the call to Defendant who told Ms. Ferrell to send the new forms to the post office box she opened. The forms were never returned to Ms. Ferrell. Defendant explained to Ms. Rogers that Ms. Ferrell had mistakenly opened a corporate account after she had left some papers in Ms. Ferrell's office.

Upon opening the Palmer Instruments account at Central Carolina Bank, Defendant deposited a check made payable to Palmer Instruments in the amount of $1573.81. Defendant also deposited a check made payable to Wahl Instruments in the amount of $2116.24 into the Wahl Instruments account at Central Carolina Bank. On 12 March 2003, Defendant deposited a check made payable to Palmer Instruments in the amount of $1105.17 into the Palmer Instruments account at Central Carolina Bank. Defendant also deposited a check made payable to Wahl Instruments in the amount of $127.71 into the Wahl Instruments account at Central Carolina Bank. Photographs from the bank surveillance video camera show

Defendant present at the bank on 5 and 12 March 2003, the dates written on the deposit slips.

Between 10 and 14 March 2003, Defendant wrote checks to herself from the Palmer Instruments and Wahl Instruments accounts at Central Carolina Bank; forged Ms. Rogers's signature on the checks; and deposited the checks in her personal bank account at the State Employees' Credit Union. From the Palmer Instruments account Defendant wrote herself a check for $1300.00. From the Wahl Instruments account Defendant wrote herself a check for $1500.00 and a check for $620.00.

On 25 March 2003, Ms. Ferrell called Mr. Santangelo to inform him that he still needed to sign and return the resolution and signature cards for Wahl Instruments' account. Mr. Santangelo told Ms. Ferrell that the companies did not have bank accounts at Central Carolina Bank, and she informed him that both companies had active accounts. Mr. Santangelo requested and obtained copies of all bank records for both accounts, including the resolutions, signature cards, deposit slips, and checks payable to Defendant. Mr. Santangelo searched Defendant's office and found Palmer Instruments' corporate seal in Defendant's desk drawer. Mr. Santangelo testified that he kept both companies' seals in his desk in a locked drawer, but he often unlocked the desk and left the room for brief periods of time.

Defendant presented no evidence at trial. A jury found Defendant guilty of four counts of uttering forged instruments and five counts of embezzlement. The trial court sentenced Defendant to six to eight months imprisonment for the uttering forged instrument charges and one charge of embezzlement. The trial court sentenced Defendant to a suspended sentence and placed Defendant on supervised probation for thirty-six months for the remaining four embezzlement charges to begin at the expiration of the active sentence.

On appeal to this Court, we dispositively agree with Defendant's contention that the trial court erred in denying her motions to dismiss the embezzlement charges.[1]

1. When reviewing a motion to dismiss, we view "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004) (citing *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986)), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 79 (2005). If we find that "substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to [have denied] the motion." *Id.* (citing *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983)). "Substantial evidence is

> To convict a defendant of embezzlement
>
> four distinct propositions of fact must be established: (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own use.

State v. Block, 245 N.C. 661, 663, 97 S.E.2d 243, 244 (1957) (internal citations omitted); *State v. McCaskill*, 47 N.C. App. 289, 292, 267 S.E.2d 331, 333, *disc. review denied*, 301 N.C. 101, 273 S.E.2d 306 (1980); *see also* N.C. Gen. Stat. § 14-90 (2004). Defendant argues that the State failed to present sufficient evidence as to the second and third prong.

To be guilty of embezzlement, a defendant "must have been entrusted with and *received into his possession lawfully* the personal property of another[.]" *Weaver*, 359 N.C. at 255, 607 S.E.2d at 604 (citation omitted) (emphasis in original). Defendant cites *State v. Keyes*, 64 N.C. App. 529, 307 S.E.2d 820 (1983), to support her argument that she never had lawful possession of the incoming checks at issue. In *Keyes*, the defendants were employees at a plant with access to all the materials in the plant, but were never given the authority to sell any of the plant's materials. *Id.* at 532, 307 S.E.2d at 822. The defendants sold materials from the plant and kept the profits for their personal use. This Court found that the "defendants may have had access to machinery parts, but there is no evidence that they received machinery parts by the terms of their employment. There is a difference between having access to property and possessing property in a fiduciary capacity." *Id.* This Court held that the defendants never took lawful possession of, or were entrusted with the parts. *Id.*, 307 S.E.2d at 823.

In the recently decided case of *Weaver*, our Supreme Court reversed the defendant's convictions for aiding and abetting embezzlement and conspiracy to embezzle. The defendant in that case was plant manager of a family business and his wife, Kimberly, was a receptionist in training to be an accounting manager at two of the family businesses. *Weaver*, 359 N.C. at 248, 607 S.E.2d at 600. Kimberly's duties "included entering payables, making bank deposits, and entering data." *Id.* However, Kimberly had no authority to write

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such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citing *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)).

checks from the company and was not authorized to use the signature stamp unless given explicit permission on a case-by-case basis. *Id.* The defendant instructed Kimberly to misappropriate funds from the companies for personal use. *Id.* at 249, 607 S.E.2d at 600-01. Kimberly used counterchecks and checks earmarked for shredding, wrote checks, used the signature stamp, and used the checks for personal expenses. *Id.*, 607 S.E.2d at 601. Our Supreme Court concluded that while Kimberly "had *access* to the checks and signature stamp by virtue of her status as an employee . . ., we cannot say, based on these facts, that Kimberly Weaver's possession of this property was *lawful* nor are we persuaded that this property was under Kimberly Weaver's care and control as required by N.C.G.S. § 14-90." *Id.* at 256, 607 S.E.2d at 605.

In this case, like in *Keyes* and *Weaver*, Defendant never took *lawful* possession of the incoming checks, nor was she entrusted with the checks by virtue of a fiduciary capacity. *Id.* Instead, Defendant acquired the incoming checks through misrepresentation, by setting up a post office box, using Ms. Rogers's name and signature, and directing incoming checks to that address without authorization. Even though Defendant had access to all incoming checks for both Palmer Instruments and Wahl Instruments, she was not authorized to direct incoming checks to the post office box she opened. Nor was opening the mail or making out the deposit slips for incoming checks one of Defendant's duties. Even though Defendant generally had access to incoming checks, she was not in lawful possession nor was she entrusted with these particular checks as a fiduciary, as she obtained the checks through misrepresentation. *See Weaver*, 359 N.C. at 256, 607 S.E.2d at 605; *Keyes*, 64 N.C. App. at 532, 307 S.E.2d at 823.

In sum, the appropriate charges against Defendant should have been larceny. In this case as in *Weaver*, "[b]ecause the State cannot make the 'allegation[s] and proof correspond,' " we must conclude that the trial court erred in denying Defendant's motions to dismiss the embezzlement charges. *Weaver*, 359 N.C. at 257, 607 S.E.2d at 605. As we reverse Defendant's convictions for embezzlement, we do not need to address her remaining assignments of error.

Reversed.

Judges McGEE and GEER concur.

STATE OF NORTH CAROLINA v. NOEL ARELLANO SANCHEZ

No. COA05-185

(Filed 20 December 2005)

Bail and Pretrial Release— appearance bond—forfeiture—grounds for relief—notice

The trial court lacked authority to grant surety's motion to set aside an entry of forfeiture of an appearance bond under N.C.G.S. § 15A-544.4(e) on the ground that the surety was not provided with notice of the forfeiture within thirty days after entry of forfeiture, and the case is remanded with instructions for the trial court to either dismiss surety's motion or deny the same for the reasons set forth in the Court of Appeals opinion, because: (1) surety's motion to set aside the entry of forfeiture was not premised on any ground set forth in N.C.G.S. § 15A-544.5, and that statute states there shall be no relief from a forfeiture except as provided in the statute and that a forfeiture shall be set aside for any one of the reasons set forth in Section (b)(1-6) and none other; (2) sureties are not without recourse where notices of forfeiture are not in compliance with N.C.G.S. § 15A-544.4 since the General Assembly specifically made allowance for relief from final judgment of forfeiture for faulty notice, N.C.G.S. § 15A-544.8(b)(1); and (3) the fact that the General Assembly omitted faulty notice as a ground for relief from an entry of forfeiture suggests the legislature made a conscious choice in this regard.

Appeal by surety from judgment entered 15 November 2004 by Judge Edgar B. Gregory in Yadkin County District Court. Heard in the Court of Appeals 13 October 2005.

Shore, Hudspeth & Harding, PA, by N. Lawrence Hudspeth, III for Yadkin County Schools.

Morrow, Alexander, Tash, Kurtz & Porter, PLLC, by Benjamin D. Porter, for defendant surety.

LEVINSON, Judge.

Appellant American Safety Casualty (surety) appeals from an order entered 15 November 2004 denying its motion to set aside forfeiture. We reverse.

On 19 May 2004 surety signed, by the signature of bail agent Michael A. Williams, an appearance bond in the amount of $50,000.00 for the pretrial release of criminal defendant Noel Arellano Sanchez. Sanchez was charged with conspiring to traffic in cocaine.

On 21 July 2004 Sanchez failed to appear for a court appearance. The trial court directed in open court that an order for arrest and an order of forfeiture issue, and that the clerk of court give notice to the defendant and all sureties that the appearance bond posted for the defendant was to be forfeited. Subsequently, a Bond Forfeiture Notice was prepared by the clerk and keyed into the Civil Case Processing System maintained by the North Carolina Administrative Office of the Courts on 27 August 2004. This Notice listed 21 July 2004 as the date of forfeiture and 24 January 2005 as the final judgment date. The notice of forfeiture was served on defendant and all sureties on 27 August 2004.

On 1 September 2004 surety, through bail agent Michael A. Williams, moved to set aside the entry of forfeiture pursuant to N.C. Gen. Stat. § 15A-544.4(e) on the grounds that surety was not provided with notice of the forfeiture within thirty days after entry of forfeiture.

Surety's motion to set aside forfeiture was heard 3 November 2004 before the trial court, and an order denying the same was entered 15 November 2004. The trial court concluded that the forfeiture was "entered on August 27, 2004", and that surety was "afforded the appropriate opportunity to respond."

Surety appeals.

As a preliminary matter, we note that appellant did not set forth the grounds for appellate review in its brief as required by N.C.R. App. P. 28(b)(4), and neither party has addressed whether the subject order on appeal is interlocutory or is, alternatively, a "final order" within the meaning of N.C. Gen. Stat. § 15A-544.5(h) (2003) ("An order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal."). Under N.C. Gen. Stat. § 1A-1, Rule 54(a) (2003), a judgment "is either interlocutory or the final determination of the rights of the parties." "A final judgment is one which disposes of the cause as to all parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and

judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). While the order on appeal clearly constitutes a ruling on surety's motion to set aside the order of forfeiture, it is not based on any of the "Reasons for Set Aside" set forth in N.C. Gen. Stat. § 15A-544.5(b) (2003). We reserve for another day the issue of whether the General Assembly intended to permit a party to take appeal from every order on a motion to set aside a forfeiture based upon reasons not set forth by the General Assembly in G.S. § 15A-544.5(b). For purposes of this appeal, we assume that the order on appeal is a final order subject to immediate appellate review.

Surety argues that the trial court erred by denying its motion to set aside the forfeiture due to lack of timely notice under N.C. Gen. Stat. § 15A-544.4(e) (2003). Specifically, surety argues that, because the notice of forfeiture was mailed more than thirty days after the date the forfeiture was "entered", the entry of forfeiture must be set aside. Thus, surety contends, the forfeiture was "entered" on 21 July 2004 when the defendant failed to appear and the trial court directed that an order for arrest and forfeiture issue. The School Board argues, on the contrary, that the notice of forfeiture was not "entered" until the information regarding the bond forfeiture was keyed into the Civil Case Processing System and the Bond Forfeiture Notice prepared by the clerk on 27 August 2004. Thus, under the School Board's reasoning, the notice of forfeiture would have been timely.

G.S. § 15A-544.4(e) provides:

> Notice under this section shall be mailed not later than the thirtieth day after the date on which the forfeiture is entered. If notice under this section is not given within the prescribed time, the forfeiture shall not become a final judgment and shall not be enforced or reported to the Department of Insurance.

"The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in G.S. § 15A-544.5." *State v. Robertson*, 166 N.C. App. 669, 670-71, 603 S.E.2d 400, 401 (2004). N.C. Gen. Stat. § 15A-544.5 (2003) provides, in pertinent part:

> (a) Relief Exclusive.—There shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section.
>
> . . .

(b) Reasons for Set Aside.—A forfeiture shall be set aside for any one of the following reasons, and none other:

(1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.

(2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.

(3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.

(4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question.

(5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.

(6) The defendant was incarcerated in a unit of the Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear.

N.C. Gen. Stat. § 15A-544.8 (2003) provides, in pertinent part:

(a) Relief Exclusive.—There is no relief from a final judgment of forfeiture except as provided in this section.

(b) Reasons.—The court may grant the defendant or any surety named in the judgment relief from the judgment, for the following reasons, and none other:

(1) The person seeking relief was not given notice as provided in G.S. 15A-544.4.

(2) Other extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.

In the instant case, surety's motion to set aside the entry of forfeiture was not premised on any ground set forth in G.S. § 15A-544.5. This statute clearly states that "[t]here shall be no relief from a forfeiture" except as provided in the statute, and that a forfeiture "shall be set aside for any one of the [reasons set forth in Section (b)(1-6)], and none other." The trial court, then, lacked the authority to grant surety's motion. Furthermore, while both parties urge this Court to resolve the issue of when a notice of forfeiture is "entered" within the meaning of G.S. § 15A-544.4(e), we decline to do so. A determination of when the notice of forfeiture was entered is not essential to our holding and would therefore constitute *dicta*. *See Hayes v. Wilmington*, 243 N.C. 525, 536-37, 91 S.E.2d 673, 682 (1956) ("[I]f the statement in the opinion was . . . superfluous and not needed for the full determination of the case, it is not entitled to be accounted a precedent[.]").

We observe that sureties are not without recourse where notices of forfeiture are not in compliance with G.S. 15A-544.4. *See* G.S. § 15A-544.8(b)(1). That the General Assembly specifically made allowance for relief from final judgment of forfeiture for faulty notice, and omitted the same as a ground for relief from an entry of forfeiture, suggests the legislature made a conscious choice in this regard. *See Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977) ("In interpreting statutes, the primary duty of this Court is to ascertain and effectuate the intent of the Legislature.") (citations omitted).

We reverse and remand with instructions for the trial court judge to either dismiss surety's motion or deny the same for the reasons set forth in this opinion.

Reversed.

Judges McCULLOUGH and ELMORE concur.

RHODES v. PRICE BROS., INC.

[175 N.C. App. 219 (2005)]

RUTH D. RHODES, MOTHER AND PERSONAL REPRESENTATIVE OF THE ESTATE, AND CARSON L. KELLY, FATHER, OF RICHARD DELL KELLY, DECEASED EMPLOYEE, PLAINTIFFS V. PRICE BROTHERS, INC., EMPLOYER, AND TRANSCONTINENTAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA05-256

(Filed 20 December 2005)

Workers' Compensation— deceased child—no willful abandonment by parent

A parent (the father) did not willfully abandon his child after his divorce, and was eligible to receive workers' compensation death benefits, where there were regular visits, gifts, cards, telephone contacts, and physical and verbal affection, and the father made all of his child support payments in a timely manner, even when there was a period of disagreement in which the child did not visit the father. N.C.G.S. § 97-40.

Appeal by Plaintiff-Mother from opinion and award entered 11 October 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 November 2005.

Archibald Law Office, by C. Murphy Archibald, for plaintiff-mother-appellant.

Shawna Davis Collins, for plaintiff-father-appellee.

Jones, Hewson & Wollard, by R.G. Spratt, III, for defendant-appellees.

WYNN, Judge.

Under section 97-40 of the North Carolina General Statutes, a parent who willfully abandons the care and maintenance of his or her child is not eligible to receive workers' compensation death benefits. In this case, the mother of a deceased son covered under the Workers' Compensation Act, contends that the full Commission erroneously found that the father did not willfully abandon his son. Because there was competent evidence to support the full Commission's findings of fact that the father regularly visited and communicated with his son, sent him cards and gifts, and made all his child support payments in a timely manner, we affirm the full Commission's conclusion that the father did not abandon his son.

On 1 September 2000, Richard Dell Kelly died as a result of the injuries he sustained from an accident in a vehicle owned by his employer Defendant Price Brothers, Inc. Richard died intestate leaving his mother (Ruth D. Rhodes) and father (Carson L. Kelly) as his sole surviving lineal heirs.

Defendants acknowledged that Richard's death was compensable under the Workers' Compensation Act but have not paid the death benefits due to a dispute between the parents as to who is entitled to receive the benefits. At a hearing before Deputy Commissioner Adrian Phillips, Ms. Rhodes asserted that Mr. Kelly was "not entitled to any death benefits because his behavior after the parents' divorce constitutes abandonment of the deceased employee." Deputy Commissioner Phillips concluded that the death benefits should be distributed equally between Ms. Rhodes and Mr. Kelly. Following the full Commission's affirmance of the opinion and award of Deputy Commissioner Phillips, Ms. Rhodes appealed to this Court.

On appeal, Ms. Rhodes argues that the full Commission erred in (1) denying her motion to add additional evidence to the record and (2) concluding that Mr. Kelly did not willfully and wrongfully abandon the care and maintenance of Richard.

First, Ms. Rhodes contends that the full Commission erred in denying her motion to add additional evidence, i.e. a 1986 Separation Agreement and record of child support payments. The question of whether to take additional evidence is addressed to the sound discretion of the full Commission, and its decision is not reviewable on appeal in the absence of a manifest abuse of that discretion. *Allen v. Roberts Elec. Contrs.*, 143 N.C. App. 55, 66, 546 S.E.2d 133, 141 (2001). The full Commission did not manifestly abuse its discretion in denying Ms. Rhodes's motion to add additional evidence.

Ms. Rhodes also argues that the full Commission erred in concluding that Carson Kelly did not willfully and wrongfully abandon the care and maintenance of Richard. We disagree.

This Court's standard for reviewing an appeal from the full Commission is limited to determining "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The full Commission's findings of fact "are conclusive on appeal when supported by competent evidence," even if there is evi-

dence to support a contrary finding, *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

Section 97-40 of the North Carolina General Statutes prohibits distribution of death benefit compensation to:

> a parent who has willfully abandoned the care and maintenance of his or her child and who has not resumed its care and maintenance at least one year prior to the first occurring of the majority or death of the child and continued its care and maintenance until its death or majority.

N.C. Gen. Stat. § 97-40 (2004). "[T]he analysis of whether a parent has 'willfully abandoned the care and maintenance' of a child requires the consideration of numerous factors: the parent's display of love, care, and affection for the child and the parent's financial support and maintenance of the child." *Davis v. Trus Joist MacMillan*, 148 N.C. App. 248, 253, 558 S.E.2d 210, 214, *disc. review denied*, 355 N.C. 490, 563 S.E.2d 564 (2002).

In her brief, Ms. Rhodes argued that the following assignments of error were unsupported by any competent evidence:

> 5. Plaintiff Carson Lydell Kelly visited with Richard Dell Kelly on a regular basis between the time of the separation of the parties until Richard Dell Kelly reached the age of majority, with the exception of one time period when Richard Dell Kelly was approximately fifteen years of age.
>
> 6. When Richard Dell Kelly was approximately fifteen years of age, he and his step-mother, Shelia Kelly, had a disagreement that lasted for approximately six to nine months. During this time period, Richard Dell Kelly did not go to his father's home to visit; however, Carson Lydell Kelly kept in contact with his son on a weekly basis by way of e-mails.
>
> ***
>
> 8. Plaintiff Carson Lydell Kelly sent cards and gifts on a regular basis for holidays and the birthdays of plaintiffs' minor children, as well as visited with the minor children during the holidays.

Our review of the record on appeal shows there is competent evidence to support the full Commission's findings of fact. *Morrison*, 304 N.C. at 6, 282 S.E.2d at 463. Findings of fact five and six are supported by Mr. Kelly's testimony that he and Richard went on a camping trip together when Richard was seventeen. Shelia Kelly, Mr. Kelly's wife, testified that when Richard was fifteen years old, they had a disagreement and Richard refused to visit his father until he was sixteen years old. She stated that following that argument Richard resumed visitation with his father. Tammy Kelly, Richard's aunt, testified that during the period Richard did not visit his father, Richard and Mr. Kelly communicated through instant message and email once a week. Supporting finding of fact eight, Shelia Kelly testified that if Richard did not spend a holiday or birthday with his father, Mr. Kelly sent cards and gifts to him. Mr. Kelly also testified that he sent a birthday card every year. We hold that these facts support the full Commission's findings of fact.

Moreover, the full Commission's findings of fact that Mr. Kelly visited with Richard on a regular basis, sent him cards and gifts for holidays and birthdays, maintained telephone contact on a regular basis, and physically and verbally displayed affection towards Richard, support the full Commission's conclusion that Mr. Kelly did not abandon the care of his son. *See Davis*, 148 N.C. App. at 253, 558 S.E.2d at 214. Additionally, the full Commission's finding that Mr. Kelly made all of his child support payments in a timely manner and maintained a health insurance policy on Richard, support the conclusion that Mr. Kelly did not abandon the maintenance of his son. *Id.*

Accordingly, we uphold the full Commission's Opinion and Award which concluded that Mr. Kelly did not willfully and wantonly abandon the care and maintenance of Richard.

Affirmed.

Judges McGEE and GEER concur.

STATE v. GIBSON

[175 N.C. App. 223 (2005)]

STATE OF NORTH CAROLINA v. JAMES CHARLES GIBSON

No. COA05-548

(Filed 20 December 2005)

Sentencing— habitual felon—equal protection—cruel and unusual punishment—proportionality

The trial court did not err by denying defendant's motion to dismiss an habitual felon indictment even though defendant contends it violated the equal protection clause under the Fourteenth Amendment and the cruel and unusual punishment clause under the Eighth Amendment based on the fact that the District Attorney in Moore County has exercised his discretion in deciding to prosecute all persons eligible for habitual felon status which is allegedly different from the way similarly situated persons are treated in other North Carolina counties, because: (1) there may be selectivity in prosecutions and the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there is a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification; (2) defendant failed to provide evidence to substantiate intentional discrimination but instead relies solely on statistics regarding the number of convictions in Moore County and Randolph County; (3) without substantial evidence of intentional discrimination and absent a showing by defendant that the prosecutorial system was motivated by a discriminatory purpose and had a discriminatory effect, the District Attorney has not abused his prosecutorial discretion in deciding to seek indictments against all eligible individuals; and (4) the sentence imposed under the habitual felon laws is not so grossly disproportionate as to constitute cruel and unusual punishment.

Appeal by defendant from a judgment consistent with a felony conviction on 6 January 2005[1] by Judge Henry E. Frye, Jr. in Moore County Superior Court. Heard in the Court of Appeals 2 November 2005.

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1. By orders dated 30 June and 1 July 2005, this Court granted defendant's motion for consolidation of COA05-548 and COA05-549 **for hearing only**. Therefore, two separate opinions are issued. *See State v. Blyther*, 175 N.C. App. ——, —— S.E.2d —— (COA05-549) (2005).

Attorney General Roy Cooper, by Assistant Attorney General Lisa Bradley Dawson, for the State.

Bruce T. Cunningham, Jr. for defendant.

BRYANT, Judge.

James Charles Gibson (defendant) appeals from a judgment consistent with a felony conviction on 6 January 2005. Defendant pled guilty to attaining the status of an habitual felon and received seventy to ninety-three months imprisonment.

On 10 January 2003, defendant broke into a store at 1:00 a.m. and removed eight cartons of cigarettes. He was arrested and charged with breaking and entering and larceny. Defendant appeals.

Defendant contends the trial court erred in denying a motion to dismiss an habitual felon indictment in violation of the equal protection clause (Fourteenth Amendment) and cruel and unusual punishment clause (Eighth Amendment) under the U.S. Constitution.

Pursuant to N.C. Gen. Stat. § 14-7.1 "any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." N.C.G.S. § 14-7.1 (2003). In order for a selective prosecution claim to prevail, defendant must show the prosecutorial system was motivated by a discriminatory purpose and had a discriminatory effect. *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995); *State v. Spicer*, 299 N.C. 309, 312, 261 S.E.2d 893, 896 (1980); *State v. Wilson*, 311 N.C. 117, 123, 316 S.E.2d 46, 51 (1984). To demonstrate such intentional discrimination, the defendant must allege " 'that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' " *Id.* at 123-24, 316 S.E.2d at 51 (quoting *Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 453 (1962)). In deciding who will and who will not be prosecuted, district attorneys must weigh many factors such as the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, and his own sense of justice in the particular case. *See State v. Dammons*, 159 N.C. App. 284, 583 S.E.2d 606, *rev. denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382 (2004); *see also State v. Cates*, 154 N.C. App. 737, 740, 573 S.E.2d 208, 210 (2002) (concluding that it was within the prosecutor's discretion to select among the defendant's prior convictions for pur-

poses of proving his habitual felon status and calculating his prior record level), *disc. rev. denied*, 356 N.C. 682, 577 S.E.2d 897 (2003). The proper exercise of a prosecutor's broad discretion in his consideration of factors which relate to the administration of criminal justice aids tremendously in achieving the goal of fair and effective administration of the criminal justice system. *Spicer*, 299 N.C. at 311-12, 261 S.E.2d at 895.

In the present case, defendant was prosecuted in Moore County and asserts he has been selectively prosecuted as an habitual felon. To support his claim, defendant states that there have been substantially more convictions of habitual felon indictments in Moore County than there have been in Randolph County over a nine-year period. Defendant argues that because the District Attorney of Moore County has a policy of prosecuting all persons potentially eligible for habitual felon status, such persons are treated differently in Moore County from the way similarly situated persons are treated in other North Carolina counties, counties where an habitual felon prosecution may or may not occur. Defendant argues he belongs to a protected class of individuals that can be precisely described and that a fundamental right is involved.

It is well established that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there is a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. *State v. Wilson*, 139 N.C. App. 544, 550, 533 S.E.2d 865, 870 (citations omitted). Here, defendant pled guilty to attaining the status of an habitual felon. *See State v. Parks*, 146 N.C. App. 568, 572, 553 S.E.2d 695, 697 (2001) ("North Carolina appellate courts have repeatedly upheld the use of [the Habitual Felon Act and Structured Sentencing Act] together, as long as different prior convictions justify each."), *disc. rev. denied*, 355 N.C. 220, 560 S.E.2d 355, *cert. denied*, 537 U.S. 832, 154 L. Ed. 2d 49 (2002). Further, the District Attorney for Moore County has exercised his discretion in deciding to prosecute all persons eligible for habitual felon status. The defendant fails to provide evidence to substantiate intentional discrimination and relies solely on statistics regarding the number of convictions in the two counties. Without substantial evidence of intentional discrimination, and further, absent a showing by defendant that the prosecutorial system was motivated by a discriminatory purpose and had a discriminatory effect, the District Attorney of Moore County has not abused his prosecutorial discre-

tion in deciding to seek indictments against all eligible individuals. *See Parks*, 146 N.C. App. at 570-71, 553 S.E.2d at 695. This assignment of error is overruled.

Defendant also argues there is a "gross disproportionality" between his seventy to ninety-three month sentence and his crime of stealing eight cartons of cigarettes. In *State v. Hensley*, the defendant argued that his sentence to a term of imprisonment of a minimum of ninety months to a maximum of one-hundred-seventeen months under the Habitual Felon Act was disproportionate to the crime of obtaining property by false pretenses. *State v. Hensley*, 156 N.C. App. 634, 636, 577 S.E.2d 417, 419, *disc. rev. denied*, 357 N.C. 167, 581 S.E.2d 64 (2003). "Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Id.* The sentence imposed under the habitual felon laws is not so "grossly disproportionate" so as to result in constitutional infirmity. *Id.* at 639, 577 S.E.2d at 421.

Accordingly, we find in sentencing defendant, the trial court did not violate his constitutional rights under the Eighth and Fourteenth Amendment. This assignment of error is overruled.

No error.

Judges HUDSON and CALABRIA concur.

STATE OF NORTH CAROLINA v. SAMUEL AARON BLYTHER

No. COA05-549

(Filed 20 December 2005)

Sentencing— habitual felon—equal protection—cruel and unusual punishment

The trial court did not err by denying defendant's motion to dismiss an habitual felon indictment even though defendant contends it violated the equal protection clause under the Fourteenth Amendment and the cruel and unusual punishment clause under the Eighth Amendment based on the fact that the District Attorney in Moore County has exercised his discretion in deciding to prosecute all persons eligible for habitual felon status which is

allegedly different from the way similarly situated persons are treated in other North Carolina counties, because: (1) there may be selectivity in prosecutions and the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there is a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification; (2) defendant failed to provide evidence to substantiate intentional discrimination but instead relies solely on statistics regarding the number of convictions in Moore County and Randolph County; and (3) without substantial evidence of intentional discrimination and absent a showing by defendant that the prosecutorial system was motivated by a discriminatory purpose and had a discriminatory effect, the District Attorney has not abused his prosecutorial discretion in deciding to seek indictments against all eligible individuals.

Appeal by defendant from a judgment consistent with a felony conviction on 13 December 2004[1] by Judge Ronald E. Spivey in Moore County Superior Court. Heard in the Court of Appeals 2 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Dorothy Powers, for the State.

Bruce T. Cunningham, Jr., for defendant.

BRYANT, Judge.

Samuel Aaron Blyther (defendant) appeals from a judgment consistent with a felony conviction on 13 December 2004. Defendant pled guilty to attaining the status of an habitual felon and received seventy to ninety-three months imprisonment.

On 21 August 1997, defendant was a passenger in a vehicle stopped by law enforcement for unsafe operation. After the stop, a bag with cocaine residue was found behind defendant's seat and he was charged with the sale of one-tenth of a gram of cocaine to an undercover agent. Defendant appeals.

Defendant contends the trial court erred in denying a motion to dismiss an habitual felon indictment in violation of the equal protec-

1. By orders dated 30 June and 1 July 2005, this Court granted defendant's motion for consolidation of COA05-548 and COA05-549 **for hearing only**. Therefore, two separate opinions are issued. *See State v. Gibson*, 175 N.C. App. ——, —— S.E.2d —— (COA05-548) (2005).

tion clause (Fourteenth Amendment) and cruel and unusual punishment clause (Eighth Amendment) under the U.S. Constitution.

Pursuant to N.C. Gen. Stat. § 14-7.1 "any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." N.C.G.S. § 14-7.1 (2003). In order for a selective prosecution claim to prevail, defendant must show the prosecutorial system was motivated by a discriminatory purpose and had a discriminatory effect. *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995); *State v. Spicer*, 299 N.C. 309, 312, 261 S.E.2d 893, 896 (1980); *State v. Wilson*, 311 N.C. 117, 123, 316 S.E.2d 46, 51 (1984). To demonstrate such intentional discrimination, the defendant must allege " 'that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' " *Id.* at 123-24, 316 S.E.2d at 51 (quoting *Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 453 (1962)). In deciding who will and who will not be prosecuted, district attorneys must weigh many factors such as "the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, and his own sense of justice in the particular case." *See State v. Dammons*, 159 N.C. App. 284, 583 S.E.2d 606, *rev. denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382 (2004); *see also State v. Cates*, 154 N.C. App. 737, 740, 573 S.E.2d 208, 210 (2002) (concluding that it was within the prosecutor's discretion to select among the defendant's prior convictions for purposes of proving his habitual felon status and calculating his prior record level), *disc. rev. denied*, 356 N.C. 682, 577 S.E.2d 897 (2003). The proper exercise of a prosecutor's broad discretion in his consideration of factors which relate to the administration of criminal justice aids tremendously in achieving the goal of fair and effective administration of the criminal justice system. *Spicer*, 299 N.C. at 311-12, 261 S.E.2d at 895.

In the present case, defendant was prosecuted in Moore County and asserts he has been selectively prosecuted as an habitual felon. To support his claim, defendant states that there have been substantially more convictions of habitual felon indictments in Moore County than there have been in Randolph County over a nine-year period. Defendant argues that because the District Attorney of Moore County has a policy of prosecuting all persons potentially eligible for habitual felon status, such persons are treated differently in Moore County from the way similarly situated persons are treated in other North

Carolina counties, counties where an habitual felon prosecution may or may not occur. Defendant argues he belongs to a protected class of individuals that can be precisely described and that a fundamental right is involved.

It is well established that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there is a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. *State v. Wilson*, 139 N.C. App. 544, 550, 533 S.E.2d 865, 870 (citations omitted). Here, defendant pled guilty to attaining the status of an habitual felon. *See State v. Parks*, 146 N.C. App. 568, 572, 553 S.E.2d 695, 697 (2001) ("North Carolina appellate courts have repeatedly upheld the use of [the Habitual Felon Act and Structured Sentencing Act] together, as long as different prior convictions justify each."), *disc. rev. denied*, 355 N.C. 220, 560 S.E.2d 355, *cert. denied*, 537 U.S. 832, 154 L. Ed. 2d 49 (2002). Further, the District Attorney for Moore County has exercised his discretion in deciding to prosecute all persons eligible for habitual felon status. The defendant fails to provide evidence to substantiate intentional discrimination and relies solely on statistics regarding the number of convictions in the two counties. Without substantial evidence of intentional discrimination, and further, absent a showing by defendant that the prosecutorial system was motivated by a discriminatory purpose and had a discriminatory effect, the District Attorney of Moore County has not abused his prosecutorial discretion in deciding to seek indictments against all eligible individuals. *See Parks*, 146 N.C. App. at 570-71, 553 S.E.2d at 695. This assignment of error is overruled.

No error.

Judges HUDSON and CALABRIA concur.

STATE OF NORTH CAROLINA v. JOSEPH CHARLES PENDLETON, DEFENDANT

No. COA05-307

(Filed 20 December 2005)

1. Appeal and Error— preservation of issues—constitutional error—assignment of error

Defendant's failure to refer in his assignment of error to any constitutional error in the denial of a continuance waived appellate review of any constitutional issue.

2. Criminal Law— DSS not a prosecutorial agency—continuance and review of notes—denied

The Department of Social Services was not a prosecutorial agency in the circumstances of this prosecution for statutory rape and other charges. The Department was thus not required to turn over its notes to defendant pursuant to N.C.G.S. § 15A-903(a)(1), and the court did not abuse its discretion by denying defendant a continuance to review the notes and interview witnesses.

3. Evidence— description of sexually explicit photos—similar previous testimony

The trial court did not abuse its discretion by allowing a victim of statutory rape and other crimes to describe explicit photos of her mother and defendant. This testimony did not differ significantly from her previous testimony.

4. Criminal Law— flight—instruction—evidence of avoidance of apprehension—prejudice not shown

Defendant did not show prejudicial error from an instruction on flight where he missed two appointments with a detective, fled the area, and presented false identification when pulled over in South Carolina, and where he merely made the conclusory statement on appeal that the instruction was prejudicial.

Appeal by defendant from judgments entered 17 December 2004 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 19 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

James M. Bell, for defendant-appellant.

HUDSON, Judge.

At the 14 December 2004 criminal session of the superior court in Guilford County, defendant Joseph Charles Pendleton was tried on multiple charges of statutory rape, statutory sex offenses and taking indecent liberties with a child. The court dismissed the charges related to offenses occurring before 31 January 2003 (03 CRS 106725-29). The jury found defendant guilty of all offenses occurring after 31 January 2003 (03 CRS 106730-35). Defendant appeals. As discussed below, we find no error.

The evidence tended to show the following: Defendant met Johnette Jones through the Internet in fall 2000 and the two soon began dating. Jones lived with her twelve-year-old daughter, C., and four-year-old son. C. testified that on 18 December 2001, defendant came to her home while her mother and brother were at church and performed oral sex on her. After her mother returned home, defendant had sex with both C. and her mother, and C. took sexually explicit photos of her mother and defendant. C. testified that defendant continued to have sex with her until June or July 2003.

Child Protective Services investigator Maria Geer and police Detective Carlene Dix interviewed C. about the incidents involving defendant. Detective Dix obtained warrants for defendant's arrest on 8 December 2003, charging him with various sex offenses. Detective Dix contacted defendant several times by telephone that month. On 2 February 2004, defendant was arrested on a fugitive warrant in Rock Hill, S.C. following a routine traffic stop during which he produced a boat license bearing someone else's name.

[1] Defendant first argues that the court erred by denying his motion to continue after the State produced discovery notes on the morning of trial. We disagree.

"The appellate standard of review of the denial of a motion to continue is abuse of discretion, unless the denial raises a constitutional issue." *State v. Barkley*, 144 N.C. App. 514, 523, 551 S.E.2d 131, 137 (2001), *disc. appeal dismissed*, 354 N.C. 221, 554 S.E.2d 646 (2001). Although defendant argues in his brief that the court's denial implicated his constitutional rights, his assignment of error does not

refer to any constitutional errors. Defendant has thus waived our consideration of any constitutional error here.

[2] Defendant contends that the notes, which originated from the county Department of Social Services ("DSS"), contained names of possible witnesses, and he moved to continue in order to interview them. The court ruled that DSS was not required to turn over the notes to defendant because DSS was not a prosecutorial agency pursuant to N.C. Gen. Stat. § 15A-903(a)(1), and thus denied the motion to continue. The statute provides, in pertinent part, that the State:

> Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.

N.C. Gen. Stat. § 15A-903 (2003). Defendant contends that DSS is a prosecutorial agency pursuant to the statute, and that the court was required to continue the trial to allow him additional investigatory time. Defendant cites no case in this State in which DSS has been determined to be a prosecutorial agency under N.C. Gen. Stat. § 15A-903 or even interpreting the phrase "prosecutorial agency," and we have found none. The record reveals that the notes in question were not part of the prosecution file, and there is no suggestion that DSS acted in the capacity of a prosecutorial agency. DSS referred the matter to the police, who developed their own evidence by interviewing C. Although a DSS employee sat in on the interview, we do not believe that this transformed DSS into a prosecutorial agency in this case. Under these circumstances, the court did not abuse its discretion in denying defendant's motion to continue.

[3] Defendant next argues that the court abused its discretion by allowing C. to describe the explicit photos showing her mother and defendant. We disagree.

Defendant contends that the court abused its discretion by failing to exclude C.'s testimony pursuant to N.C. R. Evid. 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2003).

> Exclusion of evidence on the basis of Rule 403 is within the sound discretion of the trial court, and abuse of that discretion will be found on appeal only if the ruling is 'manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision.

State v. White, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (internal citation omitted), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999).

Here, the court refused to allow the photographs themselves to be admitted, but allowed C. to describe what they showed. This testimony, describing her mother and defendant having sex, was not significantly different than C.'s previous testimony about the sexual relationship between her mother and defendant. We cannot say that the court abused its discretion by allowing C. to testify similarly about the photographs.

[4] Defendant also argues that the court erred in giving the jury an instruction on flight to avoid prosecution. We disagree.

Defendant contends that the evidence did not support the instruction on flight to the jury. Following her interview with defendant, Detective Dix obtained warrants for his arrest. Defendant asserts that because Detective Dix did not phone defendant to tell him about the warrants, defendant did not know about the warrants and had no reason to flee. When defendant was pulled over in South Carolina, he pulled over without incident and offered no resistance.

"Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There 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). "So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977).

Here, defendant failed to keep two appointments with Detective Dix, left the Greensboro area, and then presented false identification when he was pulled over in South Carolina. This evidence indicates that defendant took steps to avoid apprehension and thus supports the instruction on flight. In addition, defendant fails to explain how this instruction was prejudicial to him, instead merely making the conclusory statement that "the court's instruction to the jury on the issue of flight was prejudicial." Defendant has failed to show prejudicial error by the court.

No error.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL BRADLEY

No. COA05-410

(Filed 20 December 2005)

Sentencing— habitual felon—sufficiency of indictment

The trial court erred in a possession with intent to sell and deliver cocaine case by sentencing defendant as an habitual felon based on the original charges and the 16 July 2004 drug offense, and the case is reversed and remanded for resentencing, because: (1) where a felony guilty plea and admission to habitual felon status are adjudicated and sentencing is continued on the same until a later date, a subsequent felony charge must be accompanied by a new habitual felon indictment or bill of information to comport with the statutory requirements of N.C.G.S. § 14-7.3; and (2) defendant's guilty pleas on the original charges were adjudicated but the actual entry of judgment continued until some later date, the State had not obtained a new habitual felon indictment as required by N.C.G.S. § 14-7.3, and defendant had not agreed to waive the same and admit his status pursuant to a bill of information.

Appeal by defendant from judgments entered 5 August 2004 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 3 November 2005.

*Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Br*ooks, *for the State.*

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant.

LEVINSON, Judge.

Where a felony guilty plea and admission to habitual felon status are adjudicated, and sentencing continued on the same until a later date, a subsequent felony charge must be accompanied by a new habitual felony indictment or bill of information to comport with the statutory requirements of N.C. Gen. Stat. § 14-7.3 (2003).

Defendant was indicted for the offenses of possession with intent to sell and deliver cocaine and possession of drug paraphernalia in September 2001. He was indicted again in January 2003 for possession with intent to sell and deliver cocaine, and for maintaining a

motor vehicle for the purpose of keeping and/or selling cocaine. Thereafter, defendant entered into a plea agreement with the State. Consistent with that agreement, defendant pled guilty to two counts of possession of cocaine, and admitted his habitual felon status pursuant to two bills of information.[1] Defendant entered his plea before the trial court on 11 February 2004, and the trial court adjudicated the same. Rather than enter judgment, however, sentencing was continued until 6 April 2004. Defendant did not remain in custody following his guilty pleas.

Defendant failed to appear in court for sentencing, and an order for his arrest was issued. He was arrested on 16 July 2004. New charges for possession with intent to sell and deliver cocaine, possession of drug paraphernalia, and possession of lottery tickets arose out of events occurring 16 July 2004.

Defendant next appeared before the trial court 5 August 2004, when he entered into a second plea agreement with the State. Consistent with this agreement, defendant pled guilty to the new charge of possession with intent to sell and deliver cocaine. Although defendant, in his transcript of plea, "agree[d] to be sentenced as an habitual felon", the State had not obtained a new habitual felon indictment or drawn an additional bill of information alleging defendant's status as an habitual felon.

The trial court sentenced defendant as an habitual felon on the original charges and the 16 July 2004 drug offense. Defendant appeals.

Defendant argues that the trial court lacked the authority to sentence him as an habitual felon for the 16 July 2004 felony offense because the State had not obtained a new habitual felon indictment, and defendant had not agreed to waive the same and admit his status pursuant to a bill of information.[2] We agree.

N.C. Gen. Stat. § 14-7.3 (2003) states, in relevant part:

> [a]n indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any

1. The transcript of plea states that defendant was entering pleas to two bills of information alleging he was an habitual felon, one alleging a date of offense of 24 September 2001 and the other alleging a date of offense of 28 January 2003. These dates correspond with the dates of offense for defendant's 11 February 2004 pleas to two counts of possession of cocaine.

2. Defendant argues that the trial court lacked the statutory authority to sentence him as an habitual felon; he does not assert that any of his constitutional rights were violated.

> felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon.

The habitual felon indictment must be separate from the principal felony indictment. G.S. § 14-7.3; *State v. Allen*, 292 N.C. 431, 433, 233 S.E.2d 585, 587 (1977). Our Supreme Court has stated that G.S. § 14-7.3 "requires that the State give defendant notice of the felonies on which it is relying to support the habitual felon charge[.]" *State v. Cheek*, 339 N.C. 725, 728, 453 S.E.2d 862, 864 (1995). The statute "requires the State to allege all the elements of the offense of being a[n] habitual felon thereby providing a defendant with sufficient notice that he is being tried as a recidivist to enable him to prepare an adequate defense to that charge." *Id.* at 729, 453 S.E.2d at 864.

" 'It is settled law in this State that a plea of guilty, freely, understandingly, and voluntarily entered, is equivalent to a conviction of the offense charged.' " *State v. Sidberry*, 337 N.C. 779, 782, 448 S.E.2d 798, 800 (1994) (quoting *State v. Watkins*, 283 N.C. 17, 27, 194 S.E.2d 800, 808 (1973)). A formal entry of judgment is not required in order to have a conviction. *State v. Hatcher*, 136 N.C. App. 524, 527, 524 S.E.2d 815, 817 (2000) (citing *State v. Fuller*, 48 N.C. App. 418, 268 S.E.2d 879 (1980)) (interpreting N.C. Gen. Stat. § 15A-1331(b)).

The State did not obtain an indictment charging defendant with being an habitual felon that was ancillary to the 16 July 2004 felony drug offense. Therefore, the State did not satisfy the requirements of G.S. § 14-7.3 that there be an indictment ancillary to the predicate substantive felony. Although the State previously charged defendant with being an habitual felon by virtue of the bills of information accompanying the original charges, defendant had already been convicted of the substantive felonies associated with these bills of information. Had defendant already been sentenced on the original charges, there would be little question that the State would have been required to obtain a new habitual felon indictment ancillary to the 16 July 2004 felony offense. We conclude the same result issues here, where the accused's guilty pleas were adjudicated, but the actual entry of judgment continued until some later date.

Because defendant had already been convicted of the predicate felonies that accompanied his earlier habitual felon bills of information, the court lacked the authority to sentence him as an habitual felon for the 16 July 2004 substantive felony offense in the absence of a new charging instrument for habitual felon status.

Reversed and remanded for proceedings not inconsistent with this opinion.

Judges McCULLOUGH and ELMORE concur.

KAREN SUE BRANTLEY ROWLAND, Plaintiff v. TERRY LYNN ROWLAND, Defendant

No. COA05-337

(Filed 20 December 2005)

Divorce— equitable distribution—civil service pension—marital property

A civil service pension, received in lieu of social security, should have been classified as marital rather than as separate property, and the equitable distribution order was remanded. N.C.G.S. § 50-20(b)(1).

Appeal by defendant from judgment entered 14 September 2004, by Judge Donna H. Johnson in Cabarrus County District Court. Heard in the Court of Appeals 3 November 2005.

Mary Beth Smith for plaintiff appellee.

Tharrington Smith, L.L.P., by Jill Schnabel Jackson and Fred M. Morelock, for defendant appellant.

McCULLOUGH, Judge.

Defendant (Mr. Rowland) appeals from judgment of equitable distribution finding that plaintiff's (Mrs. Rowland) civil service retirement account was her separate property and therefore not subject to equitable distribution. We reverse and remand.

FACTS

Mr. and Mrs. Rowland were married on 23 July 1965 and separated on 30 September 2002. On 14 January 2004, the parties came before the district court in order to make an equitable distribution of the marital estate. The matter was continued and again heard in district court 10 March 2004. In the pretrial order, the parties contended in Schedule D that both sides were unable to agree on whether Mrs.

Rowland's civil service retirement pension and Mr. Rowland's social security benefits should be classified as marital property or not. At trial Mrs. Rowland argued that, if her civil service retirement pension were considered marital property, then Mr. Rowland's social security benefits should be valued and considered marital as well for distribution. Mr. Rowland contended at trial that his social security benefits were separate property and not subject to valuation and distribution.

The evidence tended to show at trial that during the marriage, Mrs. Rowland was employed by the Social Security Administration as a civil service employee. During the entire period of employment, Mrs. Rowland was exempt from social security coverage. Near the beginning of her employment she selected civil service coverage instead of social security coverage. In lieu of social security coverage, Mrs. Rowland was enrolled in a civil service retirement system pension. The civil service retirement system benefits had a date-of-separation value of $351,583.68.

Mr. Rowland was employed during the marriage as a government employee of Cabarrus County, North Carolina. He retired from county employment in 1998 and began working for Tax Management Associates (TMA). Mr. Rowland was not exempt from social security coverage, and it was determined that the present value of his Social Security benefits at the date of separation was $171,056.08.

The district court judge entered a judgment of equitable distribution after hearing all the evidence and arguments in which he made findings of facts and conclusions of law on 14 September 2004. In finding 8(e) the judge found:

> The Defendant's [Mr. Rowland] social security account is not marital. The Plaintiff's [Mrs. Rowland] civil service account is not marital. According to the uncontroverted evidence, there are no rights of survivorship on this account. Although the Plaintiff was employed by the social security administration, she does not have a social security account. Early in her employment, the Plaintiff was forced to elect between a social security account and a civil service account. She chose the civil service account, with no rights of survivorship to the Defendant's social security account. Therefore, the social security account in the Defendant's name and valued at $171,056.08 is the Defendant's separate property. In addition, the civil service account in the Plaintiff's name and valued at $351,583.68 is the Plaintiff's separate property.

The judgment also stated in 11(e)(1): "That the Plaintiff has her civil service retirement in lieu of social security. That Defendant has his social security account and the Plaintiff has no right of survivorship." The trial court then determined that an equal distribution would be inequitable and instead distributed the marital estate giving 52 percent to Mrs. Rowland and 48 percent to Mr. Rowland.

Defendant now appeals.

ANALYSIS

On appeal, Mr. Rowland contends that it was error for the trial court to classify Mrs. Rowland's civil service retirement system pension as separate property. We agree.

In an action for equitable distribution the court must classify property as either "marital property" or "separate property," as defined in N.C. Gen. Stat. § 50-20(b)(1) and § 50-20(b)(2), before dividing the property pursuant to § 50-20(c). *Caudill v. Caudill*, 131 N.C. App. 854, 855, 509 S.E.2d 246, 247-48 (1998). Accordingly, federal law provides that civil service retirement benefits are subject to classification and distribution in equitable distribution proceedings. 5 U.S.C. § 8345(j) (2005). Moreover, North Carolina General Statute § 50-20(b)(1) states that "all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act" are marital property and therefore mandates a classification of marital in this case. N.C. Gen. Stat. § 50-20(b)(1) (2003); *see also* N.C. Gen. Stat. § 50-20.1(d) (coverture formula).

In the instant case, the evidence is clear that Mrs. Rowland was enrolled in a civil service retirement pension. We believe that the General Assembly has indicated through the plain language of the statute that all pensions be classified as marital property, and therefore N.C. Gen. Stat. § 50-20(b)(1) is controlling in this situation. Therefore, it was error for the district court to classify Mrs. Rowland's civil service retirement system benefits as separate property.

Accordingly, we find that the trial court erred in classifying Mrs. Rowland's civil service retirement system pension as separate property, and we remand to the trial court to enter a new order of equitable distribution. However, the trial court is still entitled to make a

distribution of the marital assets as the North Carolina General Statutes allow.

Reversed and remanded.

Judges ELMORE and LEVINSON concur.

IN THE MATTER OF: C.L.S., MINOR CHILD

No. COA05-308

(Filed 20 December 2005)

Appeal and Error— appealability—permanency planning order—no change in status quo

The trial court did not err by dismissing respondent mother's appeal from a permanency planning order entered 25 August 2004 continuing legal and physical custody of her son with the Department of Social Services and stating that the permanent plan would be adoption, because this order is not appealable as defined by N.C.G.S. § 7B-1001 since there was no change in the status quo.

Appeal by respondent-mother from order entered 25 August 2004 by Judge Mark E. Powell in McDowell County District Court. Heard in the Court of Appeals 20 October 2005.

Michael E. Casterline for respondent-appellant.

Goldsmith, Goldsmith & Dews, P.A., by James W. Goldsmith, for petitioner-appellee.

James C. Callahan for guardian ad litem.

ELMORE, Judge.

Respondent-mother (respondent) appeals from a permanency planning review order entered 25 August 2004 continuing legal and physical custody of her son, C.L.S., with the McDowell County Department of Social Services (DSS). Since this order is not appealable as defined by N.C. Gen. Stat. § 7B-1001, we dismiss respondent's appeal.

By an order entered 28 February 2003, custody of C.L.S. was given to DSS. That custody was continued through several additional orders, including the 25 August 2004 order from which respondent appeals. By an order entered 5 December 2003, DSS was relieved of reunification efforts with respondent-mother, although continued efforts to reunify the child with his father. Thus, prior to the 24 June and 19 August 2004 hearings from which the 25 August 2004 order arises, respondent did not have custody of her son and the trial court had previously ceased reunification efforts. The 25 August 2004 permanency planning order, issued pursuant to a hearing on motions for review (in accord with section 7B-906) and permanency planning (in accord with section 7B-907), determined that 1) custody should continue with DSS, 2) the permanent plan for the child should be adoption, 3) DSS should pursue termination of parental rights, and 4) visitation should be ceased pending a hearing on a petition for termination of parental rights.

This order is appealable only if it is "final," and final orders are those that: 1) find the absence of jurisdiction; 2) determine the action and prevent a judgment from which appeal may be taken; 3) are dispositional orders entered after an adjudication that a juvenile is abused, neglected, or dependent; or 4) modify custodial rights. N.C. Gen. Stat. § 7B-1001 (2003).[1] We have previously discussed aspects of section 7B-1001 in *In re Weiler*, 158 N.C. App. 473, 581 S.E.2d 134 (2003), and *In re B.N.H.*, 170 N.C. App. 157, 611 S.E.2d 888, *disc. review denied*, 359 N.C. 632, 615 S.E.2d 865 (2005). In *In re Weiler*, this Court held that an appeal from a permanency planning review order that altered the minor's permanent plan from reunification to adoption and termination of parental rights was in fact a "final" order under N.C. Gen. Stat. § 7B-1001(3) (2003). *See In re Weiler*, 158 N.C. App. at 476-77, 581 S.E.2d at 136-37. However, in *In re B.N.H.*, we determined that *In re Weiler* was limited to its facts, declining to extend its holding to all dispositional orders. *In re B.N.H.*, 170 N.C. App. at 161-62, 611 S.E.2d at 891. Instead, the Court held that:

> the suggestion that parents have an immediate appeal of right from every review order, or every initial and subsequent permanency planning order, because of the language in G.S. § 7B-1001(3): (1) contradicts the language and plain meaning of

1. As of 1 October 2005, this section was modified by the General Assembly. *See* 2005 N.C. Sess. Laws ch. 398, §§ 10 and 19. Since these revisions were not in effect at the filing of respondent's action or the petition in her case, we do not apply the revised section 7B-1001. *See id.* § 19.

the statute; (2) frustrates the stated legislative purpose of achieving permanency for children in a timely manner; (3) does not serve the interests of children within the jurisdiction of our juvenile court; (4) is not essential to protect the rights and interests of parents; and (5) frustrates our courts' ability to meet the needs of children.

Id. at 161, 611 S.E.2d at 890.

The reasoning of that Court controls this case as well. Just as in *In re B.N.H.*, respondent here appeals from a permanency planning order that *continued* the custody of the child with DSS and stated that the permanent plan would be adoption. Unlike the order in *In re Weiler*, where the actual order appealed from changed the status quo of the relationship between the parents and the minor, here there is no change in the status quo. Custody of the minor was given to DSS by a previous order, thus the order appealed from did not alter the disposition of the child. *See* N.C. Gen. Stat. § 7B-903(a) (2003). As stated above, to read "order of disposition" in section 7B-1001 as broadly as necessary for respondent to appeal the order here would essentially make all orders following adjudication appealable, thereby frustrating the objectives of the Juvenile Code.

Dismissed.

Judges McCULLOUGH and LEVINSON concur.

EDWARD K. ROYAL, Petitioner v. DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, Respondent

No. COA05-334

(Filed 20 December 2005)

Administrative Law— contested case—administrative law judge's decision not adopted—de novo review—findings and conclusions

A contested case involving dismissal of a Highway Patrol Trooper for unacceptable personal conduct was remanded where the State Personnel Commission did not adopt the administrative law judge's decision, the trial court applied the whole record test rather than de novo review, and the court did not make findings or conclusions. N.C.G.S. § 150B-51(c).

Appeal by Respondent from judgment entered 4 November 2004 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Court of Appeals 15 November 2005.

Roy Cooper, *Attorney General*, *by Stacey T. Carter*, *Assistant Attorney General*, *Christopher Browning*, *Solicitor General and Hal Haskins*, *Special Deputy Attorney General*, *for the State.*

The Edmisten & Webb Law Firm, *by William Woodward Webb*, *for petitioner-appellee.*

WYNN, Judge.

Under North Carolina General Statute section 150B-51(c), where an "agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law." N.C. Gen. Stat. § 150B-51(c) (2004). Here, the trial court erroneously applied the "whole record test" and made no findings of fact or conclusions of law in a contested case where the State Personnel Commission did not adopt the decision of the administrative law judge. Accordingly, we remand this case to the trial court to review the record *de novo* and to make findings of fact and conclusions of law in accordance with North Carolina General Statute section 150B-51(c).

The dispositive issue on appeal arises from an Internal Affairs investigation on the conduct of Petitioner—a State Highway Patrol Officer. Following that investigation, Petitioner's superiors recommended his dismissal from the State Highway Patrol for conduct unbecoming of an officer. The Secretary of the Department of Crime Control and Public Safety affirmed the decision to dismiss Petitioner from the State Highway Patrol on 19 September 2002.

Petitioner contested that decision before an administrative law judge who issued a decision on 25 June 2003 affirming the decision to discipline Petitioner for unacceptable personal conduct. However, in light of the treatment of other officers for similar off duty criminal conduct, and to insure "consistency, uniformity, and fairness in disciplining State Highway Patrol Troopers", the administrative law judge concluded that Petitioner should be reinstated, but demoted or suspended in an appropriate manner, with back pay and attorney's fees.

Thereafter, the matter came before the State Personnel Commission on 16 October 2003 for final agency decision. Although the Commission adopted the administrative law judge's recommended

findings of fact and conclusions of law, the Commission rejected the administrative law judge's recommendation that Petitioner should be reinstated; instead, the Commission upheld Petitioner's dismissal from the State Highway Patrol.

Petitioner filed a Petition for Judicial Review of the State Personnel Commission's Decision and Order in Superior Court, Wake County. On 4 November 2004, the trial court reversed the State Personnel Commission's Decision and Order and reinstated Petitioner to the State Highway Patrol with full back pay, front pay and attorney's fees. The trial judge concluded that the State Personnel Commission's Decision and Order was arbitrary and capricious because it adopted the administrative law judge's findings of fact and conclusions of law, but rejected the administrative law judge's recommendation for Petitioner's reinstatement. The trial court reasoned that "[t]he State Personnel Commission was not at liberty to arrive at a Decision/Order contrary to that of the Administrative Law Judge unless it adopted different Conclusions of Law . . . which it did not do . . . hence, its Decision/Order was arbitrary and capricious under N.C.G.S. § 150B-51(b)." Respondent appeals to this Court.

Subsection 150B-51(c) of the North Carolina General Statutes governs a trial court's review of a contested case commenced on or after 1 January 2001 where the administrative agency did not adopt the administrative law judge's decision. *See* 2000 N.C. Sess. Laws 190. Subsection 150B-51(c) provides, in pertinent part:

> In reviewing a final decision in a contested case in which an administrative law judge made a decision . . . and the agency does not adopt the administrative law judge's decision, the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision.

N.C. Gen. Stat. § 150B-51(c) (emphasis added).

Here, the State Personnel Commission rejected the administrative law judge's recommendation to reinstate Petitioner, and affirmed the decision to terminate Petitioner from his employment as a Highway Patrol Trooper. Petitioner filed a Petition for Judicial Review of the State Personnel Commission's Final Order and

Decision in Superior Court, Wake County. Because this was a contested case in which the State Personnel Commission, an administrative agency, rejected the administrative law judge's decision, and this matter commenced after 1 January 2001, the mandates of North Carolina General Statute subsection 150B-51(c) apply to the trial court's review of this case.

However, the trial court's order states that it "applied the 'whole record test' for judicial review of the November 12, 2003 Decision/Order of the State Personnel Commission . . . pursuant to N.C.G.S. § 150B-51(b) and applicable case law authority[.]" Furthermore, the trial court did not make any findings of fact or conclusions of law in its judgment and order. Because the trial court failed to review the case *de novo* and did not make any findings of fact or conclusions of law in accordance with section 150B-51(c), we remand this case to the trial court for a *de novo* review of the record and to make findings of fact and conclusions of law consistent with this opinion.

Remanded.

Judges STEELMAN and JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 DECEMBER 2005

ANDERSON v. N.C. DEP'T OF TRANSP. No. 05-80	Ind. Comm. (I.C. #14208) (I.C. #977407) (I.C. #983955)	Affirmed in part, remanded in part
BOICE-WILLIS CLINIC, P.A. v. SEAMAN No. 05-298	Nash (04CVS2101)	Affirmed in part, reversed in part, and remanded
BOX v. BOX No. 05-422	Wake (03CVD15756)	Appeal dismissed
ESTATE OF FORBES v. KENNETH T. GOODSON LOGGING, INC. No. 04-838	Ind. Comm. (I.C. #69630)	Affirmed
IN RE B.I. No. 05-448	Buncombe (04J63)	Affirmed
IN RE C.I.B. No. 04-1613	New Hanover (03J140) (03J141) (03J142)	Affirmed
IN RE C.L., Jr., C.L. & C.L. No. 05-122	Johnston (03J132) (03J133) (03J134)	Affirmed
IN RE DUNN No. 04-1655	Durham (95E751)	Appeal dismissed
IN RE FORECLOSURE OF JORDAN No. 05-336	Franklin (04SP138)	Affirmed
IN RE K.C. No. 04-1689	Buncombe (03J268)	Affirmed
IN RE K.J.H. No. 05-567	Wayne (03J51)	Affirmed
IN RE M.I.S., S.M.S No. 05-491	Cabarrus (03J92) (03J93)	Affirmed
IN RE N.F. No. 04-1695	Wake (01J509)	Affirmed
IN RE S.N.W. No. 05-335	Richmond (02J40)	Affirmed

JOHNSON v. JOHNSON No. 04-905	Martin (01CVD701)	Affirmed
KEENER v. ARNOLD No. 05-455	Washington (99CVD231)	Affirmed in part, vacated in part
KOHLER CO. v. McIVOR No. 05-339	Mecklenburg (03CVS17744)	Affirmed
McCOMB v. PHELPS No. 05-362	New Hanover (04CVS3250)	Affirmed
NAJJAR v. NAJJAR No. 05-496	Guilford (03CVD5046)	Vacated and remanded for further findings of fact
NELSON v. NELSON No. 05-156	Rockingham (02CVD1077) (02CVD935)	Affirmed
OAKLEY v. BARKLEY No. 05-367	Pasquotank (02CVS138)	Reversed and remanded
RHOADES v. SNYDER No. 05-429	Forsyth (03CVS4918)	Appeal dismissed
SHELL v. N.C. STATE BANKING COMM'N No. 05-306	Wake (04CVS4683)	Affirmed
SIMMONS v. KING No. 05-413	Cabarrus (01CVS2578)	Affirmed
SMITH v. COON No. 05-390	Macon (02CVS173)	Affirmed
STATE v. ALLEN No. 05-53	Mecklenburg (04CRS221286) (04CRS221287)	No error
STATE v. BENNETT No. 05-332	Pasquotank (00CRS340)	No error
STATE v. BRISBON No. 05-320	Cumberland (01CRS59967) (01CRS59968)	No error
STATE v. BURGESS No. 05-303	Onslow (03CRS56823) (03CRS56824)	New trial
STATE v. BURNETTE No. 05-228	Chatham (03CRS2233)	Affirmed
STATE v. BYRD No. 05-358	Wilkes (02CRS52026)	Remanded for resentencing

STATE v. CAMERON No. 05-415	Forsyth (03CRS58293)	No error
STATE v. EDGE No. 05-328	Cumberland (99CRS72607) (99CRS72612) (99CRS72613) (99CRS72614) (99CRS72615) (99CRS72616) (99CRS72617) (99CRS72618) (99CRS72619)	No error
STATE v. GILMORE No. 05-380	Wake (04CRS44314)	No error
STATE v. HALL No. 05-161	Mecklenburg (02CRS74932)	No error
STATE v. HILLIER No. 04-1654	Mecklenburg (01CRS50680)	No error
STATE v. JOHNSON No. 05-598	Durham (03CRS13562) (03CRS13563) (03CRS47093)	No error
STATE v. LEE No. 05-276	Wake (03CRS39203) (03CRS39204)	No error
STATE v. MITCHELL No. 05-260	Forsyth (03CRS61810) (03CRS61811)	 No prejudicial error
STATE v. MORGAN No. 05-373	Wake (03CRS114124)	No error
STATE v. NOBLE No. 05-249	Guilford (03CRS81331)	No error
STATE v. OBIORAH No. 04-1567	Durham (03CRS42976)	No error
STATE v. OWENS No. 05-128	Forsyth (04CRS59923)	No error
STATE v. PHILLIPS No. 05-195	Rowan (03CRS4040) (03CRS50660) (03CRS50738) (04CRS3745) (04CRS3746)	No error

STATE v. POLLARD No. 05-36	Forsyth (04CRS54242)	Remanded for resentencing
STATE v. POWELL No. 05-224	Buncombe (03CRS61347) (03CRS61350)	No error
STATE v. ROWE No. 05-210	Guilford (94CRS20097) (94CRS11821)	Affirmed
STATE v. THAI No. 05-347	Mecklenburg (02CRS207578)	No prejudicial error at trial; Remanded for resentencing; Claim of ineffective assistance of counsel dismissed without prejudice

STATE OF NORTH CAROLINA v. LAWRENCE HANTON

No. COA04-1279

(Filed 3 January 2006)

1. Sentencing— out-of-state convictions—similarity to N.C. offenses—question of law

The issue of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court, and the court here did not err by not requiring that the issue be proven to the jury beyond a reasonable doubt.

2. Sentencing— out-of-state convictions—not alleged in indictment

The trial court did not err when sentencing defendant by considering out-of-state convictions where the State had not alleged in the indictment that those convictions were substantially similar to North Carolina offenses.

3. Sentencing— out-of-state conviction—assault—not similar to N.C. offense

The trial court erred by finding that the New York offense of second-degree assault was substantially similar to North Carolina's assault inflicting serious injury, as opposed to simple assault. The error was prejudicial because it raised defendant's record level, and he was sentenced at the maximum for that level.

Judge McGEE concurring in part and dissenting in part.

Appeal by defendant from judgment entered 22 June 2004 by Judge Richard D. Boner in Cleveland County Superior Court. Heard in the Court of Appeals 7 June 2005.

Attorney General Roy Cooper, by William M. Polk, Director, Victims and Citizens Services Section, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

LEVINSON, Judge.

Lawrence Hanton (defendant) was convicted of second-degree murder on 24 March 1999. The State presented the trial court with a

prior record level worksheet that included several prior convictions of defendant in the State of New York. Based on the worksheet, the trial court found that defendant had a prior record Level V. The trial court further found one aggravating factor and one mitigating factor, concluding that the aggravating factor outweighed the mitigating factor. Defendant was sentenced to an aggravated term of 353 to 433 months imprisonment. Defendant appealed to this Court. We remanded defendant's case for resentencing, concluding that the trial court had erred in sentencing defendant as a Level V offender when the State had not shown by a preponderance of the evidence that the out-of-state convictions were substantially similar to North Carolina offenses. *State v. Hanton*, 140 N.C. App. 679, 690-91, 540 S.E.2d 376, 383 (2000) (hereinafter *Hanton I*).

Defendant was resentenced on 22 June 2004. The State presented a prior record level worksheet in which three prior convictions that occurred in New York were used to calculate defendant's prior record level: (1) second-degree robbery, (2) third-degree robbery, and (3) attempted assault in the second-degree. The State presented the trial court with certified copies of these three felony convictions and with copies of the New York statutes for "robbery; defined," "robbery in the third degree," "robbery in the second degree," and "assault in the second degree."

N.C. Gen. Stat. § 15A-1340.14(e) (2003) governs the classification of prior convictions from other states for purposes of determining a defendant's prior record level. Pursuant to this statute, the trial court found defendant's New York convictions for second-degree robbery on 15 January 1985, and for third-degree robbery on 3 March 1987, to be substantially similar to North Carolina common law robbery. The trial court therefore classified both of these New York robbery convictions as Class G felonies, and assigned four record points to each offense. The trial court further found that defendant's New York conviction for attempted second-degree assault was substantially similar to North Carolina's assault inflicting serious injury, which is a Class A1 misdemeanor, carrying one point. Defendant was therefore assigned a total of nine prior record points, which gave him a prior record Level IV. Defendant presented evidence of mitigating factors to the trial court, and the trial court sentenced defendant to 251 to 311 months in prison, the statutory maximum sentence in the presumptive range. Defendant appeals.

I.

[1] Defendant first argues that the trial court erred by sentencing defendant to 251 to 311 months in prison where the State did not prove to the jury beyond a reasonable doubt that defendant's out-of-state convictions were substantially similar to North Carolina offenses. Specifically, defendant asserts that he is entitled to another resentencing in light of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), because the issue as to whether the out-of-state felonies were substantially similar to North Carolina offenses was not submitted to the jury and had the effect of increasing the penalty for defendant's crime.

In *Blakely*, the United States Supreme Court held that " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " *Blakely*, 542 U.S. at 296, 159 L. Ed. 2d at 409 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)). The United States Supreme Court further stated that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413-14. In applying *Blakely* to our structured sentencing scheme, our Supreme Court determined that our "presumptive range" is the equivalent of "statutory maximum." *State v. Allen*, 359 N.C. 425, 432, 615 S.E.2d 256, 262 (2005). Thus, the rule of *Blakely*, as applied to North Carolina's structured sentencing scheme, 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 265 (emphasis added).

Although defendant was not sentenced beyond the presumptive range for a Level IV offender, he argues that the trial court's findings regarding the similarity between the New York offenses and the North Carolina offenses increased defendant's prior record level from Level III to Level IV. Defendant asserts that "[b]ut for the trial court's findings that the three out-of-state offenses were to be classified as two Class G felonies and a Class A1 misdemeanor, these three offenses would have been classified as three Class I felonies" under N.C.G.S. § 15A-1340.14(e). Accordingly, defendant would have had only six prior record points and would have been only a Level III offender. Defendant thereby argues that he was sentenced in violation of

Blakely because without these findings by the trial court, the "statutory maximum" sentence that defendant could have received was 220 to 273 months, which is the maximum presumptive range sentence for a Level III offender. *See* N.C. Gen. Stat. § 15A-1340.17(c) and (e) (2003). Because of the trial court's findings of substantial similarity, defendant was sentenced to an additional 31 to 38 months in prison.

Defendant concedes that *Blakely* exempts "the fact of a prior conviction" from its requirement that facts "that increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." *See Blakely*, 542 U.S. at 328, 159 L. Ed. 2d at 412. However, defendant does not argue that his convictions in New York for the prior offenses should have been submitted to the jury. Rather, defendant argues that "the fact that the three New York offenses were *substantially similar* to two Class G felonies and a Class A1 misdemeanor in North Carolina were facts that increase[d] the penalty for [the] crime beyond the statutory maximum." Defendant accordingly argues that the question of whether the New York convictions were substantially similar to North Carolina offenses "must [have been] submitted to a jury, and proved beyond a reasonable doubt."

Defendant supports his argument by citing language in *Hanton I*. In defendant's first appeal, he argued that "the question of substantial similarity is a legal issue" that must be decided by the trial court, and that a defendant could not stipulate to whether an out-of-state offense was substantially similar to a North Carolina offense. However, our Court stated: "While we agree [with the State] that a defendant might stipulate that out-of-state offenses are substantially similar to corresponding North Carolina felony offenses, we do not agree that defendant did so here." *Hanton I*, 140 N.C. App. at 690, 540 S.E.2d at 383. "Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate. . . . This rule is more important in criminal cases, where the interests of the public are involved." *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (citations omitted). Defendant argues that because our Court stated in *Hanton I* that a "defendant may stipulate to the question of substantial similarity between out-of-state and in-state offenses, the question must be one of fact and not of law." Defendant further asserts that if the question of substantial similarity "were a question of law, then it would violate public policy to allow a defendant to stipulate to it." *See Prevette*, 39 N.C. App. at 472, 250 S.E.2d at 683 ("The due administration of the criminal law cannot be left to the stipulations of the parties.").

However, contrary to defendant's argument, the language cited by defendant that "a defendant might stipulate that out-of-state offenses are substantially similar to corresponding North Carolina felony offenses," *see Hanton I*, 140 N.C. App. at 690, 540 S.E.2d at 383, is not controlling. In *Hanton I*, our Court addressed defendant's contention that the State had not met its burden under N.C.G.S. § 15A-1340.14(e) to show that defendant's New York convictions should be classified as a higher class felony than Class I. *Hanton I*, 140 N.C. App. at 689-90, 540 S.E.2d at 382-83. The State had argued that defendant had stipulated to the fact that the New York offenses were substantially similar to the North Carolina offenses, but we found that defendant had not so stipulated, and thus that the State had not met its burden under N.C.G.S. § 15A-1340.14(e). *Hanton I*, 140 N.C. App. at 690, 540 S.E.2d at 383. Our statement that "a defendant might stipulate that out-of-state offenses are substantially similar to corresponding North Carolina felony offenses" was not necessary to our decision to remand for resentencing. *See id.* "Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985); *see also Kornegay v. Broadrick*, 119 N.C. App. 326, 327, 458 S.E.2d 274, 275 (1995). In *Hanton I*, we did not consider the issue before us in the present case, as to whether or not the question of substantial similarity between out-of-state and in-state offenses was a question of law. Therefore, our Court's statement in *Hanton I*, that a defendant *might* stipulate to this question, is non-binding dicta.

Upon examination of the issue, we conclude that whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law that must be determined by the trial court, not the jury. Determining a defendant's prior record involves "a complicated calculation of rules and statutory applications[.]" *State v. Van Buren*, 98 P.3d 1235, 1241 (Wash. Ct. App. 2004). "This calculation is a mixed question of law and fact. The 'fact' is the fact of the conviction," *id.*, which under *Blakely* is not a question for a jury. *See Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412. "The law is the proper application of the law to the fact of [a] defendant's criminal record[,]" which often involves, as the present case does, comparing "the elements of a defendant's prior convictions under the statutes of foreign jurisdictions with the elements of crimes under [North Carolina] statutes." *Van Buren*, 98 P.3d at 1241. The comparison of the elements of an out-of-state criminal offense to those of a North Carolina criminal offense "does not require the resolution of disputed facts."

Id. Rather, it involves statutory interpretation, which is a question of law. *See Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997) ("Statutory interpretation presents a question of law.").

Defendant argues that the United States Supreme Court's recent decision in *Shepard v. United States*, —— U.S. ——, 161 L. Ed. 2d 205 (2005), supports defendant's argument that a jury must decide the question of substantial similarity. However, our review of *Shepard* shows that it is inapposite to the present case. The issue before the United States Supreme Court in *Shepard* was the extent of what a sentencing court, in the context of the enhanced sentencing provisions of the Armed Career Criminals Act of 1986, 18 USC § 924(e), could review in determining whether a guilty plea of an offense defined in a nongeneric statute "necessarily admitted elements of the generic offense." *Id.* at ——, 161 L. Ed. 2d at 218. The Supreme Court held that a sentencing court could not, without violating the Sixth Amendment, "look beyond the charging document, the terms of a plea agreement, the plea colloquy, *the statutory definition*, or any explicit finding of the trial judge to which the defendant assented to determine a disputed fact *about* a prior conviction." *United States v. Collins*, 412 F.3d 515, 521 (4th Cir. 2005) (summarizing *Shepard*) (emphasis added); *see also Shepard*, —— U.S. at —— n.4 & ——, 161 L. Ed. 2d at 216 n.4 & 218. Since the trial court in the present case is not looking beyond the statutory definition of the New York offenses, and since the present case does not involve comparing nongeneric statutory offenses with generic offenses, *Shepard* has no bearing on the issue before us.

We conclude that the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court. Furthermore, the question is so related to a trial court's calculation of a prior record that it is covered by the exception to the *Blakely* rule that "the fact of a prior conviction" does not need to be proven to a jury beyond a reasonable doubt. *See Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412. The trial court in the present case did not err in not requiring that this issue be proven to the jury beyond a reasonable doubt, and defendant is not entitled to another resentencing in light of *Blakely*.

II.

[2] Defendant similarly argues that the trial court erred by sentencing defendant to 251 to 311 months in prison where the State did not allege in the indictment that defendant's out-of-state convictions were substantially similar to North Carolina offenses. Defendant asserts that our Supreme Court, in *State v. Lucas*, held that "any fact that increases the maximum penalty for a crime must be alleged in an indictment." *See Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), *overruled in part by Allen*, 359 N.C. at 437, 615 S.E.2d at 265. However, defendant misstates the holding in *Lucas*, which only referred to facts that would enhance a sentence under N.C. Gen. Stat. § 15A-1340.16A, which allows for sentence enhancement for carrying a firearm. *See Lucas*, 353 N.C. at 597-98, 548 S.E.2d at 731 ("[I]n every instance where the State seeks an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A, it must allege the statutory factors supporting the enhancement in an indictment[.]"). The evaluation of the elements in defendant's prior New York convictions fell under N.C.G.S. § 15A-1340.14(e), and was thus part of traditional sentencing. Defendant's sentence was enhanced because of his prior felonies, not because of any aggravating factors. Therefore, *Lucas* is inapplicable to the present case.

Moreover, the rule in *Lucas* cited by defendant was recently overruled by our Supreme Court. *Allen*, 359 N.C. at 438, 615 S.E.2d at 265 (overruling the "language of *Lucas*, requiring sentencing factors which might lead to a sentencing enhancement to be alleged in an indictment"). Furthermore, even before *Allen*, our Supreme Court, in examining short-form indictments, "recognized that the Fifth Amendment's guarantee to indictment by a grand jury was not applicable to the states, and [that] as such, 'all the elements or facts which might increase the maximum punishment for a crime' do not necessarily need to be listed in an indictment." *State v. Hunt*, 357 N.C. 257, 272, 582 S.E.2d 593, 603 (quoting *State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343 (2000)), *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003). As such, defendant's assignment of error is overruled.

III.

[3] Defendant next argues that the trial court erred by finding that the New York offense of second-degree assault was substantially similar to the North Carolina offense of assault inflicting serious injury, when some of the acts that constitute second-degree assault in New York would only amount to simple assault in North Carolina. At defendant's resentencing hearing, the State presented the trial court

with the 1993 version of the New York statute for second-degree assault. The trial court determined that the statute had not been modified since defendant had been convicted of second-degree assault in 1990. The statute provides that a person is guilty of second-degree assault when:

> 1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or
>
> 2. With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or
>
> 3. With intent to prevent a peace officer, police officer, a fireman, including a fireman acting as a paramedic or emergency medical technician administering first aid in the course of performance of duty as such fireman, or an emergency medical service paramedic or emergency medical service technician, from performing a lawful duty, he causes physical injury to such peace officer, police officer, fireman, paramedic or technician; or
>
> 4. He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
>
> 5. For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same; or
>
> 6. In the course of and in furtherance of the commission or attempted commission of a felony, other than a felony defined in article one hundred thirty which requires corroboration for conviction, or of immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants; or
>
> 7. Having been charged with or convicted of a crime and while confined in a correctional facility, as defined in subdivision three of section forty of the correction law, pursuant to such charge or conviction, with intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
>
> 8. Being eighteen years old or more and with intent to cause physical injury to a person less than eleven years old, the defendant recklessly causes serious physical injury to such person.

NY CLS Penal § 120.05 (1993). The trial court in the present case found that the elements of New York's second-degree assault were substantially similar to North Carolina's assault inflicting serious injury, which is an A1 misdemeanor under N.C. Gen. Stat. § 14-33(c) (2003), because "both statutes require serious injury." The trial court assigned defendant one point for the attempted second-degree assault, which raised defendant's prior record level from Level III to Level IV.

N.C. Gen. Stat. § 14-33(c) provides that "any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray," that person "[i]nflicts serious injury upon another person or uses a deadly weapon[.]" N.C. Gen. Stat. § 14-33(c)(1) (2003). Defendant argues that the trial court erred in finding NY CLS Penal § 120.05 to be substantially similar to N.C.G.S. § 14-33(c) when "at least two of the acts" described in the New York statute do not require the causation of *serious* physical injury. Specifically, defendant asserts that paragraphs six and seven of NY CLS Penal § 120.05 are not analogous to any North Carolina offense, aside from simple assault under N.C. Gen. Stat. § 14-33(a) (2003), which is a Class 2 misdemeanor.

Under paragraph six of NY CLS Penal § 120.05, a defendant is guilty of second-degree assault if the defendant "causes physical injury" to a person while committing another felony or while fleeing from the commission of a felony. Because a defendant need not cause "*serious* injury" under this section of New York's statute on second-degree assault, this particular act does not correspond with assault inflicting serious injury under N.C.G.S. § 14-33(c)(1). Similarly, paragraph seven of NY CLS Penal § 120.05 provides that a defendant is guilty of second-degree assault if the defendant intentionally causes "physical injury to another person" while confined at a correctional facility. Again, absent the requirement that a defendant cause "*serious* injury," this section of the New York offense does not correspond with N.C.G.S. § 14-33(c).

Defendant argues, and we agree for the reasons that follow, that because neither paragraphs six nor seven of NY CLS Penal § 120.05 require "serious injury", the offense most substantially similar to the New York offense on this record was simple assault.

N.C.G.S. § 15A-1340.14(e) provides that either the State or the defendant may prove by a preponderance of evidence whether an out-

of-state offense is substantially similar to a North Carolina offense. However, the statute does not instruct the trial court how to determine which North Carolina offense is most substantially similar to the out-of-state offense when the out-of-state offense has elements that are similar to multiple North Carolina offenses. In light of such an ambiguity in a criminal statute, the rule of lenity requires us to interpret the statute in favor of defendant. *See State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985) ("[T]he 'rule of lenity' forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention."). As such, on this record, where the prosecuting authority relied only on the statutory offenses themselves in making its substantial similarity arguments, the New York second-degree assault offense is most substantially similar to North Carolina's offense of simple assault set forth in N.C.G.S. § 14-33(a).

The State argues that our Court addressed this very issue in *State v. Rich*, 130 N.C. App. 113, 502 S.E.2d 49 (1998), which the State argues controls the present case. The defendant in *Rich* argued that "his conviction of 'assault with intent to cause serious injury,' occurring in New York, should have been classified by the trial court as a Class A1 misdemeanor rather than a Class I felony for sentencing purposes." *Id.* at 117, 502 S.E.2d at 52. However, we never reached the merits of this issue because the defendant had failed to preserve the issue for appeal pursuant to N.C.R. App. P. 10. *Id.* Therefore, *Rich* provides no authority regarding defendant's assignment of error in the present case.

Thus, we conclude that the trial court erred in finding New York's second-degree assault to be substantially similar to North Carolina's assault inflicting serious injury, which is a Class A1 misdemeanor, as opposed to simple assault, which is a Class 2 misdemeanor. *See* N.C.G.S. § 14-33(a). Under N.C. Gen. Stat. § 14-2.5 (2003), "an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense the offender attempted to commit." Therefore, defendant's prior New York conviction for attempted second-degree assault should have been treated as a Class 3 misdemeanor, which would have not had any point value for prior record purposes. *See* N.C. Gen. Stat. § 15A-1340.14(b)(5) (2003). Since the trial court erroneously determined that defendant's New York conviction for attempted second-degree assault was substantially similar to the North Carolina offense of assault inflicting serious injury, defendant was improperly assigned one prior record point for this offense.

This one record point raised defendant's prior record level from a Level III to a Level IV. As noted above, the "statutory maximum" sentence that defendant could have received was 220 to 273 months, which is the maximum presumptive range sentence for a Level III offender. *See* N.C. Gen. Stat. § 15A-1340.17(c) and (e) (2003). However, defendant was sentenced to the maximum sentence for a Level IV offender, and the trial court's error was therefore prejudicial.

We observe that the following issues are not presented by this appeal: whether (1) G.S. § 15A-1340.14(e) authorizes a determination of the underlying conduct giving rise to the out-of-state conviction when making a substantial similarity conclusion; and (2) if so, the extent to which *Blakely* may apply. Here, the State relied only on an evaluation of the statutes in making its substantial similarity arguments before the trial court, and we limit our holding to these circumstances.

We reverse the trial court's order and judgment sentencing defendant to 251 to 311 months imprisonment, and grant defendant a new sentencing hearing.

Affirmed in part; reversed and remanded for resentencing.

Judge HUNTER concurs.

Judge McGEE concurs in part and dissents in part.

McGEE, Judge, concurring in part and dissenting in part.

I concur with the majority's determination of the second and third issues, but respectfully dissent as to the first issue because I disagree with the majority's overly broad conclusion that "whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law that *must be* determined by the trial court, not a jury." (emphasis added).

In the present case, it appears from the record that the trial court solely conducted a comparison of the elements of the two statutes and did not appear to undertake any type of factual analysis of the circumstances underlying defendant's prior conviction. The trial court relied only on the statutes in making its determination, and therefore was within the bounds of *Shepard*. However, the majority's conclusion that substantial similarity is a question of law that a trial court, and not a jury, must determine may lead a trial court into an inherent

factual analysis that *Shepard* and *Blakely* require be determined by a jury. Absent guidance by N.C. Gen. Stat. § 15A-1340.14(e) (2003) on how a trial court should determine substantial similarity, a trial court may undertake an inherent factual inquiry into a defendant's conduct to resolve whether the defendant would have been convicted under a similar North Carolina law.

Under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " *Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)). The rule of *Blakely*, as applied to North Carolina's structured sentencing scheme through *State v. Allen*, 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. 425, 437, 615 S.E.2d 256, 265 (2005). After *Blakely*, the North Carolina General Assembly enacted Session Law 2005-145 (the *Blakely* bill), which revised the Structured Sentencing Act to conform with the Sixth Amendment protections afforded a defendant at sentencing by *Blakely*. *See* 2005 N.C. Sess. Laws ch. 145. However, the *Blakely* bill did not amend N.C.G.S. § 15A-1340.14(e), thus leaving trial courts without guidance as to how *Blakely* might affect a determination of substantial similarity under that statute. *See* 2005 N.C. Sess. Laws ch. 145.

Defendant contends that a determination of substantial similarity under N.C.G.S. § 15A-1340.14(e) involves a fact other than that of a prior conviction, and thereby meets the first part of the *Blakely/Allen* guarantee of the right to a jury trial. The majority overrules defendant's argument by holding that the determination of substantial similarity involves statutory interpretation, which is a question of law, and that the "comparison of the elements of an out-of-state criminal offense to those of a North Carolina criminal offense 'does not require the resolution of disputed facts.' " (quoting *State v. Van Buren*, 98 P.3d 1235, 1241 (Wash. Ct. App. 2004)). I cannot agree that this is always the case.

In *Shepard*, the Supreme Court reasoned that, while the disputed fact of whether a prior conviction was violent could "be described as a fact about a prior conviction, it [was] too far removed from the conclusive significance of a prior judicial record, and too much like the

findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorize[d] a [trial court] to resolve the dispute." *Shepard v. United States*, 544 U.S. ——, ——, 161 L. Ed. 2d 205, 217. In light of *Shepard*, the question for our Court is whether a finding of substantial similarity under N.C.G.S. § 15A-1340.14(e) is "too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almandarez-Torres* clearly authorizes a [trial court] to resolve the dispute." *Id.* Findings of fact subject to *Jones* and *Apprendi* are those findings "[o]ther than the fact of a prior conviction." *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; *see also Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412; *Allen*, 359 N.C. at 437, 615 S.E.2d at 265. I conclude that a finding of substantial similarity is not close enough to the fact of a prior conviction to say that a trial court must always make the determination.

In deciding *Shepard*, the Supreme Court built upon the rationale of its earlier Sixth Amendment case, *Taylor v. United States*, 495 U.S. 575, 109 L. Ed. 2d 607 (1990), in which the Court interpreted ACCA to require a trial court to examine "only [] the fact of conviction and the statutory definition of the prior offense" to determine whether a defendant's prior conviction could be characterized as a "burglary" under the enhancement statute. *Taylor*, 495 U.S. at 602, 109 L. Ed. 2d at 629. In so holding, the Court anticipated that allowing a broader evidentiary inquiry by a trial court might raise issues of violation of a defendant's right to a jury trial. *Id.* at 601, 109 L. Ed. 2d at 629. Following this concern, the Supreme Court later imposed the rule, in *Jones* and *Apprendi*, that any fact other than a prior conviction must be found by the jury. *See Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455*; see also Jones*, 526 U.S. 227, 243 n.6, 143 L. Ed. 2d 311, 326 n.6 (1999).

The Supreme Court in both *Taylor* and *Shepard* read the ACCA recidivism statute as a categorical approach to establishing the fact of a prior conviction. "[T]he enhancement provision always has embodied a categorical approach to the designation of predicate offenses. . . . Congress intended that the enhancement provision be triggered by crimes having certain specified elements[.]" *Taylor*, 495 U.S. at 588, 109 L. Ed. 2d at 620-21; *see also Shepard*, 544 U.S. at ——, 161 L. Ed. 2d at 213-14. The Supreme Court explained that ACCA referred to predicate offenses "in terms not of prior conduct but of prior 'convictions.' " *Shepard*, 544 U.S. at ——, 161 L. Ed. 2d at 213-14 (quoting *Taylor*, 495 U.S. at 600-01, 109 L. Ed. 2d 607, 628). Like

ACCA, N.C.G.S. § 15A-1340.14(e) purports to rely on prior convictions, not on the precise conduct that led to the convictions. However, unlike ACCA, our sentencing statute does not define which categories of crimes trigger enhancement. As such, a trial court's determination under N.C.G.S. § 15A-1340.14(e) is not necessarily one of mere statutory interpretation. Rather, a trial court might actually be undertaking a determination of the disputed fact of whether conduct underlying a conviction for an out-of-state crime renders the offense similar to a North Carolina crime.

In *State v. Poore*, 172 N.C. App. 839, 616 S.E.2d 639 (2005), our Court recently decided that a determination by a trial court, rather than a jury, that all elements of a defendant's current offense were included in a prior offense, for purposes of determining a defendant's prior record level, did not violate *Blakely*. We held that "neither *Blakely* nor *Allen* preclude the trial court from assigning a point in the calculation of one's prior record level where 'all the elements of the present offense are included in [a] prior offense.' " *Poore*, 172 N.C. App. at 840, 616 S.E.2d at 642 (quoting N.C. Gen. Stat. § 15A-1340.14(b)(6) (2003)). "The exercise of assigning a point for the reason set forth in G.S. § 15A-1340.14(b)(6) is akin to the trial court's determination that [the] defendant had in fact been convicted of certain prior offenses, and is not something that increases the 'statutory maximum' within the meaning of *Blakely* or *Allen*." *Poore*, 172 N.C. App. at 843, 616 S.E.2d at 642; *see also State v. Jordan*, 174 N.C. App. 479, 621 S.E.2d 229 (2005) (holding that *Blakely* and *Allen* were not implicated where a trial court determined that the defendant had prior North Carolina convictions, raising the defendant from Level I to Level II). However, a determination of substantial similarity under N.C.G.S. § 15A-1340.14(e) is not as akin to the fact of a prior conviction, nor is it always necessarily a question of law. Rather, a determination under N.C.G.S. § 15A-1340.14(e) has the potential to lead a trial court beyond the statutory elements of a crime and into fact-finding that is the proper province of a jury. *See Blakely*, 542 U.S. at 308, 159 L. Ed. 2d at 417 ("[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury."); *see also State v. Wissink*, 172 N.C. App. 829, 837, 617 S.E.2d 319, 325 (2005) (recognizing that while "the fact of a defendant's probationary status is analagous to and not far-removed from the fact of a prior conviction[,]" our Court was "bound by the language in *Blakely*, *Apprendi* and *Allen* that states that only

the fact of a prior conviction is exempt from being proven to a jury beyond a reasonable doubt").

The Fourth Circuit Court of Appeals recently considered *Shepard* in the case of *United States v. Washington*, 404 F.3d 834 (4th Cir. 2005). Although the Fourth Circuit's decision rests on federal law rather than state law, its analysis is instructive. In *Washington*, the trial court concluded, after fact-finding, that the defendant's prior conviction of breaking and entering was a "violent" offense under the federal sentencing guidelines, because the trial court found that the prior offense " 'otherwise involve[d] conduct that presents a serious potential risk of physical injury to another.' " *Washington* at 838 (quoting USSG § 4B1.2(a)(2)). In making its determination, the trial court relied on extra-indictment evidence, namely a memorandum prepared by the State and the questioning of counsel about the specifics of the prior offense. The Fourth Circuit held that under the line of cases following *Apprendi*, the trial court's determination that the defendant's prior conviction presented a serious potential risk of physical injury "involved more than the 'fact of a prior conviction' exempted by *Apprendi* from Sixth Amendment protection." *Washington*, 404 F.3d at 841. The Fourth Circuit held that the determination was a disputed fact " '*about* a prior conviction' " to which Sixth Amendment protections apply. *Washington* at 842 (quoting *Shepard*, 544 U.S. at ——, 161 L. Ed. 2d at 217) (emphasis in *Washington*). The Fourth Circuit continued:

> In these circumstances, the sentencing court relied on facts outside of the prior indictment and resolved a disputed fact "*about* a prior conviction," – namely, that the prior conviction was one which "otherwise involve[d] conduct that presents a serious potential risk of physical injury to another." These findings are "too far removed from the conclusive significance of a prior judicial record," and "too much like the findings subject to *Jones* and *Apprendi*[] to say that *Almandarez-Torres* clearly authorizes a judge to resolve the dispute[.]" This process and its results thus raise the very "risk" identified in *Shepard*, that Sixth Amendment error occurred.

Washington, 404 F.3d at 842 (internal citations omitted).

Particularly where, as in the present case, the elements of a foreign conviction are broader than those of a North Carolina offense, a trial court may very well undertake an inherent factual inquiry into defendant's conduct to resolve whether defendant would

have been convicted under a similar North Carolina law. Such an inquiry is not merely a question of law, as determined by the majority opinion, and is " 'too far removed from the conclusive significance of a prior judicial record,' and 'too much like the findings subject to *Jones* and *Apprendi*[] to say that *Almandarez-Torres* clearly authorizes a judge to resolve the dispute[.]' " *Id.* Such an inquiry and its results thus present the risk identified in *Shepard*, a violation of a defendant's Sixth Amendment right to a jury trial under *Blakely*, and would require the jury, not the trial court, to determine substantial similarity.

CARILLON ASSISTED LIVING, LLC, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADULT CARE LICENSURE SECTION; AND THE STATE OF NORTH CAROLINA, RESPONDENTS

No. COA05-135

(Filed 3 January 2006)

Administrative Law— assisted living facilities—settlement projects—2001 Session Law

The trial court erred by failing to uphold the decision of the ALJ granting summary judgment for petitioner on the ground that a 2001 Session Law did not apply to settlement projects regarding the development of assisted living facilities, and the case is remanded for entry of judgment in favor of petitioner as provided in the settlement agreement, because: (1) the language of the settlement agreement is unambiguous and provides that in exchange for the right to develop the settlement projects without obtaining an exemption, petitioner forfeited its right to litigate its remaining claims and constitutional challenges; (2) respondents properly exercised their statutory authorities to settle the case under N.C.G.S. § 150B-22 and determined that the moratorium did not operate to limit DHHS and the State's authority with regard to certain of the projects at issue; (3) appellate courts must avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds; (4) the 2001 Session Law is inapplicable to the settlement or gap projects, and the statutory exemptions apply only to the moratorium; and (5) the settlement agreement does not provide petitioner solely a statutory exemption to develop the projects, but instead, the agreement expressly

provides that petitioner shall be entitled to develop the settlement projects.

Judge JACKSON dissenting.

Appeal by petitioner from order entered 16 November 2004 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 October 2005.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr., Forrest W. Campbell, Jr., and Charles F. Marshall III, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Thomas M. Woodward and Assistant Attorney General Susan K. Hackney, for respondents-appellees.

TYSON, Judge.

Carillon Assisted Living, LLC ("petitioner") appeals from order entered granting the North Carolina Department of Health and Human Services, Adult Care Licensure Section's ("DHHS") motion to dismiss petitioner's constitutional, breach of contract, and damages claims and its claims against DHHS and the State for lack of jurisdiction and summary judgment for respondents on all remaining claims. We reverse and remand.

I. Background

Karen Moriarty Penry founded Carillon Assisted Living, LLC in 1996. Petitioner established an office in Raleigh to develop assisted living facilities in North Carolina. As of 29 January 2004, petitioner operated six licensed assisted living facilities in six different North Carolina counties.

In June 1997, petitioner filed plans with DHHS for development of twenty-one assisted living facilities.

On 28 August 1997, the North Carolina General Assembly imposed a moratorium on the development of additional assisted living facilities. The moratorium was retroactive to 1 July 1997 and expired on 30 June 1998. The law provided:

From the effective date of this Act until 12 months after the effective date of this Act, the Department of Health and Human

> Services shall not approve the addition of any adult care home beds for any type home or facility in the State, except as follows:
>
> (1) Plans submitted for approval prior to May 18, 1997;
>
> (2) Plans submitted for approval prior to May 18, 1997, may be processed for approval if the individual or organization submitting the plan demonstrates to the Department that on or before August 25, 1997, the individual or organization purchased real property, entered into a contract to purchase or obtain an option to purchase real property entered into a binding real property lease arrangement, or has otherwise made a binding financial commitment for the purpose of establishing or expanding an adult care home facility.

1997 N.C. Sess. Laws 443.

On 30 October 1998, the legislature reinstated the moratorium retroactive to 1 July 1998 through 26 August 1999. The legislature again extended the moratorium in 1999 and 2000. It remained in force through 31 December 2001.

In January 1999, DHHS declined to issue a declaratory ruling that eight of petitioner's new projects and six of its expansion projects were to be exempt from the moratorium. Petitioner petitioned for review in Wake County Superior Court alleging: (1) its proposed projects were exempt from the moratorium; (2) the moratorium was unconstitutional; and (3) application of the moratorium to petitioner's projects was unconstitutional. The court ruled in petitioner's favor on 15 October 1999 and held that the projects were exempt from the moratorium and petitioner was entitled to develop all twenty-seven projects. DHHS appealed.

On 20 June 2000, petitioner, DHHS, and the State of North Carolina through its Attorney General, entered into a settlement agreement that resolved and settled the litigation. In the agreement, petitioner agreed to forego its constitutional challenges to the moratorium in exchange for the unconditional right to develop nineteen projects ("settlement projects") instead of the twenty-seven petitioner applied for. In accordance with the agreement, the trial court's order was vacated and the pending appeals were withdrawn.

The General Assembly enacted the 2001 Session Law, which provided the moratorium would expire on 31 December 2001. After 31 December 2001, all assisted living facilities were to be subject to a

Certificate of Need ("CON") law. N.C. Gen. Stat. § 131E-175 (2003). The 2001 Session Law provides, "any person who obtained an exemption" under the moratorium must meet financing and construction deadlines on its exempt projects to save the exemption. 2001 N.C. Sess. Laws 234. The exemption holder must provide DHHS with evidence of: (a) the funding to cover the project's capital costs by 1 June 2004; (b) the completion of building foundation and footings by 1 December 2004; and (c) the issuance of a certificate of occupancy by 1 December 2005. *Id.* If the holder of the exemption fails to meet these deadlines, the exemption is terminated. *Id.*

Petitioner maintained the deadlines did not apply to its development plans and did not comply with the statutory deadlines for many of its projects. DHHS advised petitioner that it could not develop forty-three projects ("gap projects") for which petitioner filed plans during the four-month period between the date the moratorium expired, 30 June 1998, and the date it was reinstated, 30 October 1998. DHHS asserted that if the moratorium precluded petitioner from developing the gap projects until 31 December 2001, the moratorium's expiration date precluded petitioner from developing the gap projects absent a CON.

On 24 July 2003, petitioner filed a contested case in the Office of Administrative Hearings. Petitioner asserted: (1) the 2001 Session Law is inapplicable to the settlement projects; (2) DHHS breached the settlement agreement; and (3) the application of the 2001 Session Law and moratorium to the settlement projects and the gap projects violated petitioner's rights under the United States and North Carolina Constitutions.

Administrative Law Judge Beecher R. Gray ("ALJ") ruled in petitioner's favor on 13 May 2004. The ALJ found the parties had agreed and settled for petitioner to possess an unconditional right to develop the settlement projects, had not agreed solely to an exemption from the moratorium, and the deadlines contained in the 2001 Session Law did not apply to the settlement projects.

On further review, DHHS reversed the ALJ. DHHS dismissed petitioner's constitutional, breach of contract, and damages claims, and its claims against the State for lack of jurisdiction. DHHS granted summary judgment for itself and the State and rejected petitioner's claim that the 2001 Session Law is inapplicable to the settlement projects and on its claim relating to the gap projects.

On 11 August 2004, petitioner filed a petition for judicial review in Wake County Superior Court. The trial court granted respondents' motion to dismiss petitioner's constitutional, breach of contract, and damages claims, and its claims against the State for lack of jurisdiction. The trial court granted summary judgment for respondents on all remaining claims. Petitioner appeals.

II. Issues

Petitioner argues the trial court erred by: (1) failing to uphold the decision of the ALJ granting summary judgment for petitioner on the ground that the 2001 Session Law did not apply to the Settlement Projects; (2) dismissing petitioner's constitutional, breach of contract, and damages claims, and its claims against the State for lack of jurisdiction; and (3) failing to grant summary judgment for petitioner on its constitutional claims. Petitioner argues it is entitled to develop the gap projects for which plans were filed with DHHS when there was no moratorium or other development conditions were in effect.

III. Standard of Review on Administrative Claims

The appropriate standard of review in this case depends upon the issue being reviewed. This Court has stated:

> The proper standard of review by the trial court depends upon the particular issues presented by the appeal. *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); *Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 580, 281 S.E.2d 24, 28 (1981). If appellant argues the agency's decision was based on an error of law, then de novo review is required. *In re McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (citations omitted). If appellant questions whether the agency's decision was supported by the evidence or whether it was arbitrary or capricious, then the reviewing court must apply the whole record test.

Deep River Citizens' Coalition v. NC Dep't of Env't and Natural Resources, 149 N.C. App. 211, 213-14, 560 S.E.2d 814, 816 (2002).

The reviewing court must determine whether the evidence is substantial to justify the agency's decision. *Gordon v. North Carolina Department of Correction*, 173 N.C. App. 22, 34, 618 S.E.2d 280, 289 (2005). "A reviewing court may not substitute its judgment for the agency's, even if a different conclusion may result under a whole record review." *Id.*

> As to appellate review of a superior court order regarding an agency decision, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. As distinguished from the any competent evidence test and a de novo review, the whole record test gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.

ACT-UP Triangle, 345 N.C. at 706-07, 483 S.E.2d at 392 (internal quotations omitted).

IV. Session Law

Petitioner argues the language of the settlement agreement provides petitioner with the unconditional right to develop the projects and the 2001 Session Law is inapplicable to their projects. Respondents argue that petitioner's settlement projects are subject to the 2001 Session Law requiring a CON.

Our Supreme Court has stated, "if the meaning of the [agreement] is clear and only one reasonable interpretation exists, the courts must enforce the contract as written . . . ." *Woods v. Insurance Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978).

The settlement agreement provides:

> Immediately upon entry of an order by the Superior Court of Wake County allowing the joint motion references in Paragraph 1 of this agreement, Carillon, and any of Carillon's wholly-owned subsidiaries, shall be entitled to develop the assisted living facilities identified in Exhibit A to this agreement. The parties hereby agree that the moratorium is not applicable to development of the facilities described in Exhibit A.

The language of the settlement agreement is unambiguous. In exchange for the right to develop the settlement projects without obtaining an exemption, petitioner forfeited its right to litigate its remaining claims and constitutional challenges. DHHS previously had been granted full legislative authority to approve projects prior to the moratorium, which set limitations on that authority. To resolve a constitutional challenge to the moratorium, the parties agreed the moratorium did not operate to limit DHHS and the State's authority with regards to certain of the projects at issue, thereby settling a question

which otherwise would have to have been resolved by the courts. This settlement authority is precisely the legislative purpose of N.C. Gen. Stat. § 150B-22. Respondents properly exercised their statutory authorities to settle the case. N.C. Gen. Stat. § 150B-22 (2003) ("It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures.").

The dissenting opinion argues that while respondents had authority to enter into settlement agreements pursuant to this statute, that authority is not without constitutional limitation. However, "appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " *James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002)); *see also Union Carbide Corp. v. Davis*, 253 N.C. 324, 327, 116 S.E.2d 792, 794 (1960) ("Courts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue."); *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) ("[A] constitutional question will not be passed on even when properly presented if there is also present some other ground upon which the case may be decided."); *State v. Muse*, 219 N.C. 226, 227, 13 S.E.2d 229, 229 (1941) (an appellate court will not decide a constitutional question "unless it is properly presented, and will not decide such a question even then when the appeal may be properly determined on a question of less moment."). Applying this principle, the present case can be resolved on purely statutory grounds. N.C. Gen. Stat. § 150B-22.

Additionally, the settlement agreement was executed by DHHS's chief of the Adult Care Licensure Section and the State of North Carolina by the Special and Assistant Attorney Generals. The agreement specifically provides, "[t]he undersigned represent and warrant that they are authorized to enter into this agreement on behalf of the parties." Both DHHS and the State of North Carolina consented to the settlement agreement. The Superior Court's order in petitioner's favor was vacated and the parties' appeals were withdrawn. When "the Attorney General has control of the action [he] may settle it when he determines it is in the best interest of the State to do so." *Tice v. DOT*, 67 N.C. App. 48, 51, 312 S.E.2d 241, 243 (1984).

The 2001 Session Law requires the exemption holder to provide evidence of: (a) the funding to cover the project's capital costs by 1

June 2004; (b) the completion of building foundation and footings by 1 December 2004; and (c) the issuance of a certificate of occupancy by 1 December 2005. 2001 N.C. Sess. Laws 234.

The 2001 Session Law is inapplicable to the settlement or gap projects. The statutory exemptions apply only to the moratorium. The settlement agreement does not provide petitioner solely a statutory exemption to develop the settlement projects. Rather, the agreement expressly provides that petitioner "shall be entitled to develop" the settlement projects. The agreement also expressly provides, "[t]he parties hereby agree that the moratorium is not applicable to development of the facilities described in Exhibit A." Because the exemptions apply only to the moratorium and the moratorium is expressly inapplicable to petitioner by the settlement agreement, petitioner is not bound by the 2001 Session Law. N.C. Gen. Stat. § 150B-22.

In light of our decision, it is unnecessary to reach petitioner's constitutional claims.

V. Conclusion

Petitioner's settlement projects are not subject to the 2001 Session Law. *Id.* The language of the settlement agreement expressly provides petitioner the right to develop the projects, not a right to an exemption, and was executed by parties with authority to bind DHHS and the State. The provisions of the moratorium and the 2001 Session Law are inapplicable to the gap projects. In light of our decision, it is unnecessary to reach petitioner's constitutional claims. The trial court's order is reversed and this cause is remanded for entry of judgment in favor of petitioner as provided in the settlement agreement.

Reversed and remanded.

Judge JOHN concurs.

Judge JACKSON dissents.

JACKSON, Judge dissenting.

For the following reasons, I must respectfully dissent from the majority opinion.

Petitioner argues that the settlement agreement grants an unconditional right to develop the settlement projects and makes the leg-

islatively enacted moratorium inapplicable to the settlement projects. Respondent argues that the settlement projects always were subject to legislative constraints and that the settlement agreement merely settled the parties' dispute regarding whether the projects in question could be approved under one of the enumerated exceptions to the moratorium. I would hold that petitioner cannot prevail on its breach of contract claim under the interpretation of the settlement agreement proposed by either party.

The 1997 moratorium provides, in relevant part:

> (b) From the effective date of this act until 12 months after the effective date of this act, the Department of Health and Human Services *shall not approve* the addition of any adult care home beds for any type home or facility in the State, *except as follows*:
>
> (1) Plans submitted for approval prior to May 18, 1997, may continue to be processed for approval;
>
> (2) Plans submitted for approval subsequent to May 18, 1997, may be processed for approval if the individual or organization submitting the plan demonstrates to the Department that on or before August 25, 1997, the individual or organization purchased real property, entered into a contract to purchase or obtain an option to purchase real property, entered into a binding real property lease arrangement, or has otherwise made a binding financial commitment for the purpose of establishing or expanding an adult care home facility. An owner of real property who entered into a contract prior to August 25, 1997, for the sale of an existing building together with land zoned for the development of not more than 50 adult care home beds with a proposed purchaser who failed to consummate the transaction may, after August 25, 1997, sell the property to another purchaser and the Department may process and approve plans submitted by the purchaser for the development of not more than 50 adult care home beds. It shall be the responsibility of the applicant to establish, to the satisfaction of the Department, that any of these conditions have been met;
>
> (3) Adult care home beds in facilities for the developmentally disabled with six beds or less which are or would be

licensed under G.S. 131D or G.S. 122C may continue to be approved;

(4) If the Department determines that the vacancy rate of available adult care home beds in a county is fifteen percent (15%) or less of the total number of available beds in the county as of the effective date of this act and no new beds have been approved or licensed in the county or plans submitted for approval in accordance with subdivision (3) or (2) of this section which would make the vacancy rate above fifteen percent (15%) in the county, then the Department may accept and approve the addition of beds in that county; or

(5) If a county board of commissioners determines that a substantial need exists for the addition of adult care home beds in that county, the board of commissioners may request that a specified number of additional beds be licensed for development in their county. In making their determination, the board of commissioners shall give consideration to meeting the needs of Special Assistance clients. The Department may approve licensure of the additional beds from the first facility that files for licensure and subsequently meets the licensure requirements.

1997 N.C. Sess. Laws 443 (emphasis added). This legislative enactment clearly precludes the Department of Health and Human Services from approving additional beds after the effective date of the legislation—1 July 1997—except pursuant to the specific circumstances enumerated in the session law. As petitioner's applications were for the purpose of adding beds that had not been licensed prior to 1 July 1997, the Department had the authority to approve them only if they fell within one of the exemptions. Further, the session law made no provision for new beds which would be categorically exempt from its application, but provided solely for exceptions by which the statutory prohibition could be avoided.

The moratorium was continuously in effect from 1 July 1997 through 30 June 1998 and again from 30 October 1998 through 31 December 2001, having been extended annually by legislative action. The moratorium was reinstated retroactively effective 1 July 1998 by session law 212 dated 30 October 1998. 1998 N.C. Sess. Laws 212.

After 31 December 2001, the approval of additional beds was authorized only subject to receipt of a Certificate of Need ("CON"). In the legislation authorizing the approval of additional beds subject to receipt of a CON, the General Assembly included limitations on the licensing of beds pursuant to the enumerated exemptions in the moratorium. 2001 N.C. Sess. Laws 234. These limitations provided that beds that qualified under one of the exemptions for which a license had not yet been obtained could no longer be developed unless evidence of qualifying financial commitments and developmental progress milestones was submitted to respondent by certain dates. It is undisputed that petitioner had not satisfied, and could not satisfy, these requirements.

The majority argues that this matter may be resolved without reaching any constitutional issues in the appeal as the language of the settlement agreement is unambiguous and North Carolina General Statutes, section 150B-22, which states that, "[i]t is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures," is dispositive. *See supra*. I cannot agree.

As noted by our Supreme Court, "[i]t has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State of North Carolina*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997) (citing *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968), *Ex parte Schenck*, 65 N.C. 353, 367 (1871), *Bayard v. Singleton*, 1 N.C. 5, 6-7 (1787)). Moreover, "[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits." *Id.* (citing *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467, 467 S.E.2d 615, 620 (1996)). Such is the case in the instant matter.

One of the most basic tenets of our system of government is the separation of powers of the three branches. Article I, section 6 of the North Carolina Constitution provides "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." The General Assembly is vested with the legislative power of the State. N.C. Const. art. II, § 1. The duty of the executive branch, of which respondent is a part, is to ensure that legislation enacted by the General Assembly be "faithfully executed". N.C. Const. art. III § 5(4); *see also* N.C. Const. art. III, § 1.

The General Assembly may not delegate its authority to enact legislation to another branch of the government or a subordinate agency, however, it may allow an administrative body charged with executing the laws to determine the "facts to which the policy as declared by the Legislature shall apply." *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 60, 74 S.E.2d 310, 316 (1953). In doing so, the General Assembly must provide adequate standards for guidance to the administrative agency in finding the facts to which the legislation shall apply. *Id.* Significantly, although the General Assembly may delegate such fact finding power, it cannot delegate the authority to "apply or withhold the application of the law in [the agency's] absolute or unguided discretion." *Id.* (citing 11 Am. Jur., Constitutional Law, Sec. 234).

I believe that, viewed as urged by petitioner, the settlement agreement would be tantamount to allowing respondent to apply or withhold the application of the law in its unfettered discretion. This would constitute an *ultra vires* act and the settlement agreement thus would be null and void and petitioner would have no authority to develop the additional beds contained in the settlement projects under any circumstances. *Bowers v. City of High Point*, 339 N.C. 413, 424, 451 S.E.2d 284, 292 (1994) (quoting *Moody v. Transylvania County*, 271 N.C. 384, 388, 156 S.E.2d 716, 719 (1967)).

The majority holds that respondent had statutory authority to enter into the settlement agreement pursuant to North Carolina General Statutes, section 150B-22 (2005). This section merely establishes a State policy encouraging settlement of disputes between agencies and other parties through informal procedures. Although it is undisputed that respondent has authority to enter settlement agreements pursuant to this statutorily established policy, that authority is not without limitation. " '[A]n administrative agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislature [sic] grant of authority.' " *Boston v. N.C. Private Protective Services Bd.*, 96 N.C. App. 204, 207, 385 S.E.2d 148, 150-51 (1989) (quoting *In re Williams*, 58 N.C. App. 273, 279, 293 S.E.2d 680, 685 (1982)).

The Department of Health and Human Services was created pursuant to North Carolina General Statutes, section 143B-136.1, and its duties and express powers are set forth in sections 143B-137.1 through 216.66. I am unable to find any provision within these sec-

tions which authorizes respondent to exempt any person, organization, or project from the application of any duly enacted legislation to which such legislation otherwise would apply. Respondent's authority regarding the application of the moratorium, consequently, was limited to the authority delegated in the legislation itself. The authority granted to respondent in the legislation was limited to the determination of presence or absence of facts which would allow development of new beds pursuant to the enumerated exceptions.

Interpreted as urged by respondent, the settlement agreement would fall within the constraints placed upon the General Assembly's delegation of authority. Respondent entered into the settlement agreement pursuant to the State's policy to settle disputes through informal procedures based upon the decision of the superior court that petitioner's projects, including the settlement projects, fell within one of the enumerated exceptions to the moratorium. Consequently, the agreement would be enforceable as its terms were within respondent's authority. Under this interpretation, the settlement projects could be developed lawfully pursuant to the settlement agreement, subject to the constraints imposed by the subsequent legislation.

It is a well accepted canon of contract interpretation that where the words of a contract can be interpreted two different ways, one making the contract lawful and the other making it unlawful, the lawful interpretation is preferred. A. Corbin, *Corbin on Contracts* § 24.22 (1998); *see Great N.R.R. v. Delmar Co.*, 283 U.S. 686, 75 L. Ed. 1349 (1931). Interpreting the settlement agreement as suggested by petitioner, presents a situation in which the executive branch of our government has invaded the exclusive province of the legislative branch. In the instant case, the General Assembly enacted legislation, the validity of which is not at issue before this Court, and an agency of the executive branch purportedly disregarded its mandate to faithfully execute that legislation. The settlement agreement, therefore, would be unlawful. Interpreting the settlement agreement as urged by respondent, however, the actions of respondent do not violate the separation of powers doctrine. According to respondent's interpretation, the settlement agreement was entered into pursuant to a legislative delegation of authority to determine the existence of facts to which the enacted legislation will apply. Respondent's interpretation results in the settlement agreement being lawful and, therefore, is the preferred interpretation.

Accordingly, I would hold that the development of the beds in question is subject to the subsequent legislation and affirm the trial court's summary judgment order.

Petitioner also assigns error to the trial court's grant of respondent's motion to dismiss on the grounds that the Administrative Law Judge ("ALJ") lacked jurisdiction over petitioner's claims. In its petition for contested case hearing, petitioner raised constitutional, breach of contract and damages claims against respondent and the State of North Carolina as well as several of the claims set forth in North Carolina General Statutes, section 150B-51(b), including that "the Department ha[d] exceeded its authority and jurisdiction, acted erroneously, [and] failed to act as required by law and rule." See N.C. Gen. Stat. § 150B-51(b)(2)-(3), (6).

Petitioner's argue that North Carolina General Statutes, section 150B-51(b)(1) grants the trial court the jurisdiction to review the constitutionality of a statute if raised before OAH and appealed in a petition for judicial review. This is incorrect. The purpose of the statute is to allow the trial court to determine whether the agency "acted in violation of constitutional provisions" in reaching its decision—not whether an organic law of the General Assembly is unconstitutional as such determinations may not be made by administrative agencies, such as OAH. Our Supreme Court has made clear that administrative agencies do not have subject matter jurisdiction over constitutional issues. "[C]onstitutional claims will not be acted upon by administrative tribunals, . . ." *Johnston v. Gaston County*, 71 N.C. App. 707, 713, 323 S.E.2d 381, 384 (1984), *disc. rev. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985); *see also Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998) (holding that, because constitutional determinations are the province of the judiciary, seeking a determination of the constitutionality of regulations before an administrative agency would have been in vain and, consequently, petitioner's administrative remedies were inadequate to address the constitutional claims and petitioner was not required to exhaust them prior to seeking a judicial determination of those issues); *Great American Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961) ("The question of constitutionality of a statute is for the judicial branch."). Petitioner's proper procedural course regarding its constitutional claims would have been to file a separate complaint alleging its constitutional claims in superior court. N.C. Gen. Stat. § 150B-43 (2003) (providing "[n]othing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of

any administrative action not made reviewable under this Article"). Fundamentally, Petitioner's challenge would require a determination of whether the application of the moratorium and the CON statute themselves are constitutional or not. Such a determination was beyond the scope of agency decisionmaking and therefore properly should have been raised *de novo* before the superior court. This is clear as Petitioner noted itself in its original contested case petition the reason for including the State of North Carolina as a party was because, *inter alia*, Petitioner sought to challenge "the constitutionality of certain laws enacted by the General Assembly." (R.p. 54) Accordingly, I would affirm the trial court's dismissal of petitioner's action with respect to the constitutional claims.

Petitioner also argues that, because the superior court has jurisdiction to decide constitutional issues, it should have considered those issues on appeal. Petitioner fails, however, to recognize that the sole issue raised on appeal was the propriety of the final agency decision which did not adopt the ruling of the ALJ. Petitioner also erroneously argues that, notwithstanding the well-settled caselaw to the contrary, the ALJ did have jurisdiction over its constitutional, breach of contract, and damages claims. See *Meads*, 349 N.C. 656, 509 S.E.2d 165; *Great American Insurance Co.*, 254 N.C. 168, 118 S.E.2d 792; *Johnston*, 71 N.C. App. 707, 323 S.E.2d 381. As noted *supra*, this is simply an incorrect understanding of our caselaw. This argument appears to be an attempt by petitioner to correct its procedural error in failing to preserve its constitutional claims without initially filing a complaint asserting those claims in superior court.

In light of the holding that I would make regarding the interpretation of the settlement agreement, I would hold that the issues pertaining to petitioner's breach of contract and damages claims become moot. Therefore, it is unnecessary to address those issues on appeal.

As discussed *supra*, petitioner's challenge of the constitutionality of the legislation was not properly before the ALJ. Accordingly, I do not believe that the issue was properly before the superior court on the petition for judicial review and believe petitioner's argument that the superior court erred in failing to grant summary judgment in its favor regarding the constitutionality of the retroactive application of the moratorium extension to the Gap Projects unpersuasive as well. Consequently, I would hold that the superior court properly did not reach the merits of the issue.

For the reasons stated above, I would affirm the order of the superior court.

STATE OF NORTH CAROLINA v. TERRAINE SANCHEZ BYERS, DEFENDANT

No. COA04-1035

(Filed 3 January 2006)

1. Evidence— hearsay—not truth of matter asserted

The trial court did not err in a first-degree burglary and first-degree murder case by allowing into evidence a witness's testimony even though defendant contends it was in violation of *Crawford v. Washington*, 541 U.S. 36 (2004), because: (1) if the statement is offered for reasons other than the truth of the matter asserted, the statement is not hearsay and is not covered by *Crawford*; and (2) the statements were not admitted for the truth of the matter asserted, but for purposes of explaining why the witness chose to run (in fear for his life), why he sought law enforcement assistance before returning to the apartment, and why he chose not to confront defendant single-handedly.

2. Criminal Law— objection to evidence—similar evidence admitted without objection—waiver of objection

A defendant on trial for murder lost the benefit of objections to testimony by an officer about a previous assault by defendant on the victim, the admission of a criminal complaint form signed by the victim regarding the assault, and testimony by the victim's great-grandmother that the victim was afraid of defendant when a second officer gave similar testimony without objection concerning the previous assault, the victim's fear of defendant, and the victim's statements in the criminal complaint form.

3. Criminal Law— prior crimes or bad acts—objections—similar evidence admitted without objection—waiver of objection

The trial court did not err in a first-degree burglary and first-degree murder case by allowing evidence of defendant's prior conviction concerning an attack against the victim and an unrelated assault on the victim's aunt, because: (1) defendant loses

the benefit of an objection if the same or similar evidence is admitted without objection; and (2) an officer was allowed to testify without objection that the victim had previously prosecuted defendant for assault and that the aunt reported defendant threatened to kill her while holding a knife.

4. Constitutional Law— right to unanimous verdict—first-degree murder instruction

The trial court did not fail to instruct the jury in a manner to ensure a unanimous verdict where defendant contends the jury could have split on the issues of premeditation and deliberation and the felony murder rule and rendered a verdict of guilty of first-degree murder on a combination of the two theories, because: (1) based on the trial court's instruction before the jury's deliberation, the jury was aware its verdict had to be unanimous; (2) the verdict sheets explicitly called for a unanimous verdict on whether defendant was guilty of first-degree murder, and the jury was required to show which theory or theories it was using to convict defendant of first-degree murder; and (3) to ensure the jury was unanimous, jurors were polled.

5. Burglary and Unlawful Breaking or Entering; Homicide—short-form indictment—first-degree murder—first-degree burglary

The trial court did not err in a first-degree burglary and first-degree murder case by concluding the short-form indictments for both of these charges are constitutional, because: (1) both indictments complied with the statutory and case law requirements for charging these crimes; and (2) the holdings enunciated in *Blakely v. Washington*, 542 U.S. 296 (2004), and *State v. Allen*, 359 N.C. 425 (2005), do not apply to the use of a short-form indictment for murder.

6. Burglary and Unlawful Breaking or Entering— first-degree burglary—merger of underlying felony for first-degree murder under felony murder rule

The trial court did not err by failing to arrest judgment on the first-degree burglary conviction on the ground the conviction was used as the underlying felony for the first-degree murder conviction under the felony murder rule, because: (1) the underlying felony constitutes an element of first-degree murder and merges into the murder conviction when defendant is convicted of felony murder only; and (2) defendant was found guilty

under both the theories of malice, premeditation, and deliberation, and felony murder.

7. Constitutional Law— effective assistance of counsel— motion for appropriate relief—no reasonable probability of different result

Defendant's motion for appropriate relief (MAR) stating that he received ineffective assistance of counsel (IAC) based on his trial counsel's failure to present potentially exculpatory evidence and the fact that his counsel failed to raise an IAC claim on appeal or file a MAR on defendant's behalf is denied, because: (1) there was no reasonable probability that there would have been a different result in the proceeding; (2) appellate counsel's decision to not fully argue an IAC claim concerning defendant's trial counsel was warranted; and (3) as defendant's appellate counsel was not appointed to assist defendant with his MAR, it was appropriate for appellate counsel to deny defendant's request for assistance in drafting his MAR.

Appeal by defendant from judgments dated 3 March 2004 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 April 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General David Roy Blackwell, for the State.

M. Alexander Charns for defendant.

BRYANT, Judge.

Terraine Sanchez Byers (defendant) appeals from judgments dated 3 March 2004, entered consistent with jury verdicts finding him guilty of first-degree burglary and first-degree murder based upon premeditation and deliberation and felony murder.

Defendant was indicted for first-degree murder, first-degree burglary and injury to real property. Prior to trial, the prosecutor dismissed the injury to real property charge. These matters came for jury trial during the 23 February 2004 criminal session of Mecklenburg County Superior Court with the Honorable Albert Diaz presiding. Defendant was found guilty of first-degree murder and first-degree burglary on 3 March 2004. Defendant was sentenced to life imprisonment without parole on the first-degree murder charge, and 77 to 102 months imprisonment on the first-degree burglary charge. Defendant gave timely notice of appeal.

Facts

The State's evidence tended to show the following: On 22 November 2001, Reginald Williams visited Shanvell Burke (the victim) at her home located at 609 North Davidson Street, Charlotte, North Carolina. He arrived at 7:30 p.m., the two settled in, and watched a movie. Shortly after 9:00 p.m., they heard a crash at the back door. Burke went to the back door and started yelling "Terraine, stop." Williams, in fear for his life, ran out the front door to the bus terminal down North Davidson Street. There, he located a bus driver who called 911 for him.

Later, in explaining why he ran, Williams said Burke previously had allowed him to listen to telephone messages left for her by defendant, her ex-boyfriend. In one message, defendant stated he thought Burke was messing with somebody "and when he found out who it was, he was gonna kill them." Burke expressed to Williams her fear of defendant. "[S]he was afraid he was going to do something to hurt her bad."

Tonya Gregory lived next to the victim. In the summer of 2001, the victim had introduced defendant to Gregory as her boyfriend. Returning home on 22 November 2001 around 8:00 p.m., Gregory observed defendant on the sidewalk near the back door area of the victim's apartment. Later that evening, Gregory heard "bamming noises" coming from the victim's kitchen.

On 22 November 2001, shortly after 9:00 p.m., Charlotte-Mecklenburg Police Officer Michael King and another officer were dispatched on a 911 hang up call to Burke's apartment. Walking through the apartment breezeway to the back, Officer King observed a nervous and profusely sweating man (later identified as defendant) coming out of an apartment through a broken window in a door. Officer King and the other officer asked for identification and inquired if defendant lived in the apartment. Defendant did not produce identification and responded "no" when asked if he lived in the apartment he exited.

Defendant stated that a female lay inside the apartment, and she was hurt. While speaking, he turned, re-entered the apartment through the broken glass door and ran toward the front door. Officer King ordered defendant to stop and then requested backup. A foot pursuit ensued resulting in the apprehension of defendant in the parking lot. Defendant had a deep laceration on his left hand. Upon entering the apartment, Officer King and other officers observed a

knife handle with a broken blade. Burke was found in a pool of blood on the kitchen floor.

Officer Jason Joel Kerl also responded to the scene. Upon entering the apartment, he recognized Burke. Eleven days prior to her death, Officer Kerl responded to a domestic call at the Burke's apartment. Appearing "nervous and frightful that she was going to get hurt," Burke related that her boyfriend had been locked up for domestic violence, been released from jail, and returned to bother her. Five days later, Officer Kerl responded to another call at Burke's residence and, again, she appeared upset and was worried defendant was going to assault her.

On 30 August 2001 at 10:30 p.m., Charlotte-Mecklenburg Police Officer Matthew Presley Montgomery responded to an emergency call at 1923 Wilmore Drive. There, he met Burke and her aunt. As Officer Montgomery related: "[Burke] was extremely upset, she was shaking, she was almost crying since we were out in the street. I remember neither one of them could stand still; they were very excited." The two women screamed at defendant, who ran away as the police car approached. Burke related that defendant had threatened to kill her. He had become angry because she did not want to go home with him. She also told Officer Montgomery defendant had hit her with his fist and open hand about her head and face and on her back, pushed her down and stated he was going to kill her. Burke's aunt related that defendant pulled a knife on her and also threatened to kill her.

Officer Mark Santaniello testified concerning a domestic violence and assault call on 28 May 2001, involving defendant and Burke. In addition, Officer Donna Browning related her response to a call from Burke on 19 September 2000. Burke complained to Officer Browning that defendant threw bricks at her window and that she feared him.

Dr. James Michael Sullivan performed the autopsy on the victim's body. He found eleven stab wounds, the most serious to the left chest in the left breast area that penetrated through the chest wall and into the heart, causing hemorrhage into the cavity that surrounds the heart and into the left pleural cavity. This resulted in a large amount of blood loss.

Another significant stab wound entered the right chest, six inches into the chest cavity, injuring the right lung. This wound produced small to moderate amounts of bleeding in the right chest cavity. Dr.

Sullivan also found eighteen puncture wounds and some twenty-three cutting wounds. Wounds on the victim's hands appeared consistent with defensive wounds. The cause of death was multiple sharp trauma injuries with death resulting from blood loss.

John Donahue, the DNA technical leader for the Charlotte-Mecklenburg Police Department Crime Laboratory, analyzed fingernail scrapings from defendant's hands; a blood stain from a couch cushion; a swab from a knife; a swab from a knife blade; and blood stains from various places in the apartment, including the upper handrail of the stairway. The fingernail scrapings from defendant's right hand contained a mixture of DNA from the victim and defendant, with the majority contributed by defendant. The left fingernail scrapings taken from defendant revealed the victim contributed the majority of the DNA in the sample. The DNA in the blood stain on the upper handrail and the couch matched defendant's. The DNA in the blood stains from the knife and the knife blade matched the victim.

Defendant did not present evidence.

The issues on appeal are whether: (I) the trial court erred by allowing into evidence the testimony of Reginald Williams in violation of *Crawford v. Washington*; (II) the trial court erred by allowing into evidence hearsay testimony of the victim; (III) the trial court erred by allowing evidence of a prior conviction and unrelated assault on the victim's aunt; (IV) the trial court erred by failing to instruct the jury in a manner to ensure a unanimous verdict; (V) the short-form murder indictments for murder and first-degree burglary are unconstitutional in light of *Blakely v. Washington*; and (VI) the trial court erred by not arresting judgment on the first-degree burglary conviction.

I

[1] First, defendant argues the trial court committed error by allowing into evidence Reginald Williams' testimony and Williams' statements to law enforcement concerning statements the victim made to Williams, in violation of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). In the alternative, defendant argues plain error if the issue was not properly preserved at trial and/or ineffective assistance of counsel.[1]

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1. Defendant presents as an issue, whether defendant received ineffective assistance of counsel (IAC) for failure to object at trial to the admission of this evidence (although defense counsel did present a motion in limine to suppress which was denied). We also note defendant raises an IAC claim as to the admission of a criminal

Hearsay, which is generally inadmissible, "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003); *State v. Canady*, 355 N.C. 242, 248, 559 S.E.2d 762, 765 (2002) ("[A] statement is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted."). If the statement is offered for reasons other than the truth of the matter asserted, the statement is not hearsay and is not covered under *Crawford*. *Crawford*, 541 U.S. at 59, 158 L. Ed. 2d at 197 ("The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). *Crawford* holds that,

> [w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Crawford, 542 U.S. at 61, 158 L. Ed. 2d at 199.

Defendant argues Williams' testimony and the following statements Williams made to law enforcement concerning statements the victim told to Williams, were admitted in violation of *Crawford*:

Williams' Testimony

> Q: Mr. Williams, in reference to your testimony of a moment ago that you were in fear for your life, was there a time when Shanvell allowed you to listen to some telephone messages that had been left on her telephone?
>
> A: Yes.
>
> Q: And did she tell you who had left those telephone messages?
>
> A: Yes.
>
> [DEFENSE COUNSEL]: Objection.

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complaint signed by the victim regarding a prior domestic dispute involving the victim and defendant. See Issue *II*, *infra*. In his brief, however, defendant concedes that he "cannot, on direct appeal, from the naked record prove there was not some strategic reason for not objecting to these references; therefore, this error is assigned for preservation purposes only." Accordingly, this issue will not be addressed.

THE COURT: Basis?

[DEFENSE COUNSEL]: Hearsay.

THE COURT: Overruled.

Q: Who did she tell you had left those telephone messages?

A: She said it was Terraine, her exboyfriend.

Q: And was there one of those messages that you listened to in particular that provided you in part with your basis for fearing for your life?

A: Yes.

Q: And what was the message that you heard on the telephone that Shanvell told you it was from Terraine and you listened to it?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A: The fact that he thought she was messing with somebody, somebody was putting some stuff in her head, and when he found out who it was, he was gonna kill them.

Q: State whether or not Shanvell had ever expressed to you, yourself, that she herself feared Terraine?

A: Yes.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

. . .

A: She was just afraid of him. She was afraid he was going to do something to hurt her bad.

Williams' Statement to Law Enforcement[2]

A: She was just telling me, you know, why she broke up with him because he was very possessive and that he was locked up for bothering her, and she was just feeling kind of at ease while he

2. Williams made these statements during an interview with Detective David Phillips of the Charlotte-Mecklenburg Police Department. At trial, the jury listened to an audiotape recording of the interview and was given a transcript of the interview.

was locked up and she was scared of him. She was scared he was gonna do something to her.

. . .

She just said one time he was fighting her and he was slapping her around.

. . .

Yeah, he [sic] said that he [sic]—she—said that he fought her a lot, but nobody knew about it

. . .

She said he was calling sometimes twenty times a day.

. . .

[T]he time up at the Bojangles she told me about when he popped up on her. . . . [S]he said he was beating on her car and some stuff like that.

Q: [W]hen he would call over there when you were there on the phone [sic] were they arguing?

A: Once. He called a lot from jail. When the first time he was in jail and he was calling and she talked to him that she wanted him to go on with his life and stuff, and that was pretty much it.

. . .

Q : [Y]ou said he was in jail. Had she ever mentioned to you about him being in jail?

A: Yes. . . . That was for beating her that time.

Q: Did she ever mention to you anything else about anything he had ever been involved in?

A: Dog fights, and then she—I don't want to make accusations, but she said something about drugs. I don't know.

. . .

She just was telling me how he used to beat her all the time, you know.

Q: Did she tell you when he might have actually gotten out of jail?

A: [S]he told me that they were trying to get him out on bail or whatever. . . And then she told me the day that he got out because he popped up at her house.

Q: . . . Do you remember when it was that he went to jail for . . . assaulting her?

A: —didn't know when he went to jail.

Q: Okay. So it was several months ago?

A: Yes.

These statements were admissible, not for the truth of the matter asserted, but for purposes of explaining why Williams chose to run (in fear for his life), seek law enforcement assistance before returning to the apartment, and chose not to confront defendant single-handedly. *See Canady*, 355 N.C. at 248, 559 S.E.2d at 765 ("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); *State v. Golphin*, 352 N.C. 364, 440, 533 S.E.2d 168, 219 (2000). Accordingly, the trial court did not err in admitting this evidence. This assignment of error is overruled.

II

[2] Next, defendant argues the trial court erred by allowing into evidence, the hearsay statements of the victim in violation of *Crawford v. Washington*.

In *State v. Pate*, 62 N.C. App. 137, 139, 302 S.E.2d 286, 288 (1983), this Court affirmatively stated defendant waives the benefit of an objection when the same or similar evidence is admitted without objection. *See also*, *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) ("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.").

Defendant argues the admission of the following constituted error: (I) a criminal complaint signed by the victim regarding a domestic dispute occurring on 30 August 2001, involving the victim and defendant; (II) testimony of Officer Montgomery, who responded to the domestic call on 30 August 2001; (III) testimony of Officer Santaniello, who testified that defendant assaulted the victim on 30 August 2001, hit her in the back of the neck, pushed her in the back,

choked her, and threatened to kill her; and (IV) testimony of the victim's great-grandmother that the victim was afraid of defendant.

Officer Montgomery testified without objection that on 30 August 2001, the victim was extremely upset, shaking, and almost crying. The victim expressed her fear of defendant and he threatened to kill her. Defendant was angry because the victim would not go home with him and assaulted her by hitting her with his fist on her head, face, and back, then pushing her down. Officer Montgomery then drove the victim and the aunt to the Magistrate's office to file criminal complaints.

As Officer Montgomery was allowed to testify to the aforementioned without objection from defendant, defendant lost the benefit of any objection he may have made in relation to similar testimony from Officer Santaniello and the victim's aunt. Also, since Officer Montgomery's testimony essentially mimicked the statements the victim made in her criminal complaint form, defendant lost the benefit of any objection made to admission of the form.[3] This assignment of error is overruled.

III

[3] Defendant next argues the trial court erred by allowing into evidence a prior conviction concerning an attack against the victim and a criminal complaint form regarding an assault against the victim's aunt.

As stated *supra* Issue II, a defendant loses the benefit of an objection if the same or similar evidence is admitted without objection. *See Whitley*, 311 N.C. at 661, 319 S.E.2d at 588. Defendant argues the trial court erred in allowing into evidence Williams' testimony concerning defendant's prior conviction for assaulting the victim, and the aunt's criminal complaint concerning an attack occurring on 30 August 2001, where defendant attacked the aunt with a knife and threatened to kill her. However, Officer Montgomery was allowed to testify without objection that the victim had previously prosecuted defendant for assault, and on 30 August 2001, the aunt reported defendant threatened to kill her while holding a knife. Officer Montgomery's testimony regarding the attack on the aunt essentially mimicked the statements the aunt made on her criminal complaint form.

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3. We note defendant did assign, in his Assignment of Error Number 5, as plain error the admission of the victim's criminal complaint form. For the reasons stated herein, defendant has lost the benefit of any objection to admission of the criminal complaint form. Moreover, defendant has failed to show a different outcome would have resulted had the criminal complaint form not been admitted. *See State v. Parker*,

Defendant has lost the benefit of any objection to admission into evidence of the Williams' testimony regarding defendant's prior conviction and the admission of the aunt's criminal complaint form. This assignment of error is overruled.

IV

[4] Defendant next argues the trial court erred by failing to instruct the jury in a manner to ensure a unanimous verdict, contending that the jury could have split on the issues of premeditation and deliberation, and the felony murder rule and rendered a verdict of guilty of first-degree murder on a combination of the two theories.

Preliminarily, we note that the trial court instructed the jury on unanimity as follows:

> Now, Ladies and Gentlemen, I instruct you that a verdict is not a verdict until all 12 jurors agree unanimously as to what your decision shall be. You may not render a verdict by majority vote. . . .
>
> When you have reached a unanimous verdict, have your foreperson mark the appropriate place on the verdict form which I will send in to you in a few moments after you enter the jury room.

Thus, before deliberating, the jury was aware their verdict had to be unanimous.

In addition to this instruction, the verdict sheets explicitly called for a unanimous verdict on whether defendant was guilty of first-degree murder. If the jury answered this question affirmatively, it had to show whether it was convicting on one or both of the theories of first-degree murder: the theory of premeditation and deliberation, or the felony murder rule. Here, the jury unanimously decided that defendant was guilty under both theories and marked "yes" under each one.

Finally, to ensure that the jury was unanimous, jurors were polled. The clerk asked the jury:

> THE CLERK: Members of the Jury, would you please stand? Members of the Jury, your foreperson has reported that you find the defendant, Terraine Byers, guilty of first-degree murder on the basis of malice, premeditation and deliberation, and under the

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350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) ("[Plain error] is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." (quotations omitted)).

first-degree felony murder rule, and also guilty of first-degree burglary.

Was this your verdict?

(Affirmative response from all jurors.)

. . .

[DEFENSE COUNSEL]: Request polling of the jury, Your Honor.

The clerk then asked each juror individually whether or not their verdict was that defendant was guilty of first-degree murder under the basis of malice, premeditation and deliberation, and under the first-degree felony murder rule. Each juror responded, "Yes."

Our Supreme Court dealt with precisely this issue in *State v. Carroll*, holding:

> The jury's unanimous verdict based on both theories of first-degree murder was clearly represented on the verdict sheet. Moreover, following the clerk's announcement that the jury unanimously found defendant "guilty of first degree murder on the basis of malice, premeditation and deliberation and under the first degree felony murder rule," each juror individually affirmed that this was indeed his verdict. It would strain reason to conclude that the jury's verdict was not unanimously based on both theories of first-degree murder. Accordingly, the trial court properly polled the jury to ensure that the announced verdict was unanimous. . . . Nothing more was required.

State v. Carroll, 356 N.C. 526, 545, 573 S.E.2d 899, 911-12 (2002). This assignment of error is overruled.

V

[5] Defendant argues use of the short-form indictments for first-degree murder and first-degree burglary were constitutionally defective after *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). Defendant argues that under *Blakely*, every fact essential to his punishment must have been charged in the indictment. Specifically, defendant "contends that the failure to specifically name the felony crime of burglary or assault inflicting serious injury in the murder indictment and in the first-degree burglary indictment is a jurisdictional defect and judgment must be arrested on the burglary charge and on the murder charge based on upon felony murder." Defendant's argument, however, is misguided.

Our Courts have consistently held that the short-form first-degree murder indictment does not violate the Sixth Amendment of the United States Constitution. *See*, *e.g.*, *State v. Squires*, 357 N.C. 529, 591 S.E.2d 837 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004); *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). In upholding the constitutionality of short-form indictments for first-degree murder, our Supreme Court has held that:

> [the United States Supreme] Court's refusal to incorporate the grand jury indictment requirement into the Fourteenth Amendment along with the lack of precedent on this issue convinces us that the Fourteenth Amendment does not require the listing in an indictment of all the elements or facts which might increase the maximum punishment for a crime.

Wallace, at 508, 528 S.E.2d 326, 343; *see also*, *Squires*, 357 N.C. at 537, 591 S.E.2d at 842 ("The United States Supreme Court has consistently declined to impose a requirement mandating states to prosecute only upon indictments which include all elements of an offense."); *State v. Hunt*, 357 N.C. 257, 273, 582 S.E.2d 593, 604 ("[T]he United States Supreme Court has not applied the Fifth Amendment indictment requirements to the states."), *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003).

Similarly, our Courts have held that "[a]n indictment for burglary need not specify the particular felony that the accused intended to commit at the time of the breaking or entering . . . ." *State v. Lawrence*, 352 N.C. 1, 18, 530 S.E.2d 807, 818 (2000). The indictment must charge the offense "in a plain, intelligible, and explicit manner and contain[] sufficient allegations to enable the trial court to proceed to judgment and to bar a subsequent prosecution for the same offense, . . . and . . . inform[] the defendant of the charge against him with sufficient certainty to enable him to prepare his defense." *Id.* at 18-19, 530 S.E.2d at 818 (quotations omitted); *see also*, N.C. Gen. Stat. § 15A-924(a)(5) (2003).

"In *Blakely*, the [United States Supreme] Court reaffirmed its previous holding that the right to jury trial requires jurors to find sentencing facts which increase the penalty for a crime beyond the prescribed statutory maximum." *State v. Hurt*, 359 N.C. 840, 845, 616 S.E.2d 910, 913 (2005) (quotations omitted); *see also*, *State v. Allen*, 359 N.C. 425, 437, 615 S.E.2d 256, 265 (2005) ("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."). However, in *Allen*, our Supreme Court held that, under *Blakely*, "sentencing factors which might lead to a sentencing enhancement" need not be alleged in a North Carolina state court indictment. *Id.* at 438, 615 S.E.2d at 265. Furthermore, "to this date, the United States Supreme Court has not applied the Fifth Amendment indictment requirements to the states." *State v. Hunt*, 357 N.C. 257, 273, 582 S.E.2d 593, 604, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003). "[T]he 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." *Id.* at 272, 582 S.E.2d at 603.

In the instant case, the indictments for first-degree murder and first-degree burglary complied with the statutory and case-law requirements for charging first-degree murder and first-degree burglary. The holdings enunciated in *Blakely* and *Allen* do not apply to the use of a short-form indictment for murder in the instant case. *See*, *State v. Wissink*, 172 N.C. App. 829, 836-37, 617 S.E.2d 319, 324 (2005) (fact that defendant committed an offense while on probation need not have been alleged in the indictment). This assignment of error is overruled.

VI

[6] Lastly, defendant argues the trial court erred by not arresting judgment on the first-degree burglary conviction on the ground the conviction was used as the underlying felony for the first-degree murder conviction under the felony murder theory.

"When a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction." *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002). However, here, defendant was found guilty under both the theories of malice, premeditation and deliberation, and felony murder. Accordingly, we hold the trial court did not err in not arresting judgment on the first-degree burglary conviction, as defendant was found guilty of first-degree murder on the basis of malice, premeditation and deliberation. This assignment of error is overruled.

Motion for Appropriate Relief

[7] Defendant has filed a *pro se* Motion for Appropriate Relief (MAR) with this Court, which we decide pursuant to N.C. Gen. Stat.

§ 15A-1418. From defendant's pro se motion, we can identify three issues raised by defendant: (1) whether the trial court improperly admitted evidence; (2) whether the trial court had jurisdiction over defendant's charges; and (3) whether defendant's trial and/or appellate counsel were ineffective. We have addressed defendant's first two MAR issues above, see Issue *I* & *II*, *supra*, and find no error. As to defendant's claims of ineffective assistance of counsel (IAC), we find the record before us is sufficient to make a determination of the questions presented and it is not necessary to remand the case for proceedings on the motion.

As best we can determine from defendant's MAR, defendant argues he received ineffective assistance from both his trial and his appellate counsel. Defendant argues his trial counsel did not have blood samples "left around the frame of the [broken] window in the victim's residence" tested for DNA evidence and did not "determine if there [were] latent [finger]prints . . . inside or outside of the window glass." Defendant contends his trial counsel's failure to present potentially exculpatory evidence amounts to ineffective assistance of counsel.

To prevail on his IAC claim defendant must show that his counsel's conduct fell below an objective standard of reasonableness. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). Defendant must satisfy the following two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Braswell at 562, 324 S.E.2d at 248 (quotations omitted). "[E]ven an unreasonable error . . . does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248.

As defendant admits he cut his fingers on the glass of the broken window, any testing of the blood samples from the broken glass

would identify defendant's DNA. While it is possible for DNA of other individuals to be present, in light of the evidence presented at trial any such finding is not sufficient to establish a reasonable probability that there would have been a different result in the proceedings. Therefore, defendant's IAC claim as to his trial counsel is denied.

Defendant also argues he has received ineffective assistance from his appellate counsel in that his appellate counsel has not, on appeal, raised an IAC issue concerning defendant's trial counsel, has not raised issues concerning inadmissible evidence, and has not filed a Motion of Appropriate Relief on defendant's behalf. Defendant's appellate counsel was appointed to perfect defendant's appeal by the North Carolina Office of the Appellate Defender. Defendant's appellate counsel has brought forth arguments regarding alleged inadmissible evidence, see Issue *I* & *II*, *supra*. For the reasons stated above, appellate counsel's decision to not fully argue an IAC claim concerning defendant's trial counsel was warranted. Further, as defendant's appellate counsel was not appointed to assist defendant with his MAR, it was appropriate for appellate counsel to deny defendant's request for assistance in drafting his MAR. Therefore, defendant's IAC claim as to his appellate counsel is denied.

No error at trial. Defendant's claims under his Motion for Appropriate Relief are denied.

Judges McGEE and STEELMAN concur.

GOOD HOPE HEALTH SYSTEM, L.L.C., PETITIONER, AND THE TOWN OF LILLINGTON, PETITIONER-INTERVENOR v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND BETSY JOHNSON REGIONAL HOSPITAL, INC., AND AMISUB OF NORTH CAROLINA, INC. D/B/A CENTRAL CAROLINA HOSPITAL, RESPONDENT-INTERVENORS

No. COA05-123

(Filed 3 January 2006)

Hospitals— certificate of need—subsequent application—appeal of first moot

An appeal from the denial of a certificate of need for a hospital was dismissed as moot where there was a subsequent application. Although petitioner contends that the two applications

are legally and factually different, both applications are for exactly the same hospital, regardless of how it is characterized, and the agency review of the resubmitted original application during the review process for the subsequent application provides an adequate remedy.

Judge TYSON dissenting.

Appeal by petitioner and petitioner-intervenor from a Final Agency Decision issued 10 September 2004 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 14 September 2005.

Smith Moore, LLP, by Maureen Demarest Murray, Susan Frandenburg, and William Stewart, Jr., for petitioner-appellant, Good Hope Health System, LLC.

Morgan, Reeves and Gilchrist, by C. Winston Gilchrist, for petitioner-intervenor appellant, Town of Lillington.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for respondent-appellee N.C. Department of Health and Human Services.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Kathleen A. Naggs, and Nelson Mullins Riley & Scarborough, LLP, by Noah H. Huffstetler, III and Denise M. Gunter, for respondent-intervenor appellee Betsy Johnson Regional Hospital, Inc.

Bode Call & Stroupe, L.L.P., by Robert V. Bode and S. Todd Hemphill, for respondent-intervenor appellee Amisub of North Carolina, Inc. d/b/a Central Carolina Hospital.

STEELMAN, Judge.

Petitioner, Good Hope Hospital (Good Hope), is licensed as an acute care hospital. It has been in operation since 1921 in Erwin, North Carolina. Betsy Johnson Regional Hospital, Inc. (Betsy Johnson), is located in Dunn, North Carolina. Both hospitals are located in Harnett County. Due in part to its age, Good Hope's existing hospital is nearing the end of its useful life and suffers from multiple deficiencies.

2001 CON Application

In 2001, Good Hope applied for a Certificate of Need (CON) with the Department of Health and Human Services, Division of Facility Services, Certificate of Need Section (Agency) pursuant to Chapter 131E of the North Carolina General Statutes to partially replace its existing facility. The 2001 CON application proposed to reduce the number of acute care beds from forty-three to thirty-four, reduce the number of psychiatric beds from twenty-nine to twelve, for a total of forty-six beds, and proposed three operating rooms, at a cost of $16,159,950. The replacement hospital was to be built in Erwin. The Agency conditionally approved Good Hope's 2001 application, but only for two operating rooms. Good Hope filed a petition for contested case hearing in the Office of Administrative Hearings (OAH). Good Hope and the Agency settled the dispute in a written agreement. On 14 December 2001, the Agency issued a CON to Good Hope for a forty-six bed hospital with three operating rooms.

Good Hope submitted a proposal to the North Carolina Medical Care Commission (MCC) to obtain funding to develop the new facility from the United States Department of Housing and Urban Development. MCC denied the request for funding and Good Hope was unable to procure other financing. Good Hope entered into discussions with Betsy Johnson concerning a possible merger, however, no merger resulted therefrom.

Good Hope later entered into a joint venture with Triad Hospitals, Inc., which agreed to finance the project. The two formed Good Hope Hospital System, L.L.C. (GHHS). GHHS filed a motion for declaratory ruling requesting: (1) it be assigned Good Hope's 2001 CON, (2) permission to change the site of the new hospital to Lillington or Buies Creek, and (3) permission to increase the size of the hospital from 61,788 square feet to 67,874 square feet. The proposed cost of the new project was $18,523,942. The Agency denied the request for declaratory ruling. GHHS appealed the denial to the Department of Health and Human Services, Division of Facility Services (Department), but obtained a stay of that appeal. Good Hope has not relinquished its 2001 CON.

2003 CON Application

On 14 April 2003, GHHS filed a new application (2003 application) for a CON to build a complete replacement hospital in Lillington, rather than Erwin. The proposed facility was 112,945 square feet, with a total of forty-six acute care beds, ten observation beds, and three

operating rooms, at a cost of $33,488,750. Prior to filing the 2003 application, GHHS met with Ms. Hoffman, Chief of the Agency, who advised GHHS to file a new CON application, not just an amended 2001 application because of the difference in location, size, and scope of the proposed new hospital. After review, the Agency denied GHHS's 2003 application. GHHS appealed to OAH, challenging the Agency's decision. Betsy Johnson and Central Carolina Hospital (CCH) moved to intervene as respondents in support of the Agency's decision. The administrative law judge (ALJ) granted the motion to intervene. On 9 July 2004, the ALJ recommended the Agency's decision be reversed. Respondents appealed to the Department for final agency review. On 10 September 2004, the Department denied GHHS's application in a final agency decision. GHHS appealed.

2005 CON Application

While this appeal was pending before this Court, GHHS filed a new CON application (2005 application) on 15 August 2005 in response to a need determination issued by the Governor in the 2005 State Medical Facilities Plan (SMFP). The Governor has final authority to approve or amend the SMFP, which becomes the binding criteria for review of CON applications. *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 42-43, 510 S.E.2d 159, 162-63 (1999). In its 2005 application, GHHS resubmitted its 2003 CON application in its entirety, with some supplemental information.

On 26 August 2005, respondents filed a motion to dismiss plaintiffs' appeal in this case on the grounds the appeal has been rendered moot by GHHS's 2005 CON application.

Mootness

" 'When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed [as moot] for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law . . . ." *State ex rel. Utilities Com. v. Southern Bell Telephone Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 324 (1976) (*Southern Bell I*) (citations omitted). The mootness doctrine applies in CON cases. *See In re Denial of Request by Humana Hospital Corp.*, 78 N.C. App. 637, 640, 338 S.E.2d 139, 141 (1986).

GHHS's 2003 application was denied, in part, because under the 2003 SMFP there was no need for a hospital with three operating

rooms, as proposed by GHHS. The Department must follow the need requirements as promulgated in the SMFP and cannot grant a CON to a hospital which would allow more facilities than are needed. *See* N.C. Gen. Stat. § 131E-183(a)(1) (2005). The reason behind such a requirement is to prevent the proliferation of unnecessary health care facilities and equipment, which would result in costly duplication and underuse of facilities. N.C. Gen. Stat. § 131E-175 (2005). In 2005, recognizing that Good Hope Hospital was nearing the end of its useful life, the Governor amended the 2005 SMFP to include a need for a new hospital in Harnett County with no more than fifty acute care beds and three operating rooms. GHHS filed a 2005 CON application for a new hospital containing forty-six acute care beds and three operating rooms. Respondents contend the case is now moot because the Agency is required to re-review GHHS's 2003 CON application, which it resubmitted as its 2005 CON application with supplemental information under the more favorable 2005 SMFP need requirements, thus providing GHHS with the relief sought. We agree.

Our holding in *Humana*, 78 N.C. App. 637, 640, 338 S.E.2d 139, 141 is determinative of this question. In *Humana*, the hospital filed a 1981 CON application to build a new 160-bed hospital in Wake County. The Agency denied their 1981 application on the grounds that the then current SMFP did not contain a need for additional acute care beds in the area. Humana requested a reconsideration hearing, which the Agency denied. While seeking judicial review of the denial of its 1981 CON application, Humana filed another CON application in 1982. The SMFP in effect for 1982 contained a need for 174 beds in Wake County. The Agency denied Humana's 1982 CON application.

This Court dismissed Humana's appeal on grounds of mootness. Because Humana's 1982 CON application was virtually identical to its 1981 application, with additional, supplemental information, and the 1982 application was reviewed under the more favorable 1982 SMFP requirements, we held this afforded Humana an adequate remedy to have its application reviewed under the more favorable 1982 SMFP need requirements. 78 N.C. App. at 641-42, 338 S.E.2d at 142. This Court found it significant that Humana's 1981 and 1982 applications were almost identical, with the only difference being that the 1982 application contained supplemental information which was not considered as part of the 1981 application. *Id.* at 641, 338 S.E.2d at 142.

Although this Court stated in *Humana* that its decision was based on the unique facts in that case, the facts in the instant case are virtually identical to those in *Humana*. Therefore, the reasoning

in *Humana* is controlling. GHHS's 2003 application is virtually identical to its 2005 application, with the addition of supplemental information. The review of its 2005 application, under the more favorable 2005 SMFP need requirements, affords GHHS an adequate remedy of any alleged errors in the 2003 review process, thereby making this appeal moot.

GHHS contends the 2003 CON application and the 2005 application are legally and factually different, in that its 2003 application was for a replacement hospital, which is judged against different criteria than its 2005 application, which is for a new hospital. It asserts that the Agency improperly applied the criteria for a new hospital to its 2003 application for a replacement hospital. Therefore, petitioner alleges the Agency's review of its 2005 application would not afford it the remedy sought, that is, to have the criteria for awarding a CON for a replacement hospital applied to its 2003 CON application.

We do not find this argument persuasive. GHHS's 2001 application was for a replacement hospital, which was to be located in Erwin, where Good Hope is currently located. The 2003 application, however, proposed to change the location of the hospital to Lillington and doubled both the proposed square footage and cost of the hospital from the 2001 application. In GHHS's 2005 CON application, it proposed the same location, size, and scope for its new hospital as contained in its 2003 application. While GHHS did denote its 2003 application as being for a "replacement hospital," it describes the exact same hospital in the 2005 CON application as a "new hospital." Regardless of how GHHS characterizes its hospital, both plans are for the exact same hospital. Therefore, the Agency's review of the resubmitted 2003 CON application during its 2005 review process provides GHHS with an adequate remedy. In addition, if GHHS were awarded a CON based on its 2005 application, it would be required to yield any other CON it may have. The Governor explained in his Clarification Memorandum to 2005 State Medical Facilities Plan, that:

> [T]o avoid the proliferation of unnecessary health service facilities as referenced in N.C. Gen. Stat. § 131E-175(4), I have concluded that any successful applicant for a CON to develop the New Hospital shall be required as a condition of its approval to relinquish any other CON which it holds to develop or replace acute care beds or operating rooms in Harnett County and to withdraw any other pending application or litigation concerning the development or replacement of such beds or rooms.

Furthermore, the same reasons *Humana* was found to be distinguishable from *State ex rel. Utilities Comn v. Southern Bell*, 307 N.C. 541, 299 S.E.2d 763 (1983) (*Southern Bell II*), apply here. In *Southern Bell II*, our Supreme Court held that the grant of a second application for a rate increase did not moot the appeal of the denial of the first application because the second rate increase was not applied retroactively. *Id.* at 547-48, 299 S.E.2d at 767. By not applying the second rate increase retroactively, the petitioner would not receive the relief sought; therefore, the issue of the first rate application was not moot. *Id.* at 48, 299 S.E.2d at 767. This case is more akin to *Southern Bell I* where the two requests were the same. *See Humana*, 78 N.C. App. at 644, 338 S.E.2d at 143-44 (finding *Southern Bell II* did not overrule *Southern Bell I*, but simply distinguished it).

Nor do the facts of this case fit within the exception to the mootness doctrine, that the issues are "capable of repetition yet evading review." *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703 (2002) (citations and internal quotation marks omitted). To apply this exception GHHS must show the challenged action is " 'in its duration too short to be fully litigated prior to its cessation or expiration" and there is a reasonable expectation that the same issue would arise again. *Id.* at 654, 566 S.E.2d at 703-04 (citations omitted). Regardless of the Agency's decision concerning GHHS's 2005 application, its decision will not escape review.

GHHS has been afforded an adequate remedy in having its 2003 application reconsidered under the more favorable 2005 SMFP need requirements. Any allegations regarding errors in the 2003 review process are now moot.

APPEAL DISMISSED.

Judge GEER concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

I. Mootness

The majority's opinion cites *In re Denial of Request by Humana Hospital Corp.* and applies the mootness doctrine to GHHS's appeal. 78 N.C. App. 637, 640, 338 S.E.2d 139, 141 (1986). In *Humana*, this

Court stated, "[t]he doctrine of mootness is applicable to an appellate proceeding where the original question in controversy is no longer at issue." 78 N.C. App. at 640, 338 S.E.2d at 141.

> A case is considered moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). Courts will not entertain such cases because it is not the responsibility of courts to decide "abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). Conversely, *when a court's determination can have a practical effect on a controversy, the court may not dismiss the case as moot.*

Lange v. Lange, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (emphasis supplied).

GHHS persuasively argues reasons to show this case is not moot. GHHS contends, the "agency has deprived Good Hope Hospital of the substantive legal right to use and maintain its existing, previously approved hospital by erroneously misapplying the CON act to evaluate GHHS's 2003 proposal as for a new hospital and new services rather than as for replacement of an existing hospital."

The 2003 application is to be reviewed and evaluated under Policy AC-5 in the 2003 SMFP and criterion (3a) concerning reduction and relocation of existing health services. N.C. Gen. Stat. § 131E-183(a)(3a) (2003). Proposals for new services are judged against criteria 1, 3, and 6. N.C. Gen. Stat. §§ 131E-183(a)(1), (3), and (6). GHHS's 2005 CON is an application for "new services" and does not moot the 2003 CON for "relocation of existing services." I respectfully dissent.

II. Standard of Review

N.C. Gen. Stat. § 150B-23(a) (2003) provides:

> A contested case shall be commenced by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office . . . A petition shall be signed by a party or a representative of the party and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to

pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

(1) Exceeded its authority or jurisdiction;

(2) Acted erroneously;

(3) Failed to use proper procedure;

(4) Acted arbitrarily or capriciously; or

(5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

In *Humana*, cited by the majority's opinion, the hospital submitted two applications as a new provider for a new facility and new beds. 78 N.C. App. at 640, 338 S.E.2d at 141. Humana's request for a reconsideration hearing regarding the denial of its 1981 application was also denied. *Id.* This Court held that because Humana's 1982 application was reviewed, and the 1981 and 1982 applications were virtually identical, "the 1982 review process afforded Humana an adequate remedy to have its application reviewed under a plan projecting a bed need, regardless of any alleged error in the 1981 review process. Therefore, the assignments of error as to the review process of Humana's 1981 application are moot." *Id.* at 641, 338 S.E.2d at 142. This Court in *Humana* also limited the applicability of its holding and stated, "[t]his opinion should not be construed as holding that the opportunity to reapply for a certificate of need automatically moots all procedural claims in all cases." *Id.* at 646, 338 S.E.2d at 145.

Here, GHHS's 2005 application did not moot the claims involved in the 2003 application. The original issue on appeal regarding GHHS's 2003 application remains unanswered. The legal issue of how the CON Act can constitutionally and statutorily be applied to replacement projects remains unanswered. GHHS's 2003 CON and the 2005 CON applications are factually and legally different.

Unlike *Humana*, GHHS requested a reduction in beds and relocation of the existing facility in its 2003 application, not a CON for a new facility. The 2005 application sought a "new facility." This application resulted from and was based upon the Governor's amendment to the 2005 SMFP, which determined that a "New Hospital" is needed in central Harnett County. The Governor specifically stated,

"I have concluded that the Certificate of Need ("CON") application process to build the New Hospital should be open to any applicant and nothing herein is to be construed as favoritism toward, or bias against, any potential applicant." Substantially different review criteria applies if an applicant seeks to replace existing health services rather than apply for a CON for new health services. *Compare* N.C. Gen. Stat. § 131E-183(a)(3a) *with* § 131E-183(a)(1), (3), and (6). The 2005 CON request for a New Hospital is a new and different application that solely arose due to the Governor's amendment to the 2005 SMFP and is subject to review under different statutory regulations. *Id.*

The requirements for a relocation or reduction in services are provided in N.C. Gen. Stat. § 131E-183(a)(3a), which provides:

> In the case of a reduction or elimination of a service, including the relocation of a facility or a service, the applicant shall demonstrate that the needs of the population presently served will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care.

The Agency found that GHHS met the requirements of N.C. Gen. Stat. § 131E-183(a)(3a). GHHS's 2003 application did not request new beds, as did the 2005 application. In its final decision, the Agency concluded that GHHS's 2003 application failed to satisfy the requirements for new services; criteria that is wholly inapplicable to the 2003 application.

The 2005 application must satisfy the standards under N.C. Gen. Stat. § 131E-183(a)(1), (3), and (6). Under these Sections of the statute, GHHS must explain why "new" services are needed and demonstrate that the "new projects" will not result in an "unnecessary duplication" of existing health services.

The Agency denied GHHS's 2003 application. The Agency found that GHHS failed to meet the statutory requirements of N.C. Gen. Stat. § 131E-183(a)(1), (3), (4), (5), (6), (12), (18a) and 131E-183(b). GHHS argues the Agency incorrectly applied N.C. Gen. Stat. § 131E-183(a)(1), (3), and (6) standards to the 2003 application. I agree. In 2003, GHHS applied for a modification to the existing facility only. The Agency erred when it reviewed and evaluated the

2003 application under the standard set forth for new facilities in N.C. Gen. Stat. § 131E-183(a). GHHS is entitled to a decision on the merits of this issue. The majority's opinion fails to correctly apply the mootness doctrine. Since I find the appeal is not moot, I address the merits of the appeal.

III. Issues

GHHS argues the Agency: (1) exceeded its authority by ignoring its own statutes, plan, prior decisions, and settlement agreement with Good Hope; (2) exceeded its authority by demanding space information not required under N.C. Gen. Stat. § 131E-182(b) and ignoring space information required by the application; (3) violated N.C. Gen. Stat. § 131E-185 by failing to consider information from the public hearing concerning how GHHS's application conformed to the applicable law; and (4) unconstitutionally applied the CON criteria to deny GHHS's application and deprive the hospital of its right to use its existing facility.

IV. Standard of Review

N.C. Gen. Stat. § 131E-188(b) (2003) provides:

> Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision of the Department in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a).

"On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *North Carolina Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citation omitted). "If the party asserts the agency's decision was affected by a legal error, *de novo* review is required; if the party seeking review contends the agency decision was not supported by the evidence, or was arbitrary or capricious, the whole record test is applied." *Christenbury Surgery Ctr. v. N.C. Dep't of Health and Human Servs.*, 138 N.C. App. 309, 312, 531 S.E.2d 219, 221 (2000). "[T]his Court reviews the agency's findings and conclusions de novo when considering alleged errors of law." *Cape Fear Mem. Hosp. v. N.C. Dept. of Human Resources*, 121 N.C. App. 492, 493, 466 S.E.2d 299, 300 (1996) (citing *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)).

V. Agency Authority

GHHS argues the Agency exceeded its authority by ignoring its own statutes, plan, prior decisions, and settlement agreement with Good Hope. I agree.

Good Hope applied for a CON in 2001. The application proposed to: (1) replace part of its existing hospital with a new facility on Highway 421 near Erwin; (2) utilize buildings on the old campus for outpatient physical therapy, business offices, plant operations, information services, and other support functions; (3) reduce the number of beds from seventy-two to forty-six; (4) develop three operating rooms; (5) encompass 61,788 square feet; and (6) spend a capital expenditure of $16,159,950.00.

The Agency approved the application, but conditioned its approval on the development of two operating rooms. Good Hope and the Agency entered into a settlement agreement, and the Agency agreed that Good Hope could develop three operating rooms. A CON was issued to Good Hope on 14 December 2001.

Good Hope secured financing through a joint venture with Triad Hospitals, Inc. known as Good Hope Health Systems, L.L.C., and referred to in the majority's opinion as "GHHS." In 2003, GHHS filed an application to develop a replacement facility in central Harnett County. The 2003 application proposed the same number of beds and operating rooms as was provided in the 2001 application but increased the size of the facility to 112,945 square feet. The 2003 application proposed more meeting space, more private rooms, and to relocate all facilities rather than utilize any portion of the existing facility. During the review process, GHHS sent a letter to the Agency stating it was entitled to an exemption from CON review under N.C. Gen. Stat. § 131E-184(a). The Agency denied the application.

N.C. Gen. Stat. § 131E-176(16)(e) (2003) provides:

> "New institutional health services" means any of the following:
>
> . . . .
>
> (e) A change in a project that was subject to certificate of need review and for which a certificate of need was issued, if the change is proposed during the development of the project or within one year after the project was completed. For purposes of this subdivision, a change in a project is a change of more than fifteen percent (15%) of the approved capital expenditure

amount or the addition of a health service that is to be located in the facility, or portion thereof, that was constructed or developed in the project.

GHHS's 2003 application proposed additional capital expenditures exceeding 15% over the 2001 project for which a CON was issued. The 2003 application was "proposed during the development of the project" granted in the 2001 application and stated that it was proposing changes to the approved 2001 project.

The Agency incorrectly reviewed the 2003 application as a new project, rather than a modification to an existing project. The Agency failed to set forth any finding to support its determination that the 2003 application should be reviewed and evaluated as a new project instead of an existing project.

GHHS argues N.C. Gen. Stat. § 131E-183(a)(3a) controls the 2003 application. The application proposes to "reduce and relocate facilities" rather than establish a new hospital. The Agency found that GHHS's proposed replacement facility would appropriately meet the needs of all patient groups, but GHHS failed to adequately demonstrate "that the population projected to be served needs the scope of services proposed by the application," a requirement of N.C. Gen. Stat. § 131E-183(a)(3). The Agency also found GHHS's application complied with N.C. Gen. Stat. § 131E-183(a)(3a). The Agency also analyzed the application under N.C. Gen. Stat. § 131E-183(a)(6) and found the requirement of demonstrating "that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities" was not satisfied. The Agency erred when it applied criterion for new hospitals in N.C. Gen. Stat. § 131E-183(a) to GHHS's 2003 modification. In light of this error, it is unnecessary to consider the remaining assignments of error.

VI. Conclusion

The majority's opinion improperly applies the mootness doctrine to dismiss GHHS's appeal. GHHS is entitled to a decision on the merits of its appeal.

The Agency erred when it reviewed GHHS's 2003 application based on criterion for a new facility. In light of this error, it is unnecessary to consider the remaining assignments of error. I vote to reverse and remand this case for evaluation of GHHS's 2003 CON application under the statutes and regulations applicable to relocation of an existing facility. I respectfully dissent.

GOOD HOPE HOSPITAL, INC. AND GOOD HOPE HEALTH SYSTEM, L.L.C., PETITIONERS, AND TOWN OF LILLINGTON, PETITIONER-INTERVENOR v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND BETSY JOHNSON REGIONAL HOSPITAL, INC., AND AMISUB OF NORTH CAROLINA, INC. D/B/A CENTRAL CAROLINA HOSPITAL, RESPONDENT-INTERVENORS

No. COA05-183

(Filed 3 January 2006)

Hospitals— certificate of need—total replacement of facility

The legislature's intent in enacting the certificate of need (CON) law allows the total replacement of a health service facility without certificate of need review in only one instance, where the facility is destroyed or damaged by natural disaster or accident. That instance did not apply here, and the Department of Health and Human Services did not err by determining that Good Hope Hospital System was not exempt from CON review. N.C.G.S. § 131E-184.

Judge TYSON dissenting.

Appeal by petitioners and petitioner-intervenor from a Final Agency Decision issued 1 November 2004 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 14 September 2005.

Smith Moore, LLP, by Maureen Demarest Murray, Susan Frandenburg, and William Stewart, Jr., for petitioner-appellant, Good Hope Health System, LLC.

Morgan, Reeves and Gilchrist, by C. Winston Gilchrist, for petitioner-intervenor appellant, Town of Lillington.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for respondent-appellee N.C. Department of Health and Human Services.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Kathleen A. Naggs, and Nelson Mullins Riley & Scarborough, LLP, by Noah H. Huffstetler, III and Denise M. Gunter, for respondent-intervenor appellee Betsy Johnson Regional Hospital, Inc.

Bode Call & Stroupe, L.L.P., by Robert V. Bode, S. Todd Hemphill, and Diana Evans Ricketts, for respondent-intervenor appellee Amisub of North Carolina, Inc. d/b/a Central Carolina Hospital.

STEELMAN, Judge.

Petitioner, Good Hope Hospital (Good Hope), is licensed as an acute care hospital. It has been in operation since 1921 in Erwin, North Carolina. Betsy Johnson Regional Hospital, Inc. (Betsy Johnson), is located in Dunn, North Carolina. Both hospitals are located in Harnett County. Due in part to its age, Good Hope's existing hospital is nearing the end of its useful life and suffers from multiple deficiencies.

Certificate of Need Applications

In 2001, Good Hope applied for a Certificate of Need (CON) with the Department of Health and Human Services, Division of Facility Services, Certificate of Need Section (Agency) pursuant to Chapter 131E of the North Carolina General Statutes to partially replace its existing facility. The Agency conditionally approved Good Hope's 2001 application, but only for two operating rooms. Good Hope filed a petition for contested case hearing in the Office of Administrative Hearings (OAH). Good Hope and the Agency settled the dispute in a written agreement. On 14 December 2001, the Agency issued a CON to Good Hope for a forty-six bed hospital with three operating rooms.

Good Hope was unable to obtain funding for its hospital through HUD. As a result, Good Hope entered into a joint venture with Triad Hospital, Inc., who agreed to finance the project, and the two formed Good Hope Hospital System, L.L.C. (GHHS). GHHS filed a motion for declaratory ruling requesting it be assigned Good Hope's 2001 CON. The Agency denied this request. GHHS appealed the denial to the Department of Health and Human Services, Division of Facility Services (Department), but obtained a stay of this appeal. Good Hope has not relinquished its 2001 CON.

On 14 April 2003, GHHS filed a new application for a CON to build what it characterized as a complete replacement hospital in Lillington. The Agency denied this application. On 10 September 2004, the Department denied GHHS's application in a final agency decision. GHHS appealed this decision in a separate appeal. *See Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health and Human Servs.*, 175 N.C. App. 296, 623 S.E.2d 307 (2006).

Exemption Notice

By letter dated 21 August 2003, GHHS notified the Agency that it proposed to acquire Good Hope Hospital and develop a replacement

hospital in Lillington. GHHS asserted it was exempt from CON review pursuant to N.C. Gen. Stat. § 131E-184. GHHS gave its notice of exemption while its second application for a CON was pending. On 11 December 2003, the Agency denied GHHS's exemption request. GHHS filed a petition for contested case hearing on 12 January 2004 with OAH. In its petition, GHHS alleged the Agency erred in refusing to recognize its proposal to replace its existing hospital as exempt from CON review under N.C. Gen. Stat. § 131E-184. The administrative law judge (ALJ) allowed motions to intervene by the Town of Lillington, Betsy Johnson, and Amisub of North Carolina, Inc. On 2 August 2004, the ALJ issued a recommended decision to grant summary judgment against GHHS. On 1 November 2004, the Department issued its Final Agency Decision, determining GHHS's proposal was not exempt under N.C. Gen. Stat. § 131E-184. GHHS appealed.

Argument

In GHHS's first argument, it contends the Department improperly granted summary judgment against it because it erred in applying N.C. Gen. Stat. § 131E-184. We disagree.

Standard of Review

In determining whether an agency erred in interpreting a statute, this Court employs a *de novo* standard of review. *Chesapeake Microfilm v. N.C. Dept. of E.H.N.R.*, 111 N.C. App. 737, 744, 434 S.E.2d 218, 221 (1993). We also review the 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).

Analysis

A certificate of need (CON) is required before an entity can develop a "new institutional health service" as defined in N.C. Gen. Stat. § 131E-176(16). This includes building a new hospital. However, the CON law exempts certain projects that would otherwise be subject to CON review if they fit within any of the listed grounds contained in N.C. Gen. Stat. § 131E-184. Any part of the project which does not fit within an exempt purpose remains subject to the statutory prerequisite of CON review and approval. N.C. Gen. Stat. § 131E-184(b).

When interpreting a statute, we must apply the rules of statutory construction. *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979). The principal rule of statutory construction is that the

legislature's intent controls. *Id.* That intent "may be inferred from the nature and purpose of the statute, and the consequences which would follow, respectively, from various constructions." *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991). "A court should always construe the provisions of a statute in a manner which will tend to prevent it from being circumvented," otherwise, the problems which prompted the statute's passage would not be corrected. *Campbell*, 298 N.C. at 484, 259 S.E.2d at 564. In addition, statutory exceptions must be narrowly construed. *Publishing Co. v. Board of Education*, 29 N.C. App. 37, 47, 223 S.E.2d 580, 586 (1976). The party seeking the benefit of the exception bears the burden of establishing that they fit squarely within the exception. *Id.* In addition, "the interpretation of a statute given by the agency charged with carrying it out is entitled to great weight." *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citations and internal quotation marks omitted).

"[T]he overriding legislative intent behind the CON process, [is the] regulation of major capital expenditures which may adversely impact the cost of health care services to the patient." *Cape Fear Mem. Hosp. v. N.C. Dept. of Human Resources*, 121 N.C. App. 492, 494, 466 S.E.2d 299, 301 (1996) (citing N.C. Gen. Stat. §§ 131E-175(1)-(2), (4) and (6)-(7)). *See also In re Denial of Request by Humana Hosp. Corp.*, 78 N.C. App. 637, 646, 338 S.E.2d 139, 145 (1986). To achieve this goal, the CON law was enacted to "limit the construction of health care facilities in this state to those that the public needs and that can be operated efficiently and economically for [the public's] benefit." *In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986). Thus, any entity proposing any "new institutional health services" within this state is subject to review "as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria . . . ." N.C. Gen. Stat. § 131E-175(7).

In its notice of exemption, GHHS asserted it was entitled to an exemption from CON review pursuant to N.C. Gen. Stat. § 131E-184(a)(1) to eliminate or prevent imminent safety hazards and under (1a) to comply with state licensure standards. However, in applying the above stated principles of statutory construction, we find there is only one provision in the exemption statute, N.C. Gen. Stat. § 131E-184(a)(5), that allows the replacement of an entire facility, and then only "[t]o replace or repair facilities destroyed or damaged by accident or natural disaster."

"Under the doctrine of *expressio unius est exclusio alterius*, the mention of specific exceptions implies the exclusion of others." *Campbell*, 298 N.C. at 482, 259 S.E.2d at 563. Thus, the legislature's specific reference to replacement of a facility in section (a)(5) demonstrates its intent that replacement of an entire facility is not available under any other exemption contained in the statute. This interpretation is further supported by the rule of statutory construction that exemptions must be construed narrowly. Notably, another provision, section (a)(7), in the exemption statute allows for replacement, but of medical equipment. N.C. Gen. Stat. § 131E-184(a)(7). However, the replacement of such equipment is not conditioned on its destruction or damage due to accident or natural disaster, as is required in section (a)(5). This inclusion of limiting language for replacement facilities and the omission of any such language for replacement equipment further supports that the legislature meant to impose an express limitation on circumstances when replacement facilities are exempt from CON review.

As noted previously, legislative intent may also be inferred from the "consequences which would follow, respectively, from various constructions." *Alberti*, 329 N.C. at 732, 407 S.E.2d at 822. "[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Frye*, 350 N.C. at 45, 510 S.E.2d at 163. If this Court were to interpret this statute as broadly as appellants suggest, the exception would swallow the rule. In addition, the SMFP, while recognizing what an important resource hospitals are in this state—not only for healthcare, but also for employment and economic development in their communities, states "[e]ven so, it is not the State's policy to guarantee the survival and continued operation of all the State's hospitals or even any one of them." To allow Good Hope to build a entirely new facility without requiring it to comply with CON review simply because it has reached the end of its useful life would in effect grant it a franchise right to perpetual operation. Our legislature has expressly declined to allow such a result.

Most importantly, if this Court were to interpret section (a)(1), (a)(1a), or any other provision contained in N.C. Gen. Stat. § 131E-184 as allowing the replacement of an entire facility, this would contravene the legislature's purpose in enacting the CON law. Undoubtedly, the total replacement of a facility involves substantial capital expenditures. The primary purpose of the CON law is

to regulate major capital expenditures to prevent an adverse impact on the cost of health care services to patients. *Cape Fear*, 121 N.C. App. at 494, 466 S.E.2d at 301.

Our decision is in accord with the legislature's purpose and intent in enacting the CON law. We interpret N.C. Gen. Stat. § 131E-184 to allow for the total replacement of a health service facility in only one instance, where the facility is destroyed or damaged by natural disaster or accident. This interpretation adheres to the purpose of the CON law, "to control the cost, utilization, and distribution of health services and to assure that the less costly and more effective alternatives are made available." *Humana*, 78 N.C. App. at 646, 338 S.E.2d at 145 (citing N.C. Gen. Stat. § 131E-175(1)-(7) and § 131E-181(a)(4)).

Good Hope was not destroyed or damaged by accident or natural disaster. Thus, the Department did not err in determining GHHS was not exempt from CON review. As a result, we need not review GHHS's remaining arguments.

AFFIRMED.

Judge GEER concurs.

Judge TYSON dissents in separate opinion.

TYSON, Judge dissenting.

The majority's opinion cites to *Campbell v. Church* and argues the principal rule of statutory construction is the legislature's purpose and intent controls. 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979). The majority's opinion also cites to *Cape Fear Mem. Hospital v. N.C. Dept. of Human Resources* and contends the legislative intent behind the CON review process is "the regulation of major capital expenditures which may adversely impact the cost of health care services to the patient." 121 N.C. App. 492, 494, 466 S.E.2d 299, 301 (1996) (citing N.C. Gen. Stat. §§ 131E-174(1)-(2), (4), and (6)-(7)). While I certainly agree that the legislature's purpose and intent controls our interpretation of the statute, the majority's opinion misapplies the statute and ignores others. By limiting the right to an exemption from CON review to solely one provision in the exemption statute, N.C. Gen. Stat. § 131E-184(a)(5), the Department and the majority's opinion overlook the plain language of Section (1), (1a), and (1b). I respectfully dissent.

I. Issues

GHHS argues the Department: (1) improperly granted summary judgment against it because N.C. Gen. Stat. § 131E-184 grants an exemption for their replacement hospital, which was proposed to eliminate "imminent safety hazards" as defined in life safety codes, comply with state and federal licensure standards, and comply with medicare certification standards; (2) erred in determining that its written notice and explanation were not sufficient to warrant an exemption; and (3) unconstitutionally applied the exemption statute to deprive it of its right to use its existing facility.

II. Standard of Review

N.C. Gen. Stat. § 131E-188(b) (2003) provides:

> Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision of the Department in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a).

"On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *North Carolina Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citation omitted). "If the party asserts the agency's decision was affected by a legal error, *de novo* review is required; if the party seeking review contends the agency decision was not supported by the evidence, or was arbitrary or capricious, the whole record test is applied." *Christenbury Surgery Ctr. v. N.C. Dep't of Health and Human Servs.*, 138 N.C. App. 309, 312, 531 S.E.2d 219, 221 (2000). "[T]his Court reviews the agency's findings and conclusions de novo when considering alleged errors of law." *Cape Fear Mem. Hosp. v. N.C. Dept. of Human Resources*, 121 N.C. App. 492, 493, 466 S.E.2d 299, 300 (1996) (citing *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)).

III. Summary Judgment and Exemption from CON Review

GHHS argues the Department improperly granted summary judgment against it because N.C. Gen. Stat. § 131E-184 grants an exemption for their replacement hospital, which was proposed to eliminate "imminent safety hazards" as defined in life safety codes, to comply

with state licensure standards, and to comply with federal medicare certification standards. I agree.

> In a motion for summary judgment, the movant has the burden of establishing that there are no genuine issues of material fact. The movant can meet the burden by either: 1) Proving that an essential element of the opposing party's claim is nonexistent; or 2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim.
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Hines v. Yates, 171 N.C. App. 150, 157, 614 S.E.2d 385, 389 (2005) (internal quotation and citation omitted).

The ALJ reversed the Agency's decision disapproving GHHS's 2003 application and ruled that "a CON be issued for the construction of a replacement hospital in Lillington, NC as proposed in the application." Following the ALJ's decision, Good Hope wrote a letter to the Agency and explained that GHHS planned to acquire Good Hope and develop a replacement hospital in Lillington. In the letter, Good Hope contended the project was exempt from CON review pursuant to N.C. Gen. Stat. § 131E-184(a)(1), (a)(1a), and (a)(1b) which provide:

> (a) Except as provided in subsection (b), *the Department shall exempt from certificate of need review* a new institutional health service if it receives prior written notice from the entity proposing the new institutional health service, which notice includes an explanation of why the new institutional health service is required, *for any of the following*:
>
> (1) To eliminate or prevent imminent safety hazards as defined in federal, State, or local fire, building, or life safety codes or regulations.
>
> (1a) To comply with State licensure standards.

> (1b) To comply with accreditation or certification standards which must be met to receive reimbursement under Title XVII of the Social Security Act or payments under a State plan for medical assistance approved under Title XIX of that act.

(Emphasis supplied).

The Agency informed GHHS that its project was not exempt from CON review. The Department's final agency decision reversed the ALJ's recommended decision and affirmed the Agency's decision disapproving GHHS's CON application.

Following the final agency decision, GHHS moved for summary judgment based on N.C. Gen. Stat. § 131E-184(a)(1b), which states, "[t]o comply with accreditation or certification standards which must be met to receive reimbursement under Title XVIII of the Social Security Act or payments under a State plan for medical assistance approved under Title XIX of that act." The chief ALJ entered summary judgment against GHHS. The final agency decision affirmed summary judgment in favor of the Department. The final agency decision concluded, "now that it has been adjudicated that GHHS should receive a CON to develop a replacement hospital, Good Hope cannot now show that its proposed project is required."

GHHS appeals from the Department's final agency decision granting summary judgment in favor of the Agency. GHHS argues it submitted uncontradicted evidence that is sufficient to prove GHHS is exempt from CON review and is entitled to summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56 (2005). The Agency does not dispute the fact that the facility must be replaced, must comply with health and safety codes, and must maintain its certifications and licenses in order to continue to operate. GHHS contends summary judgment should be reversed because it provided evidence of an exempt purpose.

GHHS presented undisputed evidence acknowledging the dilapidated condition of Good Hope Hospital, as well as photographs and inspections documenting the deficiencies. GHHS's evidence included findings of state and federal agencies that identified the major categories of physical and environmental deficiencies throughout the facility. The evidence included a letter from the Centers for Medicare and Medicaid Services to Good Hope that stated:

> we have determined that your facility does not comply with the provisions of the National Fire Protection Association's Life Safety Code. These deficiencies form the basis for our determination of noncompliance with the Condition of Participation pertaining to Physical Environment (reference: 42 CFR 482.41) and Medicare Health Safety regulations for hospitals.

GHHS submitted with its notice of exemption a letter from the Director of Harnett County Emergency Services Department. The letter stated, "It is our opinion that the report prepared by C. Ross Architecture L.L.C. and L.C. Thomasson Associates, Inc. accurately summarizes the *imminent safety hazards* at Good Hope Hospital as defined by Federal, State, and Local fire and safety codes." (Emphasis supplied). N.C. Gen. Stat. § 131E-184(a)(1) provides GHHS with an exemption from CON review. The facility suffers "imminent safety hazards" and must be replaced. N.C. Gen. Stat. § 131E-184(a)(1).

The majority's opinion interprets N.C. Gen. Stat. § 131E-184 narrowly and limits exemptions for replacement of a facility solely to Section (5), "[t]o replace or repair facilities destroyed or damaged by accident or natural disaster." N.C. Gen. Stat. § 131E-184(a)(5). The majority's opinion cites to *Alberti v. Manufactured Homes, Inc.* and argues legislative intent may be inferred from the "consequences which would follow, respectively, from various constructions." 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991).

In *Alberti*, the plaintiffs sought to revoke their acceptance of goods from a remote manufacturer with whom they had no contractual relationship. 329 N.C. at 732, 407 S.E.2d at 822. Our Supreme Court relied on Article 2 of the Uniform Commercial Code to define "buyer" and "seller." *Id.* The Court stated, "[i]n determining whether remote manufacturers are generally 'sellers' against whom a consumer may revoke acceptance, the legislature's inclusions and omissions in its definition of 'seller' are instructive as to its intent." *Id.* at 734, 407 S.E.2d at 823. The Court held that the manufacturer was not a seller. *Id.*

Here, N.C. Gen. Stat. § 131E-184, entitled, "Exemptions from review," provides in Section (a)(1) "the Department *shall* exempt from certificate of need review . . . ." and lists nine separate and distinct exemptions from CON review. (Emphasis supplied). The first exemption is to "eliminate or prevent imminent safety hazards." N.C. Gen. Stat. § 131E-184(a)(1). If the "new institutional health service" must be renovated or replaced to "eliminate or prevent imminent

safety hazards," the statute provides an exemption from CON review. *Id.* N.C. Gen. Stat. § 131E-184(a)(5) identifies a separate and distinct exemption for when a facility must be replaced due to damage from a natural disaster or accident. All parties agree, and the undisputed evidence shows, Good Hope suffers from "imminent safety hazards." Good Hope is a ninety-year old facility that originated in a residential structure. Undisputed evidence also shows that renovation of the existing structure to comply with present local, state, and federal safety and licensure requirements, cannot be accomplished without demolishing the existing structure. N.C. Gen. Stat. § 131E-184(a)(1) expressly provides GHHS an exemption from CON review.

IV. Conclusion

GHHS presented substantial and undisputed evidence to prove its right to an exemption from CON review in order "to eliminate or prevent imminent safety hazards," or to maintain licensure standards, or comply with accreditation, or certification standards to receive entitlement reimbursements. N.C. Gen. Stat. § 131E-184(a)(1), (1a), and (1b). The language of the statute is mandatory on the Agency. "[T]he legislature clearly did not intend to impose unreasonable limitations on maintaining, or expanding, presently offered health services." *Cape Fear Mem. Hosp.*, 121 N.C. App. at 494, 466 S.E.2d at 301 (citations omitted).

The final agency decision erroneously granted summary judgment for the Department and against GHHS. GHHS provided substantial and undisputed evidence of its right to statutory exemption(s) to survive the Department's motion. The exemptions for replacement of a facility under N.C. Gen. Stat. § 131E-184(5) are not limited solely to "replace or repair facilities destroyed or damaged by accident or natural disaster." Deterioration and demolition of an aged facility with an 100 year old residential structure at its core, together with evolving standards required of health care facilities, are no less destructive than a fire, flood, or tornado. Summary judgment in favor of the Agency should be reversed, and remanded for issuance of the CON in accordance with the decision of the ALJ. I respectfully dissent.

DONALD J. PATRONELLI, PLAINTIFF v. CARRIE PATRONELLI, DEFENDANT

No. COA04-1666

(Filed 3 January 2006)

Costs— attorney fees—alimony—pro bono counsel

The trial court did not err in an alimony case by denying defendant attorney fees, because the plain language and purpose of N.C.G.S. § 50-16.4 fails to include expenses incurred by pro bono counsel.

Judge WYNN dissenting.

Appeal by defendant from order entered 6 January 2004 by Judge Anne B. Salisbury in Wake County District Court. Heard in the Court of Appeals 23 August 2005.

Oliver & Oliver, PLLC, by John M. Oliver, for plaintiff-appellee.

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

CALABRIA, Judge.

Carrie Patronelli ("defendant") appeals from an order of the trial court denying her claim for counsel fees. We affirm.

Donald J. Patronelli ("plaintiff") and defendant married in August 1997; however, by July 2001, the parties had separated. Subsequently, on 14 August 2001, plaintiff filed a complaint seeking, *inter alia*, custody of a minor child, child support, and equitable distribution. Defendant counterclaimed for custody of the minor child, child support, postseparation support, and alimony. In orders not pertinent to the present appeal, the trial court ruled on the issues of child custody, child support, and postseparation support. The trial court then set a hearing on the issues of alimony and related counsel fees. At the hearing, defendant's counsel stated, and the trial court found, that "[counsel] had incurred expenses and fees in the amount of approximately $2,500.00 in bringing the defendant's permanent alimony case to trial." The trial court further found, however, that "defendant is represented on a *pro bono* basis by her counsel" and "has not incurred any . . . expenses as she is not personally liable to her counsel for the same." The trial court then concluded, "The defendant has not incurred any [counsel] fees under [N.C. Gen. Stat.] § 50-16.4 [2003],

and thus her claim for [counsel] fees should be denied." From the trial court's denial of her claim for counsel fees, defendant appeals.

On appeal, defendant contends the trial court improperly denied her request for counsel fees. We disagree.

North Carolina General Statutes § 50-16.4, which governs counsel fees in alimony cases, states:

> At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or postseparation support pursuant to G.S. 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

We review *de novo* whether a trial court properly denied counsel fees under this statute. *See Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972) (stating, "[p]roper exercise of the trial judge's authority in granting alimony . . . or counsel fees is a question of law, reviewable on appeal"). When construing a statute, "the task of the courts is to ensure that the purpose of the Legislature, the legislative intent, is accomplished. The best indicia of that legislative purpose are the language of the act and what the act seeks to accomplish." *Wagoner v. Hiatt*, 111 N.C. App. 448, 450, 432 S.E.2d 417, 418 (1993). "Legislative purpose is first ascertained from the plain words of the statute." *State v. Anthony*, 351 N.C. 611, 614, 528 S.E.2d 321, 322 (2000) (citations omitted).

The plain language of N.C. Gen. Stat. § 50-16.4 provides that when a dependent spouse is entitled to alimony or postseparation support, a trial court may enter an order "for reasonable *counsel fees* for the benefit of such spouse." "Attorney's fees" are defined as "[t]he *charge to a client* for services performed for the client, such as an hourly fee, a flat fee, or a contingent fee." *Black's Law Dictionary* 125 (7th ed. 1999) (emphasis added). Accordingly, counsel fees cannot, by definition, be implicated in the present case where the dependent spouse never incurred counsel expenses.

The purpose of N.C. Gen. Stat. § 50-16.4 further supports our analysis. The legislative intent behind the allowance of counsel fees under section 50-16.4 is "to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate and suitable legal representation." *Lamb v. Lamb*, 103 N.C. App. 541,

549, 406 S.E.2d 622, 627 (1991) (citations omitted). This is because "[i]t would be contrary to what we perceive to be the intent of the legislature to require a dependent spouse to meet the expenses of litigation through the unreasonable depletion of her separate estate where her separate estate is considerably smaller than that of the supporting spouse." *Clark v. Clark*, 301 N.C. 123, 137, 271 S.E.2d 58, 68 (1980). In the case *sub judice*, the legislative intent of N.C. Gen. Stat. § 50-16.4 is not implicated given that the dependent spouse *has no counsel fees*, and therefore, there are no costs to shift.

We further note that our holding is not a value judgment on the meritorious and selfless services provided by *pro bono* counsel. Although there are strong public policy arguments in favor of legislation authorizing an award of fees to a public interest entity that represents claimants seeking postseparation support and alimony, it is not the province of the courts to read into legislation beneficent objectives when contrary to the plain language and purpose of a statute. These arguments, accordingly, must be reserved for the General Assembly.

Because the plain language and purpose of N.C. Gen. Stat. § 50-16.4 fail to include expenses incurred by *pro bono* counsel, we hold the trial court properly denied defendant an award of counsel fees.

Affirmed.

Judge LEVINSON concurs.

Judge WYNN dissents with a separate opinion.

WYNN, Judge, dissenting.

From the outset, I note that the issue on appeal is not whether "the plain language and purpose of N.C. Gen. Stat. § 50-16.4 *fail to include* expenses incurred by *pro bono* counsel[.]" (Emphasis added). In fact, it is without question that the statute allows a dependent spouse to seek attorney fees. Thus, the issue presented by this appeal is whether the plain language of N.C. Gen. Stat. § 50-16.4 *excludes* the award of attorney expenses that are provided on a *pro bono* basis for the benefit of a dependent spouse. Assuredly, it does not. Because I believe the fact that Wife's legal services were provided *pro bono* is of no consequence in the threshold determination

of whether she is eligible for an award of attorney fees, I would remand this matter to the trial court for further consideration on whether Wife should be awarded attorney fees under N.C. Gen. Stat. § 50-16.4. I therefore respectfully dissent.

An award of attorney fees in an alimony case is justified if the spouse is: (1) a dependent spouse; (2) entitled to the underlying relief demanded; and (3) without sufficient means. N.C. Gen. Stat. § 50-16.4 (2004); *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 396-97, 545 S.E.2d 788, 795, *per curiam aff'd*, 354 N.C. 564, 556 S.E.2d 294 (2001); *Owensby v. Owensby*, 312 N.C. 473, 475, 322 S.E.2d 772, 773-74 (1984); *Kelly v. Kelly*, 167 N.C. App. 437, 448, 606 S.E.2d 364, 372 (2004); *Larkin v. Larkin*, 165 N.C. App. 390, 398, 598 S.E.2d 651, 656 (2004); *Walker v. Walker*, 143 N.C. App. 414, 424, 546 S.E.2d 625, 631-32 (2001). There is nothing in the plain language of N.C. Gen. Stat. § 50-16.4 or in our case law interpreting N.C. Gen. Stat. § 50-16.4 stating, or even suggesting, that these prerequisites differ for a dependent spouse receiving *pro bono* legal services.

Whether a moving party meets the prerequisites for an award of attorney fees under N.C. Gen. Stat. § 50-16.4 is a question of law reviewed *de novo* on appeal. *Friend-Novorska*, 143 N.C. App. at 396-97, 545 S.E.2d at 795. If the three factors are met, "the *amount of attorney fees awarded* rests within the sound discretion of the trial judge and is reviewable on appeal only for an abuse of discretion." *Walker*, 143 N.C. App. at 424, 546 S.E.2d at 631 (emphasis added) (citation omitted). Notwithstanding, the *amount of fees charged by the attorney* is not relevant to the threshold inquiry of determining a dependent spouse's eligibility for an award of attorney fees under N.C. Gen. Stat. § 50-16.4:

> [B]efore an award of attorneys' fees in. . . . [an] alimony case is permissible, there must be a threshold finding that the dependent spouse has insufficient means to defray her litigation expenses. . . . In making this determination, the trial court should focus on both the disposable income of the dependent spouse and on her separate estate.

Bookholt v. Bookholt, 136 N.C. App. 247, 252, 523 S.E.2d 729, 732 (1999), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001). Our previous inquiries have focused on either the means of the dependent spouse alone or in comparison to those of the supporting spouse. *See id.* (remanding an award of fees for reconsideration

where the wife had a liquid estate of $88,000 and the husband had no separate estate); *see also Clark v. Clark*, 301 N.C. 123, 136-37, 271 S.E.2d 58, 68 (1980) (reversing and remanding for determination of the amount of attorney fees to be awarded where the husband had a net worth of $650,000 and savings of $75,000 and the wife had a separate estate of $87,000); *Cobb v. Cobb*, 79 N.C. App. 592, 596-97, 339 S.E.2d 825, 828-29 (1986) (vacating and remanding for determination of the amount of attorney fees to be awarded where the wife's income did not meet her living expenses and the husband had previously been earning $125,000 per year).

Here, the trial court's order only states that, since Wife was represented *pro bono* and had not been charged by her attorney, there was no basis for an award of attorney fees. The trial court failed to make specific conclusions as to the three prerequisites set forth in N.C. Gen. Stat. § 50-16.4 for an award of attorney fees. However, the trial court did make numerous findings of fact supporting the conclusion of law that Wife meets the three prerequisites necessary for an award of attorney fees under N.C. Gen. Stat. § 50-16.4. Significantly, Husband did not assign error to any of the trial court's findings of fact. Where no exception is taken to the trial court's findings of fact, the findings are presumed to be supported by competent evidence and are binding on appeal. *Draughon v. Harnett County Bd. of Educ.*, 166 N.C. App. 449, 451, 602 S.E.2d 717, 718 (2004) (citations omitted).

Even if the presumption that the findings are supported by competent evidence did not exist, the record shows that there is indeed evidence to support the findings. Regarding the first requirement, the trial court specifically found that Husband was a "supporting spouse" and Wife was a "dependent spouse." A dependent spouse is one ". . . who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2004). The trial court found that the parties had stipulated in open court that Husband was a supporting spouse and Wife was a dependent spouse, and that Wife needed "ample time to complete her training and get herself back on her feet financially." The trial court also found that Wife was "not able to live independently without some level of support from [Husband] for some period of time." These findings support the conclusion that Wife is a dependent spouse and fulfills the first requirement for an award of attorney fees under N.C. Gen. Stat. § 50-16.4.

Regarding the second requirement, that the spouse must be entitled to the underlying relief demanded, the trial court concluded that Wife was entitled to relief in the form of $800.00 per month in permanent alimony for a period of twenty-four months. The trial court found the parties had stipulated that Husband was earning $81,000.00 per year as the owner of a successful hair salon and was in the process of opening a second salon. The trial court further found that Wife has had a substantial reduction in her standard of living since the parties' separation, while Husband has had only a modest reduction in his standard of living. Finally, the trial court found that Wife needed "adequate time to retrain and get herself on her feet financially." These findings support the conclusion that Wife is entitled to the underlying relief demanded.

The third prerequisite, that Wife must have insufficient means to defray the expense of the suit, is also satisfied here. A party has insufficient means to defray the expense of the suit when he or she is "unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996) (citations omitted). Here, the trial court found that, at the time of the hearing, Wife had secured a full-time job with a beauty supply house earning approximately $14,000.00 per year. The trial court also found that Wife's reasonable expenses were $2,037.00 per month, and that her share of the child support obligation was $167.00 per month. Wife's living expenses, therefore, exceeded her income by approximately $1,035.00 per month.

Given the trial court's findings, I would conclude that Wife did not have the financial resources to employ an attorney to represent her in this domestic dispute, and that she qualified for an award of attorney fees under N.C. Gen. Stat. § 50-16.4. *See Barrett v. Barrett*, 140 N.C. App. 369, 374, 536 S.E.2d 642, 646 (2000) (awarding attorney fees where the wife had negative disposable income and a savings of $600.00); *Cobb*, 79 N.C. App. at 597, 339 S.E.2d at 828-29 (concluding that the wife was entitled to attorney fees where her income did not meet her living expenses).

Other jurisdictions with statutes similar to the language in our N.C. Gen. Stat. § 50-16.4 have held that attorney fees may be awarded for *pro bono* services provided in the family law context. For example, *In re Marriage of Swink*, 807 P.2d 1245 (Colo. App. 1991), the Colorado Court of Appeals reversed and remanded for further proceedings a trial court's finding that an award of attorney fees in a

divorce proceeding was unnecessary because the wife had obtained legal representation at no cost to herself. The court noted that the Colorado statute, like the North Carolina statute, was "intended to promote the availability of legal services to needy litigants in appropriate cases." *Id.* at 1248. Unlike the North Carolina statute, the Colorado statute, which was patterned after the Uniform Marriage and Divorce Act, requires fees and costs to have been "incurred" in order for attorney fees to be awarded. *See* Colo. Rev. Stat. § 14-10-119 (2004). Still, the Colorado Court of Appeals held their statute was "sufficiently broad to allow the court to enter an order requiring a party to pay a reasonable sum for legal services rendered to the other party by a *pro bono* attorney in dissolution of marriage proceedings." *Swink*, 807 P.2d at 1248.

In *Benavides v. Benavides*, 526 A.2d 536 (Conn. App. 1987), the Appellate Court of Connecticut vacated and remanded a trial court's award of attorney fees to an attorney employed by a federally funded nonprofit organization. The trial court had cut the award in half, even though the amount of attorney fees requested was modest. *Id.* at 537. The Connecticut statute provides, in relevant part, that ". . . the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities. . . ." Conn. Gen. Stat. Ann. § 46b-62 (2004). The Appellate Court of Connecticut noted that "[i]n family matters, the majority of courts [in other jurisdictions] have held that the award of counsel fees to the prevailing party is proper even when that party is represented without fee by a nonprofit legal services organization." *Benavides*, 526 A.2d at 537 (citations omitted). In adopting this rule, the Appellate Court of Connecticut held that

> [I]ndigents are represented by legal services attorneys in a large number of family relations matters. It would be unreasonable to allow a losing party in a family relations matter to reap the benefits of free representation to the other party. A party should not be encouraged to litigate under the assumption that no counsel fee will be awarded in favor of the indigent party represented by public legal services[,] or as in this case, that a reasonable fee will be discounted for the same reason.

Id. at 538 (citation omitted). The Connecticut court also acknowledged the public policy benefits of their holding, noting that ". . . a realization that the opposing party, although poor, has access to an attorney and that an attorney's fee may be awarded deters noncompliance with the law and encourages settlements." *Id.*

In *In re Marriage of Malquist*, 880 P.2d 1357 (Mont. 1994), *overruled on other grounds by In re Marriage of Cowan*, 928 P.2d 214 (Mont. 1996), the Supreme Court of Montana also affirmed the award of attorney fees for *pro bono* representation in domestic cases. The relevant statute, Montana Code Annotated section 40-4-110 (2004), is substantially similar to the Colorado statute, but makes express the intent of the statute, "to ensure that both parties have timely and equitable access to marital financial resources for costs incurred before, during, and after a proceeding[.]" Mont. Code Ann. § 40-4-110 (2004). The court held that "[t]he deciding factor [in awarding legal fees] is not the status of the attorney providing the professional services, but that the indigent client is financially unable to pay for legal representation in a domestic relations proceeding where representation is a practical requirement." *Malquist*, 880 P.2d at 1363. The court stated that "[w]hether a party incurs debt is irrelevant, and necessity is unrelated to the status of the attorney who delivers the legal services." *Id.* at 1365.

Likewise, the language in N.C. Gen. Stat. § 50-16.4 is sufficiently broad to allow an award of attorney fees to a dependent spouse who is represented by *pro bono* counsel. The majority concludes that because attorney fees are by definition "[t]he charge to a client for services performed for the client, such as an hourly fee, a flat fee, or a contingent fee[,]" and Wife was not "charged" by her counsel, the trial court could not award Wife attorney fees under N. C. Gen. Stat. § 50-16.4. This is simply not the case. The fact that Wife could not pay her counsel's fees does not mean that the services provided by a sympathetic lawyer were without value. Indeed, the rendition of valuable legal services created a "charge" to Wife that the gratuitous lawyer recognizing her destitute plight agreed to waive with the understanding that she had no means to pay it. If in fact, Wife did have means, it follows that she would incur a charge for the legal service provided. Section 50-16.4 provides the means for Wife to pay her attorney for the valuable legal services rendered and thus, Wife has a "charge" for the legal services provided.

Moreover, the primary reason that Wife did not have the financial resources to employ an attorney was because Husband refused to provide Wife with the financial support necessary for Wife to retain legal representation. By denying Wife an award of attorney fees solely because her attorney agreed to represent her *pro bono* based on Wife's lack of financial resources, Husband is rewarded and *benefits* from the fact that he refused to provide her the financial support necessary to pay an attorney in the first place.

Finally, by enacting N.C. Gen. Stat. § 50-16.4, the legislature understood that the provision of *pro bono* legal services has *value*. Unlike other civil disputes, attorneys are prohibited from representing a client on a contingency basis in actions for divorce, alimony or child support. *See Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E.2d 315 (1984) (holding that a fee contract contingent upon the amount of alimony and/or property awarded in a divorce proceeding is void as against public policy), *rev'd on other grounds at* 313 N.C. 313, 314, 328 S.E.2d 288, 290 (1985); *see also Williams v. Garrison*, 105 N.C. App. 79, 411 S.E.2d 633 (1992); *Townsend v. Harris*, 102 N.C. App. 131, 401 S.E.2d 132 (1991). Thus, attorneys who seek to provide legal services for dependent spouses are left with only the option of providing *pro bono* services and seeking attorney fees under N.C. Gen. Stat. § 50-16.4. An award of attorney fees to a dependent spouse represented by *pro bono* counsel under N.C. Gen. Stat. § 50-16.4 would, in fact, create an incentive for attorneys to represent indigent clients in domestic disputes with the expectation that if they are able to prove that the indigent client is a dependent spouse, they could be awarded attorney fees.

For the reasons stated above, I respectfully dissent from the majority opinion. Because the prerequisites for attorney fees under N.C. Gen. Stat. § 50-16.4 were met in this case, and the trial judge summarily held that attorney fees were not recoverable because Wife's legal services were provided *pro bono*, which is not a valid basis upon which to deny attorney fees in North Carolina, I would remand this matter for further consideration by the trial court as to whether Wife should be awarded attorney fees under N.C. Gen. Stat. § 50-16.4.

Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA v. ANTWAN LATRELL STEPHENS, DEFENDANT

No. COA05-502

(Filed 3 January 2006)

1. Evidence— hearsay—coconspirator's statement made before conspiracy established—harmless error

Although the trial court erred in an armed robbery and second-degree kidnapping case by admitting into evidence a hearsay statement made by defendant's coconspirator that was

made before the conspiracy had been established, the error was harmless because there was overwhelming evidence that defendant participated in the armed robbery of a convenience store even excluding the statement made by his coconspirator.

2. Kidnapping— second-degree—motion to dismiss—sufficiency of evidence—restraint

The trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping, because: (1) the pushing of the victim and her walking to the cash register at gunpoint was an inherent and integral part of an armed robbery; (2) defendant did not do substantially more than force the victim to the cash register; (3) defendant's restraint of the victim did not expose her to a greater danger than that inherent in armed robbery; and (4) the victim's removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense.

3. Criminal Law— motion to continue—location of witness

The trial court did not abuse its discretion in an armed robbery and second-degree kidnapping case by denying defendant's motion to continue in order to locate a witness to testify regarding her motives for giving information to the district attorney and for testifying at trial even after another inmate testified that he overheard a conversation between the witness and defendant in which she indicated the only reason she testified against defendant was based on threats of prosecution by the district attorney, because: (1) the witness had previously testified at trial, and defense counsel had already cross-examined her; and (2) on recross-examination defense counsel had already had the opportunity to question the witness regarding her motive for giving information to the district attorney.

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

Assignments of error that defendant failed to argue in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

Appeal by Defendant from judgment entered 10 December 2004 by Judge D. Jack Hooks in Superior Court, Sampson County. Heard in the Court of Appeals 29 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General John C. Evans, for the State.

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

WYNN, Judge.

In general, a "statement is admissible as an exception to the hearsay rule if it is . . . a statement by a coconspirator of such party during the course and in furtherance of the conspiracy." N.C. Gen. Stat. § 8C-1, Rule 801(d) (2004). Defendant argues that the statements in this case were made prior to the formation of the conspiracy and thus, do not fit in this exception. Although we agree that the hearsay statements allowed in this case were made prior to the formation of the conspiracy, we uphold Defendant's conviction for armed robbery because the error was harmless.

Regarding a second issue in this appeal, we note that restraint which is an inherent, inevitable feature of armed robbery may not be used to convict a defendant of kidnapping. *See State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978); *State v. Allred*, 131 N.C. App. 11, 20, 505 S.E.2d 153, 158 (1998). In this case, Defendant contends that his second-degree kidnapping conviction must be set aside because the only restraint used was that necessary to complete the armed robbery. In light of *Fulcher* and *Allred*, we must agree that the facts of this case require the vacation of Defendant's conviction for second-degree kidnapping.

At trial, the State's evidence tended to show that on the evening of 21 March 2004, Defendant Antwan Latrell Stephens was waiting in a car outside the Budget Inn, located in Clinton, North Carolina. Defendant's friend, Dennis Smith, was in room eleven of the Budget Inn with Lakeshia Cooper. During that time, Mr. Smith received a phone call from Michael Loftin stating, "I'm going to make me a lick" and asking, "Where Antwan at?" Mr. Smith testified that "to make a lick" is slang for committing a robbery. Mr. Smith took the phone outside and gave it to Defendant. After talking with Mr. Loftin, Defendant asked Mr. Smith for a ride to Cliff's Fast Stop. During the ride, Defendant repeatedly stated that "we are going to make a mother f—king lick, son." Defendant asked Mr. Smith if he could come back to the room after the lick [robbery] and Mr. Smith said yes. At approximately 8:00 p.m., Defendant met Mr. Loftin at Cliff's Fast Stop and arranged to meet each other at the Budget Inn later that evening.

At approximately 2:40 a.m. on the morning of 22 March 2004, Melissa Licona was working at the Pep Mart in Clinton. Ms. Licona testified that she was cleaning the hot dog machine and turned when she heard the door open. Thereafter, Ms. Licona observed a male, wearing a camouflage jacket and a bandanna around his nose and mouth, with a shotgun six to eight inches from her face. The man said "Bitch, give me the money," and struck her in the back with the shotgun. The man in camouflage began pushing Ms. Licona toward the register. Another man wearing a two-tone gray and blue shirt and a black toboggan over his head and face, with home made eye holes cut into it, came into the store and asked, "Where the hundreds at? Where the hundreds?" The man in camouflage beat on the cash register until it opened. The man wearing the black toboggan took out a white plastic bag and dumped the contents of the cash drawer into the bag—$420.27 in cash (including a roll of quarters) and American flag U.S. Postage Stamps. The two men left and Ms. Licona called the police.

The entrance to the Budget Inn is approximately 714 feet from the entrance to the Pep Mart. Mr. Smith testified that Defendant and Mr. Loftin later returned to room eleven of the Budget Inn out of breath like they had been running. Mr. Loftin wore a camouflage jacket, had a bandanna over his shoulder, and carried a sawed-off shotgun. Defendant wore a gray and blue shirt. Mr. Smith testified that Mr. Loftin said "Man, we just licked the mother f—king store." And Defendant said "Man, you should have seen that sh-t. That sh-t was crazy as hell." Defendant then began pulling money out of a black toboggan with eye holes cut into it and out of a clear white plastic bag.

Meanwhile, Officers Robbie King, Hank Smith, John Bass, and Detective Sergeant David Turner of the Clinton Police Department responded to Ms. Licona's 911 call. While searching the area around the store for suspects, Officer Smith observed someone peeking out from behind a curtain covering the window in room eleven of the Budget Inn. When it appeared that the occupant of the room saw the officer, the curtain was abruptly shut. Detective Turner and Officers Smith and King knocked on the door of room eleven. Mr. Smith confirmed that he rented the room and consented to a search of the room. The officers entered the room and found Defendant, Ms. Cooper, and Mr. Smith in the room near the bed; Mr. Loftin in the bathroom with a sawed-off shotgun beside him on the floor; a camouflage jacket; a camouflage bandana; a Stevens 20 gauge pump sawed-off shotgun; a blue and gray long-sleeved sweatshirt; a

black toboggan with holes cut in it; $140.00 cash (including a roll of quarters) in the bathroom; and $149.00 cash next to a white plastic trash bag.

The State also presented testimony from Tasha Stamps who stated that she saw Defendant wearing a blue and gray shirt and that Defendant admitted to her that he and Mr. Loftin robbed the Pep Mart.

Defendant presented several witnesses in his defense including Mr. Loftin who testified that when he went to the Budget Inn, Mr. Smith retrieved a sawed-off shotgun from his car. He stated that he wore a blue and gray shirt and black toboggan and Mr. Smith wore a camouflage jacket and bandanna. The two went to Pep Mart and committed the armed robbery. Following the robbery, Mr. Loftin and Mr. Smith went back to the Budget Inn and sorted out the money in the bathroom. Mr. Loftin testified that at that time Ms. Cooper was lying on the bed smoking marijuana and Defendant was asleep on the floor.

The trial court also heard *voir dire* testimony of Christopher Parker, an inmate at the Sampson County Detention Facility, who testified that on the evening after Tasha Stamps testified at the trial, she came to the county jail and yelled to Defendant through the window. Although Mr. Parker did not see Ms. Stamps, he recognized her voice and overheard her statements to Defendant that the only reason she testified against Defendant was because of threats of prosecution by the district attorney. Defendant asked Ms. Stamps "why did she tell a story on him for," and she told Defendant she was going to write to him to explain. Defense counsel argued that Mr. Parker's testimony should be admitted into evidence under Rule 804(b)(3) of the North Carolina Rules of Evidence as a statement against Ms. Stamps's pecuniary interest. The trial court did not allow the testimony as there was no showing that Ms. Stamps was unavailable and denied Defendant's motion for a continuance to locate Ms. Stamps.

Defendant was indicted and found guilty of robbery with a dangerous weapon and second-degree kidnapping. The trial court sentenced Defendant to 103 to 133 months imprisonment for the robbery with a dangerous weapon charge and thirty-four to fifty months imprisonment for the second-degree kidnapping charge.

On appeal, Defendant argues that the trial court erred in (1) admitting hearsay statements into evidence; (2) denying his motion to

dismiss the charge of second-degree kidnapping; and (3) denying his motion to continue the trial.

[1] We first address Defendant's contention that the trial court erred by admitting a hearsay statement made by Defendant's co-conspirator, Mr. Loftin. Defendant argues that the statement was made before the conspiracy had been established and thus violated Rule 801(d)(E) of the North Carolina Rules of Evidence. While we agree with Defendant, we find this error was harmless.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2004). "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy." N.C. Gen. Stat. § 8C-1, Rule 801(d). In order for the statements or acts of a co-conspirator to be admissible, there must be a showing that (1) a conspiracy existed and (2) that the acts or declarations were made by a party to it and in pursuance of its objectives (3) while the conspiracy was active, that is, after it was formed and before it ended. *State v. Williams*, 345 N.C. 137, 141, 478 S.E.2d 782, 784 (1996) (citing *State v. Tilley*, 292 N.C. 132, 138, 232 S.E.2d 433, 438 (1977)). "Statements made prior to or subsequent to the conspiracy are not admissible under this exception." *State v. Gary*, 78 N.C. App. 29, 36, 337 S.E.2d 70, 75 (1985).

The State must establish a *prima facie* case of conspiracy without relying on the declaration sought to be admitted. *Id.* However, " '[b]ecause of the nature of [conspiracy] courts have recognized the inherent difficulty in proving the formation and activities of the criminal plan and have allowed wide latitude in the order in which pertinent facts are offered in evidence.' " *Tilley*, 292 N.C. at 139, 232 S.E.2d at 438-39 (quoting *State v. Conrad*, 275 N.C. 342, 347, 168 S.E.2d 39, 43 (1969)).

At trial, Dennis Smith testified for the State that on the night of the robbery he received a telephone call from Mr. Loftin, and the following conversation ensued:

> Q: What did Mr. Loftin say to you when you picked up your cell phone?
>
> A: He was like, "Man, I just got robbed for five thousand dollars. Some Mexicans just robbed me."

Q: And did he say anything after that?

A: Yes, sir. He said, he was like, "I'm going to make me a lick." He was like, "Where Antwan at?" I was like, "He's outside in my car."

Q: Now he told you he was going to go make a lick. What does that mean, to make a lick?

A: Rob somebody. Rob something.

A conspiracy is an unlawful agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, and may be shown by circumstantial evidence. *State v. Cotton*, 102 N.C. App. 93, 95-96, 401 S.E.2d 376, 378, *cert. denied*, 329 N.C. 501, 407 S.E.2d 543 (1991).

While the independent evidence presented at trial tended to show that Mr. Loftin and Defendant conspired to rob the Pep Mart on 22 March 2004, there is no evidence that suggests that the conspiracy was in existence at the time Mr. Loftin made the statements to Mr. Smith. In fact, the evidence tends to show that the conspiracy began immediately after Mr. Loftin and Mr. Smith's conversation. Mr. Smith testified that, after speaking with Mr. Loftin, Defendant asked him for a ride to Cliff's Fast Stop and repeatedly stated that "we are going to make a mother f—king lick, son." Mr. Loftin testified that at approximately 8:00 p.m., he met Defendant at Cliff's and then arranged to meet later at the Budget Inn. This evidence shows at best that the conspiracy to rob Pep Mart began after Mr. Smith spoke with Mr. Loftin. Statements made prior to the conspiracy are not admissible under Rule 801(d)(E). *Gary*, 78 N.C. App. at 36, 337 S.E.2d at 75. Therefore, the trial court erred in allowing Mr. Smith to testify about the contents of his conversation with Mr. Loftin as the statements were hearsay and did not fit into the exception in Rule 801(d)(E) of the North Carolina Rules of Evidence.

But our inquiry must further determine whether the State has met the burden of showing that the trial court's erroneous admission of the hearsay statements was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2004). Indeed, there is overwhelming evidence that Defendant participated in the armed robbery of Pep Mart, even excluding the statement made by Mr. Smith. Mr. Smith testified that Defendant: (1) repeatedly stated that "we are going to make a mother f—king lick, son[;]" (2) returned to the Budget Inn with Mr. Loftin; (3) wore a gray and blue shirt; (4) responded to Mr. Loftin statement, "Man, we just licked the mother f—king store[,]" by stat-

ing, "Man, you should have seen that sh-t. That sh-t was crazy as hell[;]" (5) pulled money out of a black toboggan with eye holes cut into it and out of a clear white plastic bag. Ms. Licona testified that during the robbery of Pep Mart, one of the robbers wore a two-tone gray and blue shirt and a black toboggan over his head and face, with home made eye holes cut into it. Tasha Stamps testified that on the evening of 21 March 2004, she saw Defendant wearing a blue and gray shirt, and that after the robbery, Defendant told her that he and Mr. Loftin had robbed Pep Mart. Moreover, the State's evidence showed that Defendant was found in room eleven of Budget Inn with Mr. Loftin. The police found the following items in the room: a camouflage jacket, a camouflage bandana, a Stevens 20 gauge pump sawed-off shotgun, a blue and gray long-sleeved sweatshirt, a black toboggan with holes cut in it, $140.00 cash (including a roll of quarters) in the bathroom, $149.00 cash next to a white plastic trash bag.

In short, the State's evidence shows that the jury did not need to consider Mr. Smith's statement regarding his conversation with Mr. Loftin, as there is overwhelming evidence that Defendant committed the armed robbery. Accordingly, we hold the admission of the hearsay statement harmless error as it did not prejudice Defendant.

[2] We next address Defendant's contention that the trial court erred in denying his motion to dismiss the charge of second-degree kidnapping as the State failed to produce sufficient evidence that there was restraint of the victim that was not necessary to the robbery.

When reviewing a motion to dismiss, we view "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004) (citing *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986)), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 79 (2005). If we find that "substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to [have denied] the motion." *Id.* (citing *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citing *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)).

A defendant is guilty of the offense of second-degree kidnapping if he (1) confines, restrains, or removes from one place to another (2)

a person sixteen years of age or over (3) without the person's consent, (4) for the purpose of facilitating the commission of a felony. N.C. Gen. Stat. § 14-39(a)(2) (2004). "Our Supreme Court, however, has recognized that 'certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim' and has held that restraint 'which is an inherent, inevitable feature of [the] other felony' may not be used to convict a defendant of kidnapping." *Allred*, 131 N.C. App. at 20, 505 S.E.2d at 158 (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351). "The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping 'exposed [the victim] to greater danger than that inherent in the armed robbery itself[.]' " *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)).

In *Irwin*, our Supreme Court said the defendant's forcing the victim to move to the back of the store at knife point was "an inherent and integral part of the attempted armed robbery," because the journey was necessitated by the defendant's objective that the victim obtain drugs by going to the prescription counter at the back of the store and opening the safe. 304 N.C. at 103, 292 S.E.2d at 446. The court held the victim's removal was "a mere technical asportation and insufficient to support conviction for a separate kidnapping offense." *Id.*

In *State v. Muhammad*, 146 N.C. App. 292, 295-96, 552 S.E.2d 236, 238 (2001), the defendant placed the victim in a choke hold, hit him in the side three times, wrestled with the victim on the floor, grabbed the victim again around the throat, pointed a gun at his head and marched him to the front of the store. This Court held that, "these actions constituted restraint beyond what was necessary for the commission of common law robbery[,]" as the defendant "did substantially more than just force [the victim] to walk from one part of the restaurant to another." *Id.* at 296, 552 S.E.2d at 238.

In *Pigott*, the defendant threatened the victim with a gun, then bound the victim's hands and feet while searching the office and apartment for money. 331 N.C. at 210, 415 S.E.2d at 561. Our Supreme Court held "that all the restraint necessary and inherent to the armed robbery was exercised by threatening the victim with the gun. When defendant bound the victim's hands and feet, he 'exposed [the victim to a] greater danger than that inherent in the armed robbery itself.' " *Id.* (citation omitted).

Here, the facts are more aligned with the facts in *Irwin* than in *Muhammad* or *Pigott*. Defendant or his accomplice struck Ms. Licona in the back with the shotgun and then pushed her toward the register. Ms. Licona being pushed and walked to the cash register at gun point was "an inherent and integral part of the [] armed robbery." *Irwin*, 304 N.C. at 103, 292 S.E.2d at 446. Defendant did not do "substantially more" than force Ms. Licona to the cash register. *See Muhammad*, 146 N.C. App. at 296, 552 S.E.2d at 238. Defendant's restraint of Ms. Licona did not expose her to a greater danger than that inherent in an armed robbery. *Pigott*, 331 N.C. at 210, 415 S.E.2d at 561. Ms. Licona's removal "was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense." *Irwin*, 304 N.C. at 103, 292 S.E.2d at 446. Accordingly, Defendant's conviction for second-degree kidnapping must be vacated.

[3] Finally, Defendant argues that the trial court erred in denying his motion to continue. On the last day of the trial, the trial court heard *voir dire* testimony of Christopher Parker, an inmate at the Sampson County Detention Facility, who testified that he overheard a conversation between Tasha Stamps and Defendant in which she indicated that the only reason she testified against Defendant was because of threats of prosecution by the district attorney. The trial court denied defense counsel's motion for a continuance to locate Ms. Stamps. Defendant argues that the trial judge abused his discretion "and violated [his] constitutional right to confront his accuser with witnesses and present a defense[.]" We disagree.

The standard of review of a trial court's ruling on a motion for a continuance,

> is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error.

State v. Jones, 172 N.C. App. 308, 311-12, 616 S.E.2d 15, 18 (2005) (quoting *State v. Taylor*, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001)).

Defendant contends that the trial court's denial of his motion to continue to locate Ms. Stamps violated his "constitutional right to

confront his accuser . . . as guaranteed by the Sixth Amendment to the United States Constitution[.]" However, Ms. Stamps had previously testified at trial and defense counsel already cross-examined her. On recross-examination defense counsel questioned Ms. Stamps regarding her motive for giving information to the district attorney:

> Q: Okay; and then you voluntarily went to Mr. Weddle [assistant district attorney]?
>
> A: Yes, sir.
>
> Q: Why did you choose to go to him six months later?
>
> A: This is now when the trial is. I mean, this is now when the trial is. I just decided to do the right thing.
>
> Q: So you found out he was going to trial?
>
> A: Yes, sir.
>
> Q: And so then you went to the DA?
>
> A: Yes, sir.

As Defendant already had the opportunity to question Ms. Stamps regarding her motives for giving information to the district attorney and for testifying at trial, there is no constitutional issue involved in the trial court's denial of the motion to continue. Therefore, the trial court's decision is reviewed on an abuse of discretion standard. *Jones*, 172 N.C. App. at 311-12, 616 S.E.2d at 18. As the trial court's decision was not manifestly unsupported by reason, we find no gross abuse of discretion. *Id.* Accordingly, this assignment of error is overruled.

[4] Defendant failed to argue his remaining assignments of error; therefore, they are deemed abandoned. N.C. R. App. P. 28(b)(6).

Vacated in part; No prejudicial error in part.

Judges STEELMAN and SMITH concur.

ATLANTIC COAST MECHANICAL, INC., AND ATLANTIC COAST MECHANICAL, INC., BY AND ON BEHALF OF VIA ELECTRIC CO., PLAINTIFF V. ARCADIS, GERAGHTY & MILLER OF NORTH CAROLINA, INC., A PROFESSIONAL CORPORATION, GREGORY POOLE EQUIPMENT COMPANY D/B/A GREGORY POOLE POWER SYSTEMS AND CATERPILLAR, INC., DEFENDANTS

No. COA04-1533

(Filed 3 January 2006)

1. Appeal and Error— withdrawn appeal—permissive appeal—not law of the case

A dismissal from which an appeal was taken and withdrawn did not become the law of the case where the appeal was interlocutory and permissive rather than mandatory.

2. Assignments— claims arising from contract—not champerty

The trial court erred by dismissing assigned claims for breach of express warranty and breach of implied warranties of merchantability and fitness for a particular purpose arising from malfunctioning emergency generators as champerty where the claims arose from a contract of sale and were assignable.

3. Appeal and Error— cross-assignments of error—not required when no findings required from trial court

There is an exception to the requirement of cross-assignments of error where the trial court is not required to make findings of fact in its order, such as the entry of summary judgment or an order granting a motion to dismiss. The Court of Appeals will not limit the scope of its review merely because the trial court specified the grounds for its decision.

4. Warranties— implied—economic loss—privity required

Privity is required in an action for breach of implied warranties that seeks recovery for economic loss (the requirement has been eliminated by statute for actions against manufacturers for personal injury or property damage). There is only economic loss when a part of a system injures the rest of the system, as with the generator failure here, and the trial court did not err by dismissing assigned claims for breach of implied warranties for lack of privity.

5. Assignments— champerty—tort claims arising from contract

The trial court did not err by dismissing as champertous claims arising from a generator malfunction at a water treatment plant where the claims had been assigned. A breach of contract can give rise to a tort claim.

6. Contracts— malfunctioning equipment—not a breach of contract

The trial court did not err by granting summary judgment for defendant Poole on a breach of contract claim arising from malfunctioning generators supplied by Poole to a water treatment plant.

Appeal by plaintiff from judgments entered 2 May 2003 and 20 August 2004 by Judge Howard E. Manning, Jr., and judgment entered 22 March 2004 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 18 August 2005.

Safran Law Offices, by Perry R. Safran, Brian J. Schoolman, and Carrie V. Barbee, for plaintiff-appellants.

Ragsdale Liggett, PLLC, by Gregory W. Brown, for defendant-appellee Gregory Poole.

Millberg, Gordon & Stewart, PLLC, by John C. Millberg and Douglas J. Brocker, for defendant-appellee Carterpillar, Inc.

STEELMAN, Judge.

Plaintiff, Atlantic Coast Mechanical, Inc. (ACM), appeals the trial court's dismissal of several of its claims against defendant Gregory Poole Equipment Company (Poole) and dismissing all of its claims against defendant Caterpillar, Inc. (Caterpillar). ACM also appeals the trial court's entry of summary judgment in favor of Poole on its remaining claim for breach of contract. For the reasons stated herein, we affirm in part and reverse in part.

Factual and Procedural Background

ACM was the general contractor responsible for the additions and renovations to the South Cary Wastewater Treatment Plant. ACM hired Via Electric Company (Via) to serve as the electrical subcontractor for the project. The project required that two generator sets be installed to provide emergency power in the event of a power outage. In July 1997, Via purchased two Caterpillar generators from

Poole, a distributor for Caterpillar. The generators were installed in May 1998. On 16 September 1999, one of the generators malfunctioned, causing the generator to send excessive voltage through the system, and damaging electronic equipment at the plant. As a result of the damage to the plant's equipment, the Town of Cary back-charged ACM $68,537.97 for the damages, who in turn back-charged that amount to Via. In a separate suit, the Town of Cary, ACM, and Via settled their various claims regarding the project, including the damages to the electronic equipment. The Town of Cary is not a party to this suit.

On 6 February 2001, Via filed this action against ACM and other defendants. ACM filed an answer, counterclaim, and third party complaint against Acardis, Geraghty & Miller of North Carolina (Arcadis). ACM settled its claims against Arcadis. Poole and Caterpillar were not originally parties to this suit, but were defendants in a prior suit filed by Via arising out of the same series of events. As part of a settlement agreement between Via and ACM, Via assigned its claims against Caterpillar and Poole to ACM.

ACM subsequently amended its third party complaint to become the plaintiff in this action and added Caterpillar and Poole as defendants based upon Via's assignment of claims. ACM's complaint stated claims against Caterpillar for breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and negligence. The complaint also stated claims against Poole for breach of contract, breach of express warranty, breach of implied warranty of merchantability and fitness for a particular purpose, and negligence. On 11 October 2002, Caterpillar filed a motion to dismiss ACM's claims. Poole filed a similar motion on 14 October 2002. Judge Manning heard the motions and dismissed all of ACM's claims against Caterpillar and dismissed all but ACM's breach of contract claim against Poole. ACM filed a notice of appeal from the dismissal order as to defendant Caterpillar on 2 June 2003, but later withdrew that appeal. A year later, Judge Manning entered an order of final judgment, concluding that his earlier order dismissing the case as to Caterpillar became a final judgment and the law of the case as a result of ACM's appeal of the earlier order and subsequent withdrawal of that appeal.

On 26 March 2004, Poole moved for summary judgment on the remaining breach of contract claim. Judge Hobgood granted Poole's motion for summary judgment, dismissing ACM's claim for breach of contract. Plaintiff appeals.

Law of the Case

[1] Plaintiff contends the trial court erred in holding the withdrawal of its appeal from the order dismissing its claims against Carterpillar became a final judgment and the law of the case. We agree.

The order of dismissal in this case did not adjudicate all the claims, as one claim was left to be litigated against defendant Poole. Therefore, it was interlocutory and generally not appealable. *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). The order did, however, dismiss all claims against Caterpillar. This Court has held that an order dismissing all claims against one defendant, although interlocutory, is subject to immediate appeal because it affects a substantial right. *Prince v. Wright*, 141 N.C. App. 262, 265, 541 S.E.2d 191, 195 (2000). The language regarding interlocutory appeals affecting a substantial right under N.C. Gen. Stat. § 1-277 is "permissive not mandatory." *DOT v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999). "Thus, where a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so." *Id.*

Plaintiff did not waive its right to appeal after the entry of final judgment by foregoing an interlocutory appeal since the appeal was permissive rather than mandatory. *Accord id.* We hold that plaintiff was not required to immediately appeal the trial court's order dismissing its claims against defendant Caterpillar. As a result, the trial court erred in holding the dismissal order became the law of the case. The dismissal order is subject to review by this Court.

Assignability of Claims

[2] In plaintiff's first argument, it contends the trial court erred in dismissing its claims against Poole and Caterpillar under the doctrine of champerty. We agree in part and disagree in part.

Plaintiff's amended complaint asserted the following claims against Poole and Caterpillar: (1) breach of the implied warranty of merchantability; (2) breach of the implied warranty of fitness for a particular purpose; and (3) negligence. Plaintiff also asserted claims against Poole for breach of express warranty and breach of contract. The 2 May 2003 order dismissed plaintiff's claims against Poole and Caterpillar for breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and negligence, as all being personal tort claims.

The order further dismissed plaintiff's breach of contract claim against Poole to the extent it sounded in tort.

It is well-established in this state that personal tort claims are not assignable because such assignments would be void against public policy because they promote champerty. *Charlotte-Mecklenburg Hosp. Auth. v. Georgia Ins. Co.*, 340 N.C. 88, 91, 455 S.E.2d 655, 657 (1995); *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996). However, an action arising out of contract may be assigned. *Id*; N.C. Gen. Stat. § 1-57 (2005). We must now determine whether the claims plaintiff asserted against Poole and Caterpillar were contract or tort claims.

A. Breach of Express Warranty

An express warranty is an element in a sale contract and is contractual in nature. *Perfecting Service Co. v. Product Development & Sales Co.*, 261 N.C. 660, 668, 136 S.E.2d 56, 62 (1964). A seller's liability for breach of an express warranty does not depend upon proof of his negligence, but arises out of the contract. *Veach v. Bacon Am. Corp.*, 266 N.C. 542, 550, 146 S.E.2d 793, 799 (1966). Plaintiff's claim for breach of express warranty, as assigned by Via, stems directly from Via's contractual agreement with Poole. As such, the assignment of this claim was not against public policy and was assignable. The trial court erred in dismissing plaintiff's claim for breach of express warranty against defendant Poole.

B Implied Warranties of Merchantability and Fitness for a Particular Purpose

This Court has recognized that a "breach of warranty is an offspring of mixed parentage, aspects of it sounding in both tort and contract." *Reid v. Eckerd Drugs, Inc.*, 40 N.C. App. 476, 480 (1979). Nevertheless, "[a] warranty is an element in a contract of sale and, whether express or implied, is contractual in nature." *Perfecting Service Co.*, 261 N.C. at 668, 136 S.E.2d at 62. Generally, "the only classes of choses in action which are not assignable are those for torts for personal injuries and for wrongs done to the person, the reputation, or the feelings of the injured party, and those for breach of contracts of a purely personal nature, such as promises of marriage." Francis M. Dougherty, Annotation, *Assignability of Claim for Legal Malpractice*, 40 A.L.R. FED. 684 (1985). *See also Kirby Forest Industries, Inc. v. Dobbs*, 743 S.W.2d 348, 354 (Tex. App. 1987) (holding causes of action for breach of implied warranties were

assignable since they arose out of contract). Here, the cause of action for breach of implied warranties arose from the contract of sale. Further, under modern law, assignability is the general rule and nonassignability is the exception. *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 688, 413 S.E.2d 268, 271 (1992) (citing 2 N.C. Index 4th *Assignments* § 2 (1990)).

Applying the foregoing principles, we hold that the causes of action for breach of the implied warranties of merchantability and fitness for a particular purpose are assignable. The trial court erred in dismissing plaintiff's causes of action against defendants Poole and Caterpillar.

[3] Defendant Caterpillar argues, in the alternative, that even if the claims were assignable, the dismissal order should be upheld on alternate grounds. Caterpillar contends this Court should uphold the dismissal order because it was not in privity with ACM or Via, and privity is still required in an action for breach of implied warranties where the plaintiff seeks damages for economic loss.

Even though the trial court did not cite the correct basis for the judgment entered and Caterpillar did not cross-assign as error alternate grounds to support the order, we will not disturb a judgment where the correct result has been reached. In *Cieszko v. Clark*, this Court held that the appellee was not required to cross-assign as error alternate grounds to support the trial court's order of summary judgment under Rule 10(d) of our Rules of Appellate Procedure. 92 N.C. App. 290, 293, 374 S.E.2d 456, 458-59 (1988). This Court reasoned that in the context of summary judgment "[i]t would be incongruous to require an appellee to list cross-assignments of error when the appellant is not required to list assignments of error." *Id.* at 293, 374 S.E.2d at 459. The appellee was free to argue on appeal any ground to support the trial court's grant of summary judgment regardless of the fact the trial court specified the grounds for its summary judgment decision. *See also Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989); *Save Our Schools of Bladen County, Inc. v. Bladen County Bd. of Ed.*, 140 N.C. App. 233, 237, 535 S.E.2d 906, 910 (2000).

The same rationale applies regarding our review of an order granting a motion to dismiss. Upon appellate review, we review both a motion to dismiss and 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); *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414 (2003). Both require the review

of a specific portion of the record. *See Bladen*, 140 N.C. App. at 237, 535 S.E.2d at 910 (noting appellate court must consider the whole record when reviewing the grant of summary judgment); *Wood v. BD&A Constr., L.L.C.*, 166 N.C. App. 216, 218, 601 S.E.2d 311, 313 (2004) (review limited to the complaint). In addition, the scope of review for both is limited to a specific inquiry. Summary judgment involves two questions: (1) whether there is a genuine issue of material fact, and (2) whether the moving party is entitled to judgment as a matter of law. *Cieszko*, at 293, 374 S.E.2d at 459. Similarly, when reviewing the grant of a motion to dismiss "we look to whether 'the pleadings, when taken as true, are legally sufficient to satisfy the elements of at least some legally recognized claim.' " *Terrell v. Kaplan*, 170 N.C. App. 667, 669, 613 S.E.2d 526, 528 (2005) (citations omitted). Most importantly, just as with motions for summary judgment, "[t]he trial court is not required to make findings of fact when ruling on a motion to dismiss." *Jaeger v. Applied Analytical Indus. Deutschland GMBH*, 159 N.C. App. 167, 170, 582 S.E.2d 640, 644 (2003). *See also Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) (noting "the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases"); *Cieszko*, 92 N.C. App. at 293, 374 S.E.2d at 459 ("trial courts generally do not specify the grounds for summary judgment").

In accordance with the above-stated principles, it would be illogical to require an appellee appealing the grant of a motion to dismiss to list cross-assignments of error when the appellant is not required to list assignments of error. We will not limit the scope of our review of this appeal merely because the trial court specified the grounds for its decision. *Accord id.* Caterpillar is free to argue on appeal any grounds to support the judgment. We do note, however, that this exception to the requirement of an appellee to cross-assign as error is limited to instances where the trial court is not required to make findings of fact in its order, such as the entry of summary judgment or an order granting a motion to dismiss.

[4] We must now examine whether the dismissal order should be upheld on the basis of lack of privity. Under the common law, a buyer of a "good" could not assert a claim against the manufacturer for breach of implied warranties because there was no privity. *Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp.*, 46 N.C. App. 248, 251, 264 S.E.2d 768, 770 (1980). However, the North Carolina Products Liability Act eliminated the privity requirement against manufacturers, but only for actions seeking recovery for personal injury

or property damage. N.C. Gen. Stat. § 99B-2(b); *AT & T Corp. v. Medical Review of N.C., Inc.*, 876 F. Supp. 91, 95 (E.D.N.C. 1995). Privity is still required in an action for breach of implied warranties that seeks recovery for economic loss. *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 338, 525 S.E.2d 441, 446 (2000); *Gregory v. Atrium Door and Window Co.*, 106 N.C. App. 142, 144, 415 S.E.2d 574, 576 (1992). The rationale for this exception is that an action seeking to recover damages for economic loss is not a product liability action governed by the Act. *AT&T*, 876 F.Supp. at 95.

Accordingly, we must determine whether the damage the plant suffered to its generators and electronic equipment constituted "economic loss." Under North Carolina law, "when a component part of a product or a system injures the rest of the product or the system, only economic loss has occurred." *Wilson v. Dryvit Sys.*, 206 F. Supp. 2d 749, 753 (E.D.N.C. 2002) (citing *Gregory*, 106 N.C. App. at 144, 415 S.E.2d at 575, which held water damage to flooring caused by allegedly defective doors was economic loss). Here, the generators were installed as a component part of the system, thus the plant only suffered economic loss. Therefore, in order for ACM to maintain an action against Caterpillar there must be privity. As none exists, the trial court did not err in dismissing ACM's breach of implied warranty claims against Caterpillar.

C. Negligence

Although, plaintiff contends the trial court erred in dismissing its negligence claims against Poole and Caterpillar, we do not address this issue as it is not properly before this Court. Our scope of review is "confined to a consideration of those assignments of error set out in the record on appeal." N.C. R. App. P. 10(a). Since plaintiff failed to assign this as error in the record, this issue is not properly before us.

D. Breach of Contract

[5] The trial court also dismissed plaintiff's claims for breach of contract to the extent they "sound[ed] in tort." Plaintiff's breach of contract claims were as follows:

> a) failure to supply a Generator set that performed according to the Project specifications, specifically failure to provide an adequate automatic transfer switch with adequate overvoltage protection and failure to provide adequate overload and current protection,

b) failure to supply a Generator set that performed according to the Project specifications;

c) supplying a Generator Set that contained defective materials and/or equipment

d) failure to properly inspect and test the Generator Set to determine the existence of any deficiencies

e) failure to ensure that its supplier provided that proper Generator set

f) failure to perform the work in accordance with the terms and conditions of the contract with Via

g) failure to provide reimbursement to ACM for damages incurred as a result of faulty performance by Poole despite demands by ACM for payment.

The trial court properly dismissed the claims contained in (d) and (e) as these were tort claims, although they arose out of a breach of contract. *See North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 82, 240 S.E.2d 345, 350 (1978) (holding a breach of contract gives rise to a tort action where "[t]he injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract . . . "). The claim under (g) for failure to pay damages was also properly dismissed as it had no basis in breach of contract. As these claims sounded in tort, and since tort claims are not assignable, the trial court did not err in dismissing plaintiff's breach of contract claims to the extent they sounded in tort.

Summary Judgment

[6] In plaintiff's second argument, it contends the trial court improperly granted summary judgment in favor of Poole on the breach of contract claims. We disagree.

We review the trial court's grant of summary judgment *de novo*. *Stafford*, 163 N.C. App. at 151, 592 S.E.2d at 713. 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) (2005).

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 [its] claim . . . .' " *Id.* (citations omitted).

In order to prove a breach of contract, the plaintiff must establish: (1) the existence of a valid contract, and (2) defendant breached of the terms of that contract. *Wall v. Fry*, 162 N.C. App. 73, 77, 590 S.E.2d 283, 285 (2004). Neither party contests they entered into a valid contract for the purchase of the generators. The only dispute is whether Poole provided generators that met the terms of the contract.

Specifically, ACM contends Poole breached the contract in that it failed to: (1) provide generators with an adequate automatic transfer switch having adequate overvoltage protection; (2) provide a generator set that performed according to the project specifications; (3) properly inspect the generator set to determine any deficiencies; and (4) perform the work in accordance with the terms and conditions of the contract. The evidence taken in the light most favorable to ACM establishes that Poole was not the manufacturer of the generators, only the distributor. Poole delivered the two generators, which met the requirements Via specified. Poole inspected the generators after they was delivered to the work site and ran start-up tests on them to insure they were working properly before they became operational. The generators ran consistently for four hours with only minimal problems, which Poole repaired. In the deposition of Milton Via, Jr., Via's project manager, he testified the generators performed satisfactorily for the seventeen or eighteen months preceding the 16 September 1999 incident. Despite the generator's malfunction, there was no evidence presented showing that Poole could have detected a defect in the parts described above. All the evidence presented demonstrates Poole complied with the terms of the contract. Thus, plaintiff is unable to establish an essential element of its claim, that is, that Poole breached the contract. Accordingly, the trial court did not err in granting Poole's motion for summary judgment on the breach of contract claim.

For the reasons discussed herein, we reverse Judge Manning's order dismissing ACM's claims against Poole for breach of express warranty and for breach of the implied warranties of merchantability and fitness for a particular purpose. We affirm Judge Manning's order dismissing the claims against Caterpillar for breach of the implied warranties, and also affirm Judge Hobgood's order of summary judgment on the claim for breach of contract.

REVERSED IN PART; AFFIRMED IN PART.

Judges HUDSON and JACKSON concur.

STATE OF NORTH CAROLINA v. AARON HOWARD YELTON, DEFENDANT

No. COA04-1544

(Filed 3 January 2006)

1. Evidence— lay opinion—identification of substance as methamphetamine

The trial court did not abuse its discretion in a second-degree murder, possession with intent to sell and deliver methamphetamine, and sale and delivery of methamphetamine case by allowing lay witness testimony that the substance given by defendant to an individual who died was methamphetamine, because: (1) the testimony was admissible under N.C.G.S. § 8C-1, Rule 701 since it was rationally based on the witness's six years of experience with methamphetamine and her perceptions while smoking the substance; (2) the witness's uncertainty as to the precise weight and cost of an "eightball" was irrelevant; and (3) the witness's testimony was helpful for a clear understanding of her testimony or to the determination of a fact in issue.

2. Confessions and Incriminating Statements— motion to suppress—Miranda rights—waiver

The trial court did not err in second-degree murder, possession with intent to sell and deliver methamphetamine, and sale and delivery of methamphetamine case by denying defendant's motion to suppress statements he made during an interrogation by two detectives, because: (1) the trial court's findings of fact are binding on appeal since defendant did not specifically assign

error to any of the trial court's findings, and the trial court found that before any interview or discussion with defendant occurred the defendant was advised of his Miranda rights; and (2) the findings established a valid waiver under Miranda prior to defendant's making the disputed statements.

3. Evidence— defendant's statements—exculpatory—integral and natural part of development of facts—chain of circumstances

The trial court did not err in a second-degree murder, possession with intent to sell and deliver methamphetamine, and sale and delivery of methamphetamine case by admitting into evidence five statements elicited from defendant during a police interrogation even though defendant contends they violated N.C.G.S. § 8C-1, Rule 404(b), because: (1) two of the statements could only have exculpated defendant since they suggest defendant did not sell methamphetamine to the deceased on 6 March 2002, and defendant does not show how these statements could have been prejudicial; (2) while a third statement was not necessarily exculpatory, it did not refer to prior crimes, wrongs, or acts, and thus, fell outside the scope of Rule 404(b); and (3) regarding the fourth and fifth statements, defendant's statements that he had turned the deceased on to some meth two to three weeks prior to his death and that he would give drugs to the deceased when he worked for defendant were an integral and natural part of the development of the facts and were necessary to complete the story of defendant's crimes for the jury.

4. Drugs— possession of controlled substance with intent to sell or deliver—sale and/or delivery of controlled substance—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the charges of possession of a controlled substance with intent to sell or deliver, and the sale and/or delivery of a controlled substance, because: (1) as a witness's identification of the substance as methamphetamine was determined by the Court of Appeals to be admissible under N.C.G.S. § 8C-1, Rule 701, the evidence was sufficient to meet the State's burden of proof regarding this element; (2) while the State presented no evidence that defendant sold the deceased methamphetamine for money, the State presented substantial evidence that defendant provided the deceased with methamphetamine in exchange for other consideration on that date; and (3) while

some of the other statements defendant gave detectives were exculpatory and defendant has challenged the credibility of a witness's testimony, the trial court was required to view the evidence in the light most favorable to the State when ruling on defendant's motion to dismiss.

5. Homicide— second-degree murder—motion to dismiss—sufficiency of evidence

Although defendant contends the trial court erred by denying defendant's motion to dismiss at the close of all evidence the second-degree murder charge, this assignment of error is dismissed because defendant's conviction for involuntary manslaughter renders harmless any error in not dismissing the charge of second-degree murder.

Appeal by defendant from judgments entered 11 May 2004 by Judge James U. Downs in Rutherford County Superior Court. Heard in the Court of Appeals 20 September 2005.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

Deaton, Biggers & Gulden, P.L.L.C., by W. Robinson Deaton, Jr. and Brian D. Gulden, for defendant-appellant.

GEER, Judge.

Defendant Aaron Howard Yelton appeals from convictions for involuntary manslaughter, possession with intent to sell and deliver methamphetamine, and sale and delivery of methamphetamine. These charges arose out of the death of Jason Hodge as a result of ingesting methamphetamine that, the State contended and the jury found, defendant provided to Hodge. On appeal, defendant argues primarily that the trial court erred by allowing lay witness testimony that the substance given to Hodge was methamphetamine and that the trial court violated Rule 404(b) of the Rules of Evidence by admitting evidence of defendant's statements regarding his prior interactions with Hodge. We conclude that the lay witness' testimony was rationally based on the witness' six years of experience with methamphetamine and her perceptions while smoking the substance and was, therefore, admissible under Rule 701 of the Rules of Evidence. We further conclude that the testimony regarding defendant's prior dealings with Hodge was not offered for a reason prohibited by North Carolina Rule of Evidence 404(b) and, accordingly, was admissible.

Because defendant's remaining arguments regarding the trial are also without merit, we hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. On 6 March 2002, Jason Hodge, who had been drinking heavily, arrived at defendant's home with Ernie Sims and Jesse Hill. Already present at defendant's house were Amy Alley and several other individuals not relevant to this appeal. Defendant and Hodge went outside. From about five feet away, Alley witnessed defendant hand Hodge an "eightball" of methamphetamine that Hodge then hid in his sock.

Subsequently, Hodge, Sims, Hill, and Alley all left in Hill's vehicle and drove to Sims' trailer. After arriving, Hodge thought he had lost his methamphetamine and became angry. Alley reminded Hodge that he had put it in his sock. Hodge removed the methamphetamine from his sock, and Hodge, Alley, and the others smoked it. Hodge then became increasingly erratic: he yelled, tore off his clothes, struck himself in the head with computer components, and began physically fighting with Sims.

Hodge was eventually forcibly thrown out of the trailer. He pounded on the exterior door; when Sims opened the door, Hodge hit Sims and dragged him into the yard. The others attempted to break up the fight, but no one was able to control Hodge. Hodge was hit repeatedly with a log, a stick, and fists in an effort to subdue him. Even though Hodge continued to fight and resist, two of the men were eventually able to bind Hodge's wrists and ankles with duct tape. Hodge was then left face-down outside, where he subsequently died. At trial, the forensic pathologist who performed the autopsy on Hodge testified that ingestion of methamphetamine was a proximate cause of his death.

Defendant was indicted for (1) second degree murder, (2) possession with intent to sell and deliver methamphetamine, and (3) sale and/or delivery of methamphetamine. He was convicted of involuntary manslaughter and of both drug charges. The trial court imposed a sentence of 19 to 23 months for the involuntary manslaughter conviction and a consecutive sentence of 15 to 18 months for the drug convictions. Defendant timely appealed to this Court.

I

[1] Defendant first assigns error to the trial court's admission of Alley's testimony regarding the nature of the substance exchanged between defendant and Hodge. Defendant contends that Alley's identification of the substance as methamphetamine constituted impermissible lay opinion testimony.

Rule 701 of the North Carolina Rules of Evidence permits lay opinion testimony so long as it is rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. N.C. Gen. Stat. § 8C-1, N.C.R. Evid. 701 (2003). We review the trial court's decision to allow the testimony for abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). Accordingly, we may reverse only upon a showing that the trial court's admission of Alley's testimony was so arbitrary that it could not have been the result of a reasoned decision. *Id.*

Alley testified that when she "walked outside [she] seen [defendant] hand [Hodge] an eightball, and [Hodge] put it in his sock." She further testified that she later smoked the substance, which she saw Hodge take directly from his sock, and that it was methamphetamine.

Defendant argues that Alley lacked the requisite personal knowledge to give her opinion regarding what was exchanged between defendant and Hodge because Alley's understanding of what an "eightball" is originated with other people. Defendant points to the fact that on cross-examination Alley admitted that she did not know how much an "eightball" typically costs or how many grams of methamphetamine are actually in an "eightball" and that she only knew that the item handed to the victim was an "eightball" because "that's what [Sims] and them told [her]." Alley's testimony as a whole, however, indicates no lack of knowledge that the substance was methamphetamine, but only that the particular amount was called an "eightball."

Alley's uncertainty as to the precise weight and cost of an "eightball" is, however, irrelevant. The relevant issues at trial were whether Alley had sufficient personal knowledge of methamphetamine to identify it, whether her conclusion that defendant gave Hodge methamphetamine was rationally based upon her perceptions, and whether her opinion on the issue was helpful either to

the jury's understanding of her testimony or the determination of a fact in issue.

First, the State established that Alley had extensive personal knowledge of methamphetamine. At the time of trial, she had been smoking methamphetamine for six years and was able to describe, in great detail, the method by which one smokes methamphetamine. Second, Alley's identification of the substance that she smoked—and that had been received from defendant—as methamphetamine was based on that personal experience. *See State v. Drewyore*, 95 N.C. App. 283, 287, 382 S.E.2d 825, 827 (1989) (permitting lay testimony of a customs agent who identified a smell coming from a truck as marijuana based on his years of experience smelling marijuana). With respect to the final element, defendant does not dispute that Alley's testimony on this issue was helpful for a clear understanding of her testimony or to the determination of a fact in issue. Accordingly, we hold that the trial court did not abuse its discretion by admitting Alley's testimony identifying the substance given by defendant to Hodge as methamphetamine.

II

[2] Defendant next assigns error to the trial court's denial of his motion to suppress statements he made during an interrogation by detectives Ron and Philip Bailey. Although defendant admits that at some point during the interrogation, he waived his right to remain silent under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), he asserts that the disputed statements were elicited prior to that waiver and should, therefore, have been suppressed.

Since defendant has not specifically assigned error to any of the trial court's findings of fact on this issue, those findings are binding on appeal and our review "is limited to whether the trial court's findings of fact support its conclusions of law." *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965, 120 S. Ct. 2694 (2000). In any event, we note that even if defendant had properly assigned error to the pertinent findings of fact, those findings would still be binding on appeal as they are supported by the detectives' testimony. *State v. Barden*, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074, 123 S. Ct. 2087 (2003).

The trial court found that "before any interview or discussion with the defendant occurred the defendant was advised of his *Miranda* rights." The court thereafter concluded that "no statement

was given [by] 11:50 [a.m.]. Then the defendant waived his rights at 11:54, after which questions were asked and statements were given." These factual findings are binding on appeal and establish a valid waiver under *Miranda* prior to defendant's making the disputed statements. The trial court, therefore, did not err in denying defendant's motion to suppress.

III

[3] Defendant also assigns error to the trial court's admission into evidence of five statements elicited from defendant during the same police interrogation on the grounds that they were inadmissible under Rule 404(b) of the Rules of Evidence. It is well-established that Rule 404(b) is a "rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring [their] exclusion if [their] *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Thus, " 'evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused.' " *Id.* at 278, 389 S.E.2d at 54 (emphases omitted) (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)).

The statements challenged by defendant include the following: (1) defendant's claim that he "never sold [Hodge] drugs"; (2) defendant's asking the detectives if they would "sell [Hodge] drugs with two people [they] didn't know"; (3) defendant's statement that he would have "turned [Hodge] onto some meth if the other two guys were not there"; (4) defendant's claim he had "turned [Hodge] onto some meth" two to three weeks prior to his death; and (5) defendant's admission that he would "give [Hodge] drugs when [Hodge] worked for [defendant]."

As a preliminary matter, we note the first two statements could only have exculpated defendant since they suggest defendant did *not* sell methamphetamine to Hodge on 6 March 2002. Defendant does not suggest, nor can we divine, how these statements could have been prejudicial. *State v. Morgan*, 359 N.C. 131, 159, 604 S.E.2d 886, 903 (2004) (concluding that, even if the defendant established certain evidence was improperly admitted, the Court would not reverse because the defendant had not demonstrated prejudice), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 79, 126 S. Ct. 47 (2005). Additionally, while the third statement is not necessarily exculpatory, it does not refer to prior crimes, wrongs, or acts and, therefore, falls outside of the scope of

Rule 404(b). *State v. Thibodeaux*, 341 N.C. 53, 63, 459 S.E.2d 501, 508 (1995) (holding that trial court did not err in admitting testimony that defendant had indicated he might solve his financial difficulties by robbing a bank when "[t]he testimony at issue did not relate to any prior crime, wrong or act of the defendant").

Regarding the fourth and fifth statements, our Supreme Court has held that "[e]vidence of other crimes committed by a defendant may be admissible under Rule 404(b) if it establishes the chain of circumstances or context of the charged crime. Such evidence is admissible if the evidence of other crimes serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (internal citations omitted), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436, 116 S. Ct. 530 (1995). Our Supreme Court has explained further:

> "Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

In this case, defendant's statements that he had "turned [Hodge] on to some meth" two to three weeks prior to his death and that he would "give [Hodge] drugs when [Hodge] worked for [defendant]" were, as *Agee* specified, an integral and natural part of the development of the facts and were necessary to complete the story of defendant's crimes for the jury. The statements were not offered solely to evidence defendant's propensity to commit a crime, but rather established the nature of the victim's relationship with defendant, including the fact that defendant traded Hodge drugs for work. This fact was necessary to meet the State's burden of proof regarding the charge of sale of a controlled substance.

Because the statements helped describe the chain of circumstances leading up to the exchange and provided the context for the charged crime, the trial court did not err in admitting the testimony. *See id.* at 550, 391 S.E.2d at 175-76 ("Because the evidence of defendant's marijuana possession served the purpose of establishing the

chain of circumstances leading up to his arrest for possession of LSD, Rule 404(b) did not require its exclusion as evidence probative *only* of defendant's propensity to possess illegal drugs."); *State v. Holadia*, 149 N.C. App. 248, 255, 561 S.E.2d 514, 519-20 (holding that the trial court did not err under Rule 404(b) in admitting testimony of the victim of an armed robbery regarding defendant's statement referring to defendant's prior drug activity with the victim), *disc. review denied*, 355 N.C. 497, 562 S.E.2d 432 (2002).

IV

Defendant next assigns error to the trial court's denial of his motion at the close of all the evidence to dismiss the State's charges for insufficient evidence.[1] In addressing a criminal defendant's motion to dismiss for insufficiency of the evidence, the trial court must determine whether there is substantial evidence: (1) of each essential element of the offense charged; and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869. Contradictions and discrepancies do not warrant dismissal, but are for the jury to resolve. *Id.*

A. The Controlled Substance Charges

[4] Defendant was charged with possession of a controlled substance with intent to sell or deliver and with the sale and/or delivery of a controlled substance, both in violation of N.C. Gen. Stat. § 90-95 (2003). The first charge has the following elements: (1) possession, (2) of a controlled substance, (3) with the intent to sell or distribute the controlled substance. N.C. Gen. Stat. § 90-95(a)(1); *State v. Carr*, 145 N.C. App. 335, 342, 549 S.E.2d 897, 901 (2001). The second charge, on the other hand, requires that the State show the transfer of a controlled substance by sale, delivery, or both. *Carr*, 145 N.C. App. at 342, 549 S.E.2d at 901. Methamphetamine is a "controlled substance" under the North Carolina Controlled Substances Act. N.C. Gen. Stat. §§ 90-87(5), 90-90(3) (2003).

1. Defendant also assigns error to the trial court's denial of his motion to dismiss made at the close of the State's case. By putting on evidence after the State rested its case, however, defendant waived his right to appeal the denial of the initial motion. N.C.R. App. P. 10(b)(3).

On appeal, defendant argues first that the State did not present substantial evidence that the substance defendant delivered to Hodge was methamphetamine. Defendant's argument, however, assumes that Alley's testimony is inadmissible. Since we have held that Alley's identification of the substance as methamphetamine was admissible under Rule 701, that evidence is sufficient to meet the State's burden of proof regarding this element.

Defendant next argues that the State failed to offer substantial evidence of a sale. Defendant acknowledges that this Court has defined a "sale" in the context of illegal drug transactions as an exchange for money *or any other form of consideration*. *Carr*, 145 N.C. App. at 343, 549 S.E.2d at 902-03. While the State presented no evidence that defendant sold Hodge methamphetamine for money on 6 March 2002, the State presented substantial evidence that defendant provided Hodge with methamphetamine in exchange for other consideration on that date.

Detective Philip Bailey testified that defendant stated in his interview (1) that Hodge worked for defendant in exchange for methamphetamine and (2) that it would be "bad business" to provide Hodge with methamphetamine had Hodge not done work for him. We hold that based on this testimony, a rational juror could have concluded that defendant gave Hodge methamphetamine on 6 March 2002 as payment for work Hodge had previously performed.

While some of the other statements defendant gave detectives were exculpatory and defendant has challenged the credibility of Alley's testimony, the trial court was required to view the evidence in the light most favorable to the State when ruling on defendant's motion to dismiss. *Scott*, 356 N.C. at 596, 573 S.E.2d at 869. We, therefore, reject defendant's argument that the trial court erred by not granting his motion to dismiss the controlled substances charges for insufficiency of the evidence.

B. The Second Degree Murder Charge

[5] We next consider defendant's argument that the trial court erred by not granting his motion to dismiss the charge of second degree murder at the close of all the evidence. Defendant was indicted for second degree murder, but convicted only of involuntary manslaughter. Involuntary manslaughter is a lesser-included offense of second degree murder. *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989).

Defendant did not assign error regarding the sufficiency of the evidence to support the verdict of involuntary manslaughter.[2] Instead, defendant argues that the State failed to present substantial evidence that defendant committed second degree murder. We need not address this issue because defendant's conviction for involuntary manslaughter renders harmless any error in not dismissing the charge of second degree murder.

This Court has addressed this issue before. In *State v. Graham*, 35 N.C. App. 700, 701, 242 S.E.2d 512, 512 (1978), the defendant was charged with the second degree murder of his girlfriend after a heated argument ended with her being shot and killed. The jury was instructed on both second degree murder and voluntary manslaughter and convicted the defendant of voluntary manslaughter. *Id.* at 705, 242 S.E.2d at 515. On appeal, the defendant assigned error to the trial court's second degree murder instruction. *Id.* This Court declined to reach the issue, concluding that a "verdict finding defendant guilty of the lesser offense of voluntary manslaughter rendered harmless any errors in the [trial] court's instructions on the greater offense, absent a showing that the verdict was affected thereby." *Id.* Because "[n]othing in th[e] record indicate[d] that the challenged instructions on second degree murder in any way affected the verdict rendered finding defendant guilty of voluntary manslaughter," this Court overruled defendant's alleged error. *Id. See also*, *e.g.*, *State v. Mangum*, 245 N.C. 323, 330-31, 96 S.E.2d 39, 45 (1957) ("The court's charge on second degree murder was correct, but whether it was or not, is not material on this appeal, because the defendant was convicted of the lesser offense of manslaughter, and there is nothing to show that the verdict of guilty of manslaughter was thereby affected."); *State v. Lassiter*, 160 N.C. App. 443, 460, 586 S.E.2d 488, 500 (verdict of voluntary manslaughter rendered harmless any errors in instructing the jury on first degree murder), *disc. review denied*, 357 N.C. 660, 590 S.E.2d 853 (2003). Because defendant has made no showing that the submission to the jury of the second degree murder charge affected the involuntary manslaughter verdict, we overrule this final assignment of error.

No error.

Judges MARTIN and BRYANT concur.

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2. Accordingly, we express no opinion on whether the State presented sufficient evidence of this lesser-included offense.

STATE OF NORTH CAROLINA v. SONYA CASE HARRIS

No. COA05-111

(Filed 3 January 2006)

1. Appeal and Error— sentencing—failure to object at trial—Rule 10(b)(1) not applicable

A sentencing issue was properly before the Court of Appeals, despite defendant's failure to object, because sentencing errors are not considered an error at trial for the purpose of Rule 10(b)(1).

2. Sentencing— factors—indictment allegations not required

State v. Lucas, 353 N.C. 568, has been overruled by *State v. Allen*, 359 N.C. 425, to the extent that it required that sentencing factors be alleged in an indictment.

3. Sentencing— concessions or stipulations—waiver of constitutional right—not sufficiently considered

A sentence was remanded where there was no discussion in the record that concessions or stipulations by defendant would be tantamount to a waiver of defendant's right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, which was decided only six working days prior to defendant's resentencing hearing. The relevant inquiry is not whether defendant stipulated to the factual basis for an aggravating factor, but rather whether she effectively waived her constitutional right to a jury determination.

4. Constitutional Law— sentencing—effective representation of counsel

Defense counsel's performance at a sentencing hearing was not so deficient that prejudice need not be argued, and, with no allegation of prejudice, defendant failed to meet her burden of showing that defendant was deprived of a fair trial.

Appeal by defendant from judgment dated 9 July 2004 by Judge E. Penn Dameron in Superior Court, Henderson County. Heard in the Court of Appeals 11 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for the State.

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

McGEE, Judge.

Sonya Case Harris (defendant) was indicted on 8 October 2001 on a charge of second-degree murder of David Boyd (Boyd). Defendant's case was joined for trial with those of Harlan Ponder and Jason Ponder (collectively, the Ponders). Defendant and the Ponders were convicted by a jury of second-degree murder. The trial court found three aggravating factors and sentenced defendant in the aggravated range to a term of imprisonment of 276 months to 341 months. Defendant appealed the conviction and sentence. In an unpublished opinion, our Court affirmed defendant's conviction but remanded for resentencing. *State v. Ponder*, 163 N.C. App. 613, 594 S.E.2d 258 (2004).

At the resentencing hearing on 6 July 2004, the trial court found two aggravating factors and again sentenced defendant in the aggravated range to a term of imprisonment of 276 months to 341 months. Defendant appeals.

Defendant, the Ponders, and Boyd were involved in a fight in the presence of Boyd's girlfriend and Robert Banks (Banks) on 22 July 2001. Banks testified that defendant attempted to kick Boyd in the face, after which the Ponders hit Boyd until he lost consciousness and fell to the ground, hitting his head. Boyd regained consciousness and defendant and the Ponders resumed beating him. After Boyd lost and regained consciousness a second time, defendant and the Ponders kicked and stomped on Boyd's ribs. The Ponders then dragged Boyd to a nearby field, while defendant grabbed Boyd's girlfriend and threatened her with a knife. Boyd died as a result of a head injuries that caused bleeding inside Boyd's skull. Boyd also suffered two fractured ribs, fractured rib cartilage, and cuts on his back.

At the resentencing hearing, defendant testified on her own behalf and admitted that she kicked Boyd, smacked and punched him in the face, and made multiple cuts on Boyd's back with a knife. Defendant denied asking the Ponders to assault Boyd or to otherwise come to her defense. Defendant also denied that she ever joined the Ponders while they kicked and beat Boyd. The State asked the trial court to find three aggravating factors: (1) that defendant was armed with a deadly weapon at the time of the offense; (2) that defendant joined with more than one other person in committing the offense and was not charged with conspiracy; and (3) that defendant induced the Ponders to participate in the offense or occupied a position of leadership over them. Defense counsel disputed that defendant in-

duced the Ponders to participate or occupied a position of leadership over them. Defense counsel did not dispute the existence of the two other aggravating factors. Defense counsel advised the trial court that none of the statutory mitigating factors applied to defendant, but defense counsel asked the trial court to consider defendant's children:

> I would just suggest to the Court that [defendant] does have these two kids. And I don't think that anyone is going to stand up and try to say, and I don't think she would tell the Court, that she was mother of the year. I mean, she acknowledged that she used drugs, she acknowledged she abused alcohol. Tough—tough to be a parent under the best of circumstances. Certainly tough if you're doing that.

Defense counsel stated that the father of defendant's children was deceased but was corrected by defendant that he was alive.

The trial court found two aggravating factors: (1) that defendant was armed with a deadly weapon at the time of the offense; and (2) that defendant joined with more than one other person in committing the offense and was not charged with conspiracy. The trial court then stated that he "would not find the existence of any mitigating factors" and that the aggravating factors were sufficient to outweigh any mitigating factors that "might exist."

Defendant argues four assignments of error, which we will address as two issues: (I) whether the trial court erred in imposing a sentence in the aggravated range and (II) whether defendant was deprived of the effective assistance of counsel.

I.

[1] Defendant argues that the trial court erred in imposing a sentence in the aggravated range, where that sentence was based on factors neither (1) pled in an indictment, (2) found by a jury beyond a reasonable doubt, nor (3) admitted by defendant.

The State contends defendant failed to preserve this issue for our Court's review because defendant did not object to the trial court's imposition of an aggravated sentence. N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]"). However, our Court has held that "[a]n error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1) because this

rule is 'directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal.' " *State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005) (quoting *State v. Hargett*, 157 N.C. App. 90, 93, 577 S.E.2d 703, 705 (2003)); *see also State v. Jeffery*, 167 N.C. App. 575, 605 S.E.2d 672 (2004); *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991). Accordingly, despite defendant's failure to object to the sentence, the issue is properly before this Court.

[2] Defendant argues that in the absence of an indictment alleging the aggravating factors, the trial court lacked jurisdiction to impose a sentence in the aggravated range. Defendant cites *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), *overruled in part by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), for the rule that any fact that increases the maximum penalty for a crime must be alleged in an indictment. However, our Supreme Court has overruled *Lucas* to the extent it required that sentencing factors be alleged in an indictment. *Allen*, 359 N.C. at 438, 615 S.E.2d at 265. Therefore, defendant's argument is without merit.

[3] Defendant also contends that the aggravating factors used to enhance her sentence must have been submitted to a jury and found beyond a reasonable doubt. The United States Supreme Court held in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), that aggravating factors that would increase a defendant's sentence above that authorized by a jury verdict must be found beyond a reasonable doubt by a jury. This Sixth Amendment principle was applied to North Carolina's structured sentencing scheme in *Allen*. However, *Allen* provides that a trial court, without a jury, "may still sentence a defendant in the aggravated range based upon [a] defendant's admission to an aggravating factor enumerated in N.C.G.S. § 15A-1340.16(d)." *Allen*, 359 N.C. at 439, 615 S.E.2d at 265.

In the present case, the trial court sentenced defendant in the aggravated range based upon two statutory aggravating factors: (1) defendant was armed with a deadly weapon at the time of the offense; and (2) defendant joined with more than one other person in committing the offense and was not charged with conspiracy. *See* N.C. Gen. Stat. § 15A-1340.16(d) (2003). Since the trial court did not submit the issue of aggravating factors to a jury, the query for our Court is whether defendant admitted to the aggravating factors. If defendant did not admit to the aggravating factors, the trial court's finding of the aggravating factors was error.

Allen does not provide guidance as to the form a defendant's admission must take in order to constitute a valid waiver of a defendant's constitutional right to a jury determination of aggravating factors. However, this Court has stated that a waiver of a constitutional right under *Blakely* and *Allen* must be made knowingly and intelligently. In *State v. Meynardie*, 172 N.C. App. 127, 616 S.E.2d 21 (2005), for example, our Court held:

> Since neither *Blakely* nor *Allen* had been decided at the time of defendant's sentencing hearing, defendant was not aware of his right to have a jury determine the existence of the aggravating factor. Therefore, defendant's stipulation to the factual basis for his plea was not a "knowing [and] intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."

Meynardie at 131, 616 S.E.2d at 24 (quoting *Brady v. United States*, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 756 (1970)); *see State v. Whitehead*, 174 N.C. App. 165, 620 S.E.2d 272 (2005); *State v. Wissink*, 172 N.C. App. 829, 617 S.E.2d 319 (2005); *State v. Everette*, 172 N.C. App. 237, 616 S.E.2d 237 (2005).

Moreover, in light of *Blakely* and *Allen*, the North Carolina General Assembly enacted Session Law 2005-145 (the *Blakely* bill), which requires that an admission to a statutory aggravating factor take the same form as a defendant's guilty plea. The *Blakely* bill requires a trial court to advise a defendant that "[h]e or she is entitled to have a jury determine the existence of any aggravating factors[.]" 2005 N.C. Sess. Laws ch. 145, § 4. Moreover, "[b]efore accepting an admission to the existence of an aggravating factor . . ., the [trial] court shall determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." *Id.* Although the *Blakely* bill is effective only for offenses committed on or after 30 June 2005, and we are not bound by it, we find the General Assembly's language instructive on this issue.

The State argues that defendant admitted to the first aggravating factor, being armed with a deadly weapon at the time of the offense. Defendant testified at the resentencing hearing as follows:

> Q. Did you at any point use the knife or threaten to use the knife regarding Mr. Boyd? Did you threaten him with the knife?
>
> A. No, I didn't threaten him with the knife.

Q. Did you at some point, either before all this took place or after it took place, take that knife that you carried with you and make marks on the back of Mr. Boyd as are shown in this photograph[] that the Judge has?

A. Yes, I did.

Q. Okay. Where did you do that?

A. On his back.

Q. When did you do that?

A. After—when I was fighting with [Boyd's girlfriend] and I was coming back up the bank, [the Ponders] hollered, let's go, the police is going to be coming. And they [were] already going through the field and they hollered for me to leave. And [Boyd] was laying there in the field and I done it.

As for the second aggravating factor, defendant denied that she joined with more than one other person in committing the offense. The State contends that despite defendant's denial, defense counsel admitted the existence of both aggravating factors.

The State contends that defendant stipulated to the second aggravating factor through a statement made by defense counsel at the sentencing hearing. The relevant portion of the sentencing hearing transpired as follows:

[STATE]: Your Honor, the State would like to argue to the Court pursuant to 15A-1340.16, Subpart D, that there are aggravating factors in this case and that those include, Nos. 1, that the person of [defendant] occupied a position of leadership or dominance of the other participants in the commission of this offence.

. . . .

We'd argue that the second aggravating factor concerning joining with more than one other person and not being charged with conspiracy applies in this instant. . . .

And Subpart 10, that the defendant was armed with a deadly weapon at the time of the crime[.] . . .

The State would argue that the Court could use any one of those in order to find mitigating—or the aggravating range appropriate here. And we request that the Court do so.

> THE COURT: All right. Mr. Newman.
>
> [DEFENSE COUNSEL]: Thank you. Your Honor, really, I don't think there's a dispute as to [aggravating factors] Nos. 2 [that defendant joined with more than one other person in committing the offense,] and 10 [that defendant was armed with a deadly weapon]. I mean, there's just no reason to say anything about those. That was the finding before [at the first sentencing hearing]. And I mean, Mr. Ellis is right, that does reflect the evidence at the trial.
>
> . . . .
>
> I would just ask the Court to—that if you find 2 and 10, that No. 1, I think, would actually be open to some dispute there.
>
> . . . .
>
> [DEFENSE COUNSEL]: Did you want to say anything, Ms. Harris?
>
> [DEFENDANT]: I would like to apologize.
>
> . . . .
>
> [THE COURT]: . . . Based on the evidence that I've heard, Miss Harris, I would find by the standard of proof required at this sentencing hearing, that you did participate in this crime with the involvement of more than one other person, but were not charged with a conspiracy involved in the commission of this crime[.]

The trial court also found that defendant was armed with a deadly weapon.

The State contends that defense counsel's concession that there was no dispute as to two of the aggravating factors amounts to an admission or stipulation of those factors, and therefore *Blakely* does not apply. The State, citing *State v. Mullican*, 329 N.C. 683, 406 S.E.2d 854 (1991), argues that North Carolina courts have permitted such concessions by a defense attorney to serve as stipulations to facts necessary to support aggravated sentences. In *Mullican*, our Supreme Court held that a defendant stipulated to evidence supporting the finding of an aggravating factor where the defendant did not object during the State's summary of the evidence and defense counsel made a statement consistent with the State's summary. *Mullican*, 329 N.C. at 686, 406 S.E.2d at 855-56. Since *Mullican*, this Court has

held that a defendant may impliedly stipulate to the presence of aggravating factors through statements by counsel. In *State v. Sammartino*, 120 N.C. App. 597, 463 S.E.2d 307 (1995), we held that where the defendants' attorneys did not rebut the State's recitation of a codefendant's statement about an aggravating factor, but instead used the statement to argue against the aggravating factor, we could "infer that [the] defendants consented to the prosecutor's recitation of the factual basis and the reading of the codefendant's statement." *Id.* at 601, 463 S.E.2d at 310. *See State v. Jackson*, 119 N.C. App. 285, 458 S.E.2d 235 (1995) (holding that a defense counsel's statements at a pretrial hearing amounted to an admission of prior convictions as an aggravating factor).

However, *Mullican* and the related cases cited by the State are inapplicable to the present case because those cases were decided before *Blakely* and *Allen*. In light of *Blakely* and *Allen*, the relevant inquiry for this Court is not whether defendant stipulated to the factual basis for a finding of an aggravating factor by the trial court, but rather whether defendant effectively waived her constitutional right to have a jury determine the existence of any aggravating factor. *See Meynardie*, 172 N.C. App. at 130, 616 S.E.2d at 24; *Wissink*, 172 N.C. App. at 838, 617 S.E.2d at 325; *Everette*, 172 N.C. App. at 246, 616 S.E.2d at 243. A valid waiver of the constitutional right to a jury trial must be knowing and intelligent. *Brady*, 297 U.S. at 748, 25 L. Ed. 2d at 456; *see State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985). A defendant must be "sufficient[ly] aware[] of the relevant circumstances and likely consequences" of a waiver. *Brady*, 397 U.S. at 748, 25 L. Ed. 2d at 756.

In the present case, the record is void of any evidence that defendant, defense counsel, or the trial court was aware of the consequences of statements made by defense counsel or defendant at the sentencing hearing. There is no discussion in the record that concessions or stipulations would be tantamount to a waiver of defendant's right to a jury trial under *Blakely*, which was decided only six working days prior to defendant's resentencing hearing.

We hold that there is no factual basis upon which to find that any stipulation by defendant or counsel was a knowing and intelligent waiver of the right to have a jury determine the existence of any aggravating factors. Accordingly, we remand for a second resentencing. At the resentencing hearing, the State bears the burden of proving to a jury, beyond a reasonable doubt, the existence of any

aggravating factors unless defendant admits to the existence of any aggravating factors. Any waiver by defendant of the right to a jury trial as to aggravating factors must be a knowing and intelligent surrender of that right under *Blakely* and *Allen*.

II.

[4] Defendant next argues she was deprived of effective assistance of counsel on two grounds: (1) her attorney was apparently ignorant of the *Blakely* decision and (2) her attorney failed to make a reasoned argument in support of a mitigated range sentence. However, defendant offers the first ground as an alternative argument: in the event we find an objection was necessary under Rule (10)(b)(1) to preserve defendant's right to appeal her aggravated sentence, defendant contends that counsel's failure to object, in ignorance of *Blakely*, constituted ineffective assistance of counsel. Since we hold that no objection was necessary to preserve defendant's right to appeal, we need not address defendant's first ground.

Generally, assistance of counsel is deemed ineffective when a defendant shows that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The first part of this standard requires that a defendant show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 80 L. Ed. 2d at 693. The second part of the standard "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 80 L. Ed. 2d at 693. Our Supreme Court has interpreted this to mean that a defendant must show that " 'absent the deficient performance by defense counsel, there would have been a different result at trial.' " *State v. Rogers*, 355 N.C. 420, 449-50, 562 S.E.2d 859, 878 (2002) (quoting *State v. Strickland*, 346 N.C. 443, 455, 488 S.E.2d 194, 201 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998), and *cert. denied*, 354 N.C. 579, 559 S.E.2d 551 (2001)).

Defendant argues her counsel's failure to advocate for mitigating factors, as well as counsel's statements about aggravating factors, fell below an objective standard of reasonableness. However, defendant presents no argument that counsel's deficient performance prejudiced the outcome of the proceeding. We note that in certain circumstances, the deficiency of a counsel's performance is so great that prejudice need not be argued. *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984). For example, in *State v. Davidson*,

77 N.C. App. 540, 335 S.E.2d 518 (1985), this Court found that a defendant received ineffective assistance at sentencing where the defense counsel's statement to the trial court began, " 'Your Honor, every now and then you get appointed in a case where you have very little to say and this is one of them.' " *Id.* at 545, 335 S.E.2d at 521. As the defense counsel continued, he implied that the defendant had provided false information, informed the trial court of the defendant's prior conviction, and disparaged the defendant for refusing a plea bargain. *Id.* Upon review, our Court found the counsel's statement was

> altogether lacking in positive advocacy. Counsel offered no argument in defendant's favor, made no plea for findings of mitigating factors, . . . failed to suggest any favorable or mitigating aspects of defendant's background, and failed even to advocate leniency. More significant, the representation consisted almost exclusively of commentary entirely negative to defendant.

Id.

Unlike the facts of *Davidson*, defense counsel's performance in the present case is not "altogether lacking in positive advocacy." *Id.* Here, defendant's counsel asked the trial court for a mitigated sentence, contested one of the aggravating factors found at the initial sentencing hearing, and identified mitigating aspects of defendant's personal history. This performance by defense counsel was not so deficient that prejudice need not be argued. *See Conic*, 466 U.S. at 658, 80 L. Ed. 2d at 667. With no allegation of prejudice, defendant has failed to meet her burden under the second part of the *Strickland* standard. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. This assignment of error is overruled.

Remanded for resentencing.

Judges WYNN and GEER concur.

STATE OF NORTH CAROLINA v. KENNETH LACEY, DEFENDANT

No. COA05-238

(Filed 3 January 2006)

1. Evidence— findings of fact—conflicting but competent evidence—credibility

The trial court did not err in an assault with a deadly weapon inflicting serious injury, second-degree kidnapping, and double first-degree burglary case by concluding there was sufficient evidence supporting findings of fact eight and nine regarding whether defendant's counsel was present at the 3 January 2003 interview in which defendant confessed to the Wilson County crimes, because: (1) although there is conflicting evidence, there is competent evidence to support the trial court's findings that there was only one interview on 3 January 2003 at which defendant confessed to the crimes even though defendant and his counsel both testified there were two interviews and that defendant confessed to the crimes at the second interview; and (2) it is the function of the trial court to weigh the credibility of witnesses.

2. Witnesses— necessary or essential—no showing of abuse of discretion

The trial court did not err in an assault with a deadly weapon inflicting serious injury, second-degree kidnapping, and double first-degree burglary case by concluding as a matter of law that an assistant United States attorney was not an essential or necessary witness, because: (1) defendant did not assign as error any of the findings of fact that support this conclusion of law, and therefore, the findings of fact are binding on appeal; and (2) there was no showing of an abuse of discretion.

3. Confessions and Incriminating Statements— voluntariness—not a part of trickery or deception

The trial court did not err in an assault with a deadly weapon inflicting serious injury, second-degree kidnapping, and double first-degree burglary case by concluding as a matter of law that defendant's statements were freely and voluntarily made and were not a part of any trickery or deception, because: (1) the trial court found as a finding of fact, which defendant did not assign as error and is thus binding on appeal, that defendant agreed to and in fact solicited participation in a debriefing to disclose informa-

tion related to the indictment or other crimes as part of a plea agreement; (2) defendant readily and willingly participated in the debriefing, and no questions were asked of defendant and defendant was not otherwise prompted regarding any of the information pertaining to defendant's involvement in these crimes; and (3) defendant had previously read and signed the plea agreement and had gone over the terms of the agreement with his attorney who was also present at the debriefing.

4. Confessions and Incriminating Statements— statements to county officer—no violation of federal plea agreement

The trial court did not err in an assault with a deadly weapon inflicting serious injury, second-degree kidnapping, and double first-degree burglary case by concluding as a matter of law that use of defendant's statements to a county officer did not violate his plea agreement with the federal government, because: (1) the plea agreement provided that the United States District Court for the Eastern District of North Carolina would not prosecute defendant for any crimes he confessed to except for crimes of violence, and a Beaufort County police officer's subsequent statement giving a specific example of a crime of violence, i.e. murder, did not modify defendant's plea agreement; (2) defendant knew the contents of the plea agreement, had counsel present, and knew the police officer was not a party to the agreement; and (3) as the officer's statement did not modify the plea agreement, the federal government did not breach the plea agreement by informing Wilson County authorities of defendant's confession to a home invasion which was a crime of violence.

5. Sentencing— aggravated range—*Blakely* error

The trial court violated defendant's Sixth Amendment right to a jury trial in an assault with a deadly weapon inflicting serious injury, second-degree kidnapping, and double first-degree burglary case by sentencing defendant in the aggravated range without submitting the aggravating factors to the jury, and the case is remanded for resentencing, because: (1) the facts of the aggravating factors were neither presented to the jury nor proved beyond a reasonable doubt; and (2) defendant did not stipulate to any aggravating factor.

Appeal by Defendant from judgment entered 17 May 2004 by Judge Jerry R. Tillett in Superior Court, Wilson County. Heard in the Court of Appeals 29 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

McCotter, Ashton & Smith, P.A., by Terri W. Sharp and Rudolph A. Ashton, III, for defendant-appellant.

WYNN, Judge.

In analyzing plea agreements, "contract principles will be 'wholly dispositive' because 'neither side should be able . . . unilaterally to renege or seek modification simply because of uninduced mistake or change of mind.' " *United States v. Wood*, 378 F.3d 342, 348 (4th Cir. 2004) (citations omitted). Defendant contends that an interviewing police officer's statements modified his written plea agreement. As Defendant knew the contents of the plea agreement, had counsel present, and knew the police officer was not a party to the agreement, we affirm the trial court's denial of Defendant's motion to suppress his pretrial statements made to the police officer.

However, we must remand this case for resentencing pursuant to *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) and *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005).

On 25 September 2002, Defendant Kenneth Lacy[1] entered into a plea agreement with Assistant United States Attorney Winnie Jordan Reaves. On 30 September 2002, Defendant pled guilty in United States District Court for the Eastern District of North Carolina to possession with intent to distribute at least five grams of crack cocaine.

In exchange for his truthful cooperation, the plea agreement provided certain protections for Defendant under the following pertinent provisions:

> 2.i. To testify, whenever called upon to do so by the Government, fully and truthfully in any proceeding, and to disclose fully and truthfully in interviews with Government agents, information concerning all conduct related to the Indictment and any other crimes of which the Defendant has knowledge. These obligations are continuing ones. The Defendant agrees that all of these statements can be used against the Defendant at trial if the Defendant withdraws from the plea agreement or if he is allowed to withdraw the guilty plea.
>
> ***

1. The spelling of Defendant's name on the judgment is listed as Kenneth Lacey, however, all other documents refer to the spelling of his name as Kenneth Lacy.

> 4.d. That the USA-EDNC will not further prosecute the Defendant for conduct constituting the basis for the Criminal Indictment; however, this obligation is limited solely to the USA-EDNC and does not bind any other state or federal prosecuting entities.
>
> ***
>
> 4.g. That the USA-EDNC agrees not to use any information provided by the Defendant pursuant to this Agreement to prosecute the Defendant for additional offenses, except crimes of violence.
>
> 4.h. That the USA-EDNC agrees not to share any information provided by the Defendant pursuant to this Agreement with other state or federal prosecuting entities except upon their agreement to be bound by the terms of this Agreement.

Under the plea agreement, on 3 January 2003, Lieutenant Timothy McLawhorn with the Beaufort County Sheriff's Office interviewed Defendant. In the Order denying suppression of Defendant's statement, the trial court found that Investigator Russell Davenport and Robert McAfee (Defendant's federal counsel) were also present at the debriefing.

Lieutenant McLawhorn testified at the suppression hearing that at the beginning of the interview he told Defendant, "as long as you haven't committed any murders, you know, things like that he didn't have anything to worry about." Lieutenant McLawhorn had not read Defendant's plea agreement with the federal government. Defendant testified that Lieutenant McLawhorn told him at the beginning of the interview, "and I want you to know whatever you say won't be used against you, unless it's a murder. Someone will have to answer to that."

Lieutenant McLawhorn prepared a written summary of the interview from his notes. This summary included Defendant's confession to the crimes in the instant case, a home invasion in Wilson, North Carolina. Thereafter, Lieutenant McLawhorn contacted detectives in the Wilson County Sheriff's Office and forwarded them a copy of his written summary, including Defendant's confession to the home invasion in Wilson County.

On 7 July 2003, Defendant was indicted in Superior Court, Wilson County, for two counts of assault with a deadly weapon with intent to kill inflicting serious injury, first-degree burglary, first-degree kidnap-

ping, and attempted robbery with a dangerous weapon. Defendant filed a motion to suppress his statements to members of the Beaufort County Sheriff Department made under the plea agreement with the federal government. The trial court held a hearing on the motion to suppress.

Defendant served a subpoena on 16 March 2004, on Assistant United States Attorney Winnie Reaves ordering attendance and testimony in a state court criminal proceeding. The United States of America submitted a motion to quash the subpoena in United States District Court for the Western District of North Carolina. On 19 March 2004, United States Magistrate Judge James C. Dever, III granted the motion by the United States and quashed the subpoena based on the doctrine of sovereign immunity. The order was affirmed by Chief United States District Judge Terrence W. Boyle by order entered 26 April 2004.

At the suppression hearing, Defendant's federal counsel, Mr. McAfee, testified that Defendant did not discuss the Wilson home invasion crimes in his presence during the interview with Lieutenant McLawhorn. Mr. McAfee believed that Lieutenant McLawhorn's summary was a combination of two separate interviews, only one of which he was present. But Lieutenant McLawhorn testified that he only interviewed Defendant once and the written summary was prepared from one interview. Defendant testified that there was two interviews, and the home invasion was discussed in the second interview at which Laura Miller was also present.

The trial court found that there had been only one interview and made the following pertinent findings of fact regarding Mr. McAfee's testimony:

> 29. Attorney McAfee testified that the defendant had told him prior to the debriefing that he had in fact been involved in these cases occuring in Wilson County, and that McAfee knew the type of crimes involved would be 'crimes of violence' within the meaning of that term of the plea agreement.
>
> 30. Mr. McAfee testifed that he recalls Officer McLawhorn making what he characterized as an "offhand statement" to the effect that the defendant was protected under his plea agreement for what was said in the debriefing and that they would not be concerned about things defendant said unless it was a murder. If so, there would be a problem.

31. Attorney McAfee testified that he did not consider this comment an intent to change or modify the original plea agreement; he was not advised of any authority to do so, and he made no attempt to stop the debriefing, either at that point or later when the defendant confessed to the crimes charged in this case.

Thus, the trial court denied Defendant's motion to suppress his statements. Reserving his right to appeal from the denial of his motion to suppress, Defendant pled guilty to assault with a deadly weapon inflicting serious injury, second-degree kidnapping, and two counts of first-degree burglary.

Following a sentencing hearing, the trial court found the following as aggravating factors: (1) "The Defendant induced others to participate in the commission of the offense[;]" (2) "The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy[;]" (3) "The defendant was armed with a deadly weapon at the time of the crime[;]" (4) "The defendant committed the offense while on pretrial release on another charge." The trial court noted that "each factor in aggravation outweighs all mitigation and is alone a sufficient basis for the sentence from within the aggravated range." Accordingly, the trial court sentenced Defendant in the aggravated range to 146 to 185 months imprisonment for the first-degree burglary charge, fifty-seven to seventy-eight months imprisonment for the second-degree kidnapping charge, fifty-eight to seventy-nine months and fifty-seven to seventy-eight months for the to assault with a deadly weapon charges.

On appeal, Defendant argues that the trial court erred in (1) denying his motion to suppress his statements, and (2) sentencing him in the aggravated range.

"The standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (citation omitted). If the trial court's conclusions of law are supported by its factual findings, we will not disturb those conclusions on appeal. *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001).

[1] Defendant contends that there was insufficient evidence to support findings of fact eight and nine insofar as the trial court found that

Mr. McAfee was present at the 3 January 2003 interview in which Defendant confessed to the Wilson County crimes.

A review of the record shows that, although there is conflicting evidence, there is competent evidence to support the trial court's findings of fact that there was only one interview, on 3 January 2003, at which Defendant confessed to the Wilson County crimes. *See Smith*, 160 N.C. App. at 114, 584 S.E.2d at 835. Lieutenant McLawhorn testified that he only interviewed Defendant once, on 3 January 2003, and he prepared a written summary, that included Defendant's confession, from one interview. Investigator Davenport also testified he and Lieutenant McLawhorn only interviewed Defendant once. Although Defendant and Mr. McAfee both testified that there were two interviews, and that Defendant confessed to the Wilson County crimes at the second interview, it is not the job of this Court to reweigh the credibility of witnesses, that is a function of the trial court. *State v. Buckom*, 126 N.C. App. 368, 375, 485 S.E.2d 319, 323 (1997). As there is competent evidence to support the trial court's findings of fact, they are binding on appeal. *Smith*, 160 N.C. App. at 114, 584 S.E.2d at 835.

[2] Defendant next contends that the trial court erred in concluding as a matter of law that Assistant United States Attorney Reaves was not an essential or necessary witness. But Defendant did not assign as error any of the findings of fact that support this conclusion of law, therefore, the findings of fact are binding on appeal. *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998) (where an appellant fails to assign error to the trial court's findings of fact, the findings are "presumed to be correct"). Rulings on whether a witness is a necessary or an essential witness will not be disturbed absent a showing of an abuse of discretion by the trial court. *See State v. Swann*, 322 N.C. 666, 676-77, 370 S.E.2d 533, 539 (1988) (a request for a continuance based on the absence of a witness is addressed to the sound discretion of the trial court). We find no abuse of discretion by the trial court.

[3] Next, Defendant contends that the trial court erred in concluding as a matter of law that Defendant's statements were freely and voluntarily made and were not a part of any trickery or deception. We disagree.

"[C]onvictions following the admission into evidence of confessions which are involuntary, i. e., the product of coercion, either phys-

ical or psychological, cannot stand." *Rogers v. Richmond*, 365 U.S. 534, 540, 5 L. Ed. 2d 760, 766 (1961). The State must affirmatively show that a defendant was fully informed of his rights and voluntarily waived them. *State v. Johnson*, 304 N.C. 680, 683, 285 S.E.2d 792, 795 (1982).

The trial court found as a finding of fact, which Defendant did not assign error to and is binding on appeal, that "[a]s part of the plea arrangement, the defendant agreed to, and in fact solicited participation in a debriefing to disclose information related to the indictment or other crimes[.]" Further, the trial court found that "Defendant readily and willingly participated in the debriefing. No questions were asked of the defendant or otherwise was the defendant prompted regarding any of the information pertaining to the defendant's involvement in these crimes." Moreover, Defendant had previously read and signed the plea agreement and gone over the terms of the agreement with his attorney. His attorney was also present at the debriefing. Accordingly, the trial court did not err in concluding that Defendant's statements were freely and voluntarily given.

[4] Next, Defendant contends that the trial court erred in concluding as a matter of law that use of Defendant's statements did not violate his plea agreement with the federal government. Defendant argues that Lieutenant McLawhorn's statement to Defendant that he was immune from prosecution for any crimes he confessed to "as long as you haven't committed any murders, you know, things like that[,]" modified the plea agreement. We disagree.

In analyzing plea agreements, "contract principles will be 'wholly dispositive' because 'neither side should be able, any more than would be private contracting parties, unilaterally to renege or seek modification simply because of uninduced mistake or change of mind.' " *Wood*, 378 F.3d at 348 (citations omitted). "A plea agreement, however, is not simply a contract between two parties. It necessarily implicates the integrity of the criminal justice system and requires the courts to exercise judicial authority in considering the plea agreement and in accepting or rejecting the plea." *Id.* (quoting *United States v. McGovern*, 822 F.2d 739, 743 (8th Cir. 1987), *cert. denied*, 484 U.S. 956, 98 L. Ed. 2d 377 (1987)). Consequently, we hold "the Government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements." *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986).

Defendant signed a written plea agreement with the Assistant United States Attorney Reaves. This agreement was accepted by the United States District Court for the Eastern District of North Carolina. Section 4.g of the plea agreement provides that the United States District Court for the Eastern District of North Carolina will not prosecute Defendant for any crimes he confessed to *except for crimes of violence*. Lieutenant McLawhorn's subsequent statement giving a specific example of a crime of violence, i.e. murder, did not modify Defendant's plea agreement. *See Wood*, 378 F.3d at 348. Defendant knew the terms of his written plea agreement and had counsel present during the interview. Moreover, Defendant knew his plea agreement was with the United States District Court for the Eastern District of North Carolina, for which Assistant United States Attorney Reaves was the representative. Lieutenant McLawhorn with the Beaufort County Sheriff's office had neither actual or apparent authority to modify the terms of the plea agreement. *See State v. Sturgill*, 121 N.C. App. 629, 638, 469 S.E.2d 557, 563 (1996).

As Lieutenant McLawhorn's statement did not modify the plea agreement, the federal government did not breach the plea agreement by informing Wilson County authorities of Defendant's confession to the home invasion. Sections 4.g and 4.h allowed the federal government to share with the State information Defendant gave them regarding crimes of violence, which includes a home invasion resulting in injury to the victims. Accordingly, the trial court did not err in concluding that the plea agreement was not breached by the federal government.

[5] Finally, Defendant contends that the trial court erred in sentencing him within the aggravated range in violation of his Sixth Amendment right to a jury trial. *See Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004).

Recently, our Supreme Court recognized that under the *Blakely* holding, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 359 N.C. at 437, 615 S.E.2d at 265; *see Speight*, 359 N.C. at 606, 614 S.E.2d at 264. The Court therefore held that "those portions of N.C.G.S. § 15A-1340.16 (a), (b), and (c) which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating fac-

tors by a preponderance of the evidence violate the Sixth Amendment to the United States Constitution." *Allen*, 359 N.C. at 438-39, 615 S.E.2d at 265. Accordingly, our Supreme Court concluded that "*Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible *per se*." *Id.* at 444, 615 S.E.2d at 269.

In this case, the trial court found the following as aggravating factors: (1) "The Defendant induced others to participate in the commission of the offense[;]" (2) "The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy[;]" (3) "The defendant was armed with a deadly weapon at the time of the crime[;]" (4) "The defendant committed the offense while on pretrial release on another charge." It is undisputed that the facts for these aggravating factors were neither presented to a jury nor proved beyond a reasonable doubt. Nor did Defendant plainly stipulate to any aggravating factor. *Id.* at 439, 615 S.E.2d at 265 ("[U]nder *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)." (emphasis added)); *see also State v. Corey*, —— N.C. App. ——, ——, 618 S.E.2d 784, 785 (2005). Following our Supreme Court holdings in *Allen* and *Speight*, we must remand this matter for resentencing since the aggravating factors were neither prior convictions nor facts admitted by Defendant.

Accordingly, we grant Defendant's motion for appropriate relief filed 18 May 2005.

No error in part; Remanded for resentencing in part.

Judges STEELMAN and SMITH concur.

PINEVILLE FOREST HOMEOWNERS ASSOCIATION, PLAINTIFF v. PORTRAIT HOMES CONSTRUCTION CO., DEFENDANT

No. COA05-365

(Filed 3 January 2006)

1. Appeal and Error— appealability—standing—denial of motion to dismiss

An order denying defendant developer's motion to dismiss plaintiff homeowners association's claims for negligence and breach of warranties was interlocutory and not immediately appealable.

2. Appeal and Error— appealability—issue not addressed below

Defendant's argument that a third-party warranty barred plaintiff's suit was dismissed as interlocutory where the denial of defendant's motion to dismiss addressed neither the justiciability of the warranty issue between the parties nor the merits of their claims.

3. Appeal and Error— order denying arbitration—sufficiency of findings for review

An order in which the trial court denied a stay and refused to require arbitration was remanded where the order did not meet the requirements for appellate review. The new order must contain findings which sustain its determination of the validity and applicability of the arbitration provisions.

Appeal by defendant from order entered 20 December 2004 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 November 2005.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Timothy G. Sellers and Michelle Price Massingale, for plaintiff-appellee.

DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for defendant-appellant.

JOHN, Judge.

Portrait Homes Construction Co. ("defendant") appeals the trial court's 20 December 2004 order ("the Order") denying its Motion to Dismiss and Motion to Stay and Compel Arbitration. For the reasons

discussed herein, we dismiss defendant's appeal in part and reverse and remand in part.

Pertinent procedural and factual background information includes the following: Defendant is an Illinois-organized corporation authorized to do business in North Carolina. On 15 May 2000, defendant filed a Declaration of Covenants, Conditions, and Restrictions ("the Declaration") with the Mecklenburg County Public Registry, expressing therein its intent to build "an exclusive residential community of single-family attached residential units" named "Pineville Forest." The Declaration stated defendant "ha[d] incorporated or w[ould] incorporate" the Pineville Forest Homeowners Association ("plaintiff"), a nonprofit corporation established for the purpose of "owning, maintaining and administering the Common Area, maintaining the exterior of the residential units and the [adjacent property owned by the Town of Pineville, North Carolina], administering and enforcing the covenants and restrictions and collecting and disbursing the assessments and charges [thereafter] created[.]" Defendant subsequently developed Pineville Forest by constructing approximately one hundred thirty-three residential units in twenty-four separate buildings.

Plaintiff filed the instant complaint on 9 September 2004, alleging defendant's "improvements" to the residential units and common area were defective and deficient in both workmanship and material. Plaintiff further claimed these defects and deficiencies resulted, *inter alia*, in "moisture intrusion, sheathing and framing deterioration[,] mold and mildew growth and pest infestation." According to the complaint, defendant had thus "breached its obligations and duties under the implied warranties of habitability, quality and fitness[,]" including the assurance that the improvements "would be free from defective materials, constructed in a workmanlike manner, constructed according to sound engineering construction standards and suitable for residential use." Finally, plaintiff asserted defendant was "negligent and failed to fulfill the duties and responsibilities owed" plaintiff and the individual owners, including the duty to "construct the Community and Improvements located thereon in a reasonably careful and prudent fashion, in accordance with accepted construction standards and in accordance with properly prepared plans and specifications."

Defendant responded with a 27 September 2004 "Motion to Dismiss Pursuant to Rule 12(b)(6)," asserting plaintiff was without standing to bring suit and that plaintiff's sole remedy was binding arbitration. Additionally, on 13 October 2004, defendant filed a

"Motion to Dismiss or Stay Pending Binding Arbitration," asserting the Declaration as well as a third-party warranty signed by individual homeowners required arbitration of disputes between the parties, and seeking dismissal of the complaint and an order compelling arbitration. On 3 November 2004, plaintiff sought amendment of its complaint to add as John Doe defendants those subcontractors who supplied labor, materials, and services in connection with the construction, installation, and provision of improvements to the community. Following a hearing, the trial court granted plaintiff's motion to amend, but ruled separately in the Order that "[d]efendant's Motion to Dismiss and Motion to Stay and Compel Arbitration" were denied. Defendant appeals.

We first consider plaintiff's challenge to those portions of defendant's appeal which implicate the issues of plaintiff's standing and the effect of the third-party warranty. Plaintiff contends defendant's arguments addressing these matters are interlocutory and not properly before this Court. As detailed below, we conclude plaintiff is correct.

[1] With respect to the standing issue, we take note parenthetically at the outset of defendant's stipulations in the settled record on appeal that "[a]ll parties were properly before the trial court" and "[t]he trial court had subject matter and personal jurisdiction over the parties." In light of these stipulations, defendant's arguments asserting plaintiff lacked standing to bring suit appear curious at best. *See Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001) ("Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction.") (citations omitted), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002).

In addition, it is also unclear from the record whether the Order was directed at *both* motions filed by defendant. For example, the Order recites denial of defendant's "Motion to Dismiss and Motion to Stay and Compel Arbitration," thereby only slightly paraphrasing the title of defendant's second motion, which did not expressly raise the issue of standing. Next, defendant reinforces such an interpretation by the terminology of its sole assignment of error, reading "[t]he trial judge committed reversible error by denying Defendant's Motion [*sic*] Dismiss or Stay and Compel Arbitration," again in the main incorporating the title of defendant's second motion. Finally, plaintiff, without specification, interjects that "at least one of [defendant's] arguments [on appeal] was not even considered by the trial court."

Nonetheless, as "[p]arties cannot stipulate to give a court subject matter jurisdiction when such jurisdiction does not exist[,]" *Alford v. Shaw*, 327 N.C. 526, 533 n.1, 398 S.E.2d 445, 448 n.1 (1990) (citation omitted), and the issue of standing may be raised on direct appeal, *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878-79, *disc. review denied*, 356 N.C. 610, 574 S.E.2d 474 (2002), we address whether defendant's appeal of the trial court's ruling on this issue is interlocutory.

"A motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." *Slaughter v. Swicegood*, 162 N.C. App. 457, 464, 591 S.E.2d 577, 582 (2004) (citation omitted); *see also Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 525 S.E.2d 441 (2000). As our Supreme Court has stated,

> [o]rdinarily, a denial of a motion to dismiss under Rule 12(b)(6) merely serves to continue the action then pending. No final judgment is involved, and the disappointed movant is generally not deprived of any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits. Thus, an adverse ruling on a Rule 12(b)(6) motion is in most cases an interlocutory order from which no direct appeal may be taken.

State v. School, 299 N.C. 351, 355, 261 S.E.2d 908, 911 (1980) (citations omitted); *see also Anderson v. Atlantic Casualty Ins. Co.*, 134 N.C. App. 724, 725, 518 S.E.2d 786, 787-88 (1999) (interlocutory order not immediately appealable unless appellant deprived of a substantial right or appeal properly certified pursuant to N.C. Gen. Stat. § 1A-1, Rule 54)). Moreover, upon appeal of an interlocutory order, it is not the responsibility of this Court to "construct arguments for or find support for [the] appellant's right to appeal . . . ." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Rather, it is the burden of the appellant to "present appropriate grounds for th[e] acceptance of [its] interlocutory appeal . . . ." *Id.* at 379, 444 S.E.2d at 253.

In the case *sub judice*, the trial court did not certify the Order as immediately appealable pursuant to N.C.G.S. § 1A-1, Rule 54. Although conceding in its appellate brief that appeal of the Order is interlocutory, defendant maintains the trial court's ruling "affects a substantial right of the defendant that may be lost if appeal is

delayed." However, defendant continues merely by averring that "in similar cases such as *Creek Pointe*, this Court has permitted the issue [of standing] to be considered before the final disposition of the case." Defendant misses the mark.

While conceding standing of a homeowners' association to bring suit was an issue considered in *Creek Pointe*, we note the panel therein properly applied the rule that "determination of whether a substantial right is affected is made on a case by case basis." 146 N.C. App. at 162, 552 S.E.2d at 223. Unlike the circumstance herein, the claims of the homeowners' association in *Creek Pointe* were actually *dismissed* by the trial court pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), a context directly opposite to that considered in *School*, *supra*. Further, although interlocutory because other parties remained in the case, the *Creek Pointe* appeal was allowed to proceed under the substantial right exception because this Court concluded there existed a possibility of multiple trials against different members of the same group, thus raising the possibility of inconsistent verdicts. 146 N.C. App. at 162-63, 552 S.E.2d at 223-24 (citing *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E.2d 354, *disc. review denied*, 311 N.C. 758, 321 S.E.2d 136 (1984); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982)).

In the case *sub judice*, however, all parties remain, and defendant does not appear to be deprived by the Order "of any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits." *School*, 299 N.C. at 355, 261 S.E.2d at 911; *see also Miller v. Swann Plantation Development Co.*, 101 N.C. App. 394, 395, 399 S.E.2d 137, 139 (1991) (the " 'right itself must be substantial and the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgment' ") (citation omitted). In short, we dismiss as interlocutory defendant's attempt to raise the contention that plaintiff lacks standing to bring suit.

We also decline to invoke our discretionary power under N.C.R. App. P. 2 (2005) to address this issue, bearing in mind that "this power is to be invoked . . . only on 'rare occasions' for such purposes as to prevent manifest injustice or to expedite a decision affecting the public interest." *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005) (citations omitted). Neither circumstance is present in the instant case.

[2] Similarly, we reject as premature defendant's additional reliance upon plaintiff's alleged acceptance of a third-party warranty as a bar

to suit. With respect to this contention, defendant acknowledges "[a] motion to dismiss is ordinarily interlocutory[.]" Notwithstanding, citing *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974), defendant insists "the [warranty] issue is so intertwined with the motion to arbitrate," this Court should exercise its "supervisory jurisdiction" to hear defendant's appeal on this issue. As with the issue of standing, we elect not to do so.

In *Consumers Power*, the trial court denied respondent's motion to dismiss petitioner's declaratory judgment action on grounds of lack of justiciability. Following a dissent regarding respondent's appeal to this Court, our Supreme Court declined to dismiss the appeal as interlocutory. Instead, the Court considered the case in view of 1) its "belie[f] that decision of the principal question presented would expedite the administration of justice," and 2) this Court's prior decision addressing the issue of justiciability, which represented a "deci[sion] . . . upon its merits." *Id.* at 439, 206 S.E.2d at 182.

Again, neither situation described by the Supreme Court is present herein. The Order addressed neither the justiciability of the warranty issue between the parties nor the merits of their respective claims thereon. *See id.* Moreover, although we review the Order to the extent it involves a decision concerning the applicability of arbitration, *see infra*, we remain unpersuaded that immediate examination of defendant's warranty claims on the merits would "expedite the administration of justice." *See Consumers Power*, 285 N.C. at 439, 206 S.E.2d at 182; *see also Reep*, 360 N.C. at 38, 619 S.E.2d at 500. Accordingly, we dismiss as interlocutory defendant's argument that a third-party warranty bars plaintiff's suit.

[3] We now turn to the issue of arbitration. Defendant maintains certain provisions in the Declaration require the parties to submit to binding arbitration. Therefore, concludes defendant, the Order was erroneous in refusing to stay the proceedings and require arbitration. We are compelled, however, to reverse and remand the Order because it fails to meet the requirements for appellate review.

It is well established that because "[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, . . . an order denying arbitration is . . . immediately appealable." *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881, *disc. review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999), *cert. denied*, 528 U.S. 1155, 145 L. Ed. 2d 1072 (2000). The question of whether a

dispute is subject to arbitration is a question of law for the trial court, and its conclusion is reviewable *de novo*. *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). The determination involves a two-pronged analysis in which the court "must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether 'the specific dispute between the parties falls within the substantive scope of that agreement.' " *Id.* (citation omitted).

This Court has recently reversed and remanded an order denying arbitration which expressly failed to "indicate whether [the trial court] determined if the parties were bound by [the] arbitration agreement." *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 635, 610 S.E.2d 293, 296 (2005). The trial court's order therein stated *in toto*:

> This Matter came before the Court on Defendant's Motion to Dismiss and on Defendant's Motion to Stay and Compel Arbitration. After reviewing all matters submitted and hearing arguments of counsel, the Court is of the opinion that both motions should be denied. It is therefore, ordered, adjudged and decreed that Defendant's Motion to Dismiss is denied and that Defendant's Motion to Stay and Compel Arbitration is Denied.

Id. at 634, 610 S.E.2d at 296.

In directing reversal and remand, this Court observed the order "contained neither factual findings that allow us to review the trial court's ruling, nor a determination whether an arbitration agreement exists between the parties." *Id.* at 635, 610 S.E.2d at 297. Accordingly, we were "unable to determine the basis of the trial court's judgement." *Id.* at 635, 610 S.E.2d at 296; *see also Barnhouse v. American Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 509, 566 S.E.2d 130, 132 (2002) ("The order denying defendants' motion to stay proceedings does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether or not the court correctly denied defendants' motion. Although it is possible to infer from the order denying defendants' motion that the trial court found that no arbitration agreement existed, other possibilities are equally likely.") (citation omitted).

The Order herein provides as follows:

> The Court having considered the Defendants' Motions, briefs, and arguments of counsel for the Plaintiff . . . and for the Defendant, . . .; and it appearing to the Court that Defendants' Motions should be Denied;

It is THEREFORE, ORDERED, ADJUDGED and DECREED that Defendant's Motion to Dismiss and Motion to Stay and Compel Arbitration are DENIED.

We are unable to distinguish the foregoing from the order deemed insufficient in *Ellis-Don*. Therefore, because that decision as well as *Barnhouse* are binding upon us, *see 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."), we reverse and remand the Order.

On remand, the trial court may hear evidence and further argument to the extent it determines in its discretion that either or both may be necessary and appropriate. Thereafter, the court is to enter a new order containing findings which sustain its determination regarding the validity and applicability of the arbitration provisions. *See Barnhouse*, 151 N.C. at 509 n.1, 566 S.E.2d at 132 n.1 ("[O]ur holding does not require the trial court to make detailed and specific findings of fact regarding the agreement to arbitrate. Rather, the trial court's order must simply reflect whether or not a valid agreement to arbitrate exists between the parties."); *see also Ellis-Don*, 169 N.C. App. at 635, 610 S.E.2d at 297 ("The trial court's denial of defendant's motion to stay and compel arbitration is reversed and the matter is remanded for further factual findings and conclusions of law in accordance with this opinion.").

Dismissed in part; Reversed and Remanded in part.

Judges WYNN and STEELMAN concur.

IN THE MATTER OF: L.W., MINOR CHILD

No. COA05-192

(Filed 3 January 2006)

Termination of Parental Rights— failure to appoint guardian ad litem for parent—mental illness

The trial court erred in a termination of parental rights case by failing to hold a hearing to determine respondent mother's entitlement under N.C.G.S. § 7B-1111(a)(6) to the appointment of

a guardian ad litem at the hearing where the minor child was adjudicated neglected, and the case is remanded for appointment of a guardian ad litem for respondent and a new hearing. Although the trial court did not terminate respondent's parental rights by specifically relying on dependency, the mother's mental health issues were present throughout the permanency planning reviews and were so intertwined with the child's neglect as to obviate consideration of the termination order without concurrent consideration of the mental issues that were present.

Appeal by respondent from order entered 27 September 2004 by Judge Mark Galloway in Person County District Court. Heard in the Court of Appeals 28 November 2005.

Susan J. Hall for respondent-appellant.

No brief filed for appellees.

MARTIN, Chief Judge.

Respondent-mother ("mother") appeals from an order terminating her parental rights to her minor child, L.W. We reverse and remand.

L.W. was placed in non-secure custody on 17 September 2001 pursuant to a petition by the Person County Department of Social Services ("DSS") alleging that he was a dependent juvenile. The trial court adjudicated L.W. dependent and transferred custody to DSS in an order dated 2 October 2001 but ultimately returned custody of L.W. to mother in March 2002 due to improvement resulting from DSS' efforts to eliminate the need for placement of L.W. outside of the home.

At a subsequent home visit, social workers noted clothes, dirty diapers, and other items in disarray in the house; a plate of chicken bones and bugs inside L.W.'s playpen; and a knife with a blade approximately seven inches long on an end table accessible to L.W. When asked about the knife, mother spoke of killing someone and stated she was "about to use it now" when asked a second time. Social workers further questioned mother regarding whether she was attending her mental health needs, including diagnoses for ADHD and bipolar disorder for which mother received Social Security disability. Other noted concerns included anecdotal evidence that mother allowed L.W. to cross the street without proper supervision and that a small

fire in the oven occurred due to mother's failure to properly clean grease from the stove. As a result of these concerns, DSS again petitioned the court, alleging L.W. to be neglected, and the trial court placed L.W. in non-secure custody with DSS on 23 April 2002.

On 22 May 2002, the trial court adjudicated L.W. neglected, granted custody to DSS, but ordered that L.W. remain in mother's house subject to DSS supervision. The trial court made findings that mother had failed to maintain her mental health counseling appointments or medication and such failure had negatively impacted her ability to care for L.W. The trial court further found the state of mother's house unacceptable to serve as L.W.'s residence without improvement. The trial court ordered, in pertinent part, that mother (1) not consume alcohol or drugs or associate with individuals consuming such products, (2) not take L.W. into areas known for substance abuse, (3) attend parenting and mental health counseling sessions as set up by DSS or Family Connections and take necessary medication, (4) keep the house neat and clean, and (5) allow no cohabitation. These requirements were largely maintained in review orders entered by the trial court until April of 2004.

During this period of review, mother's compliance with the trial court's orders regarding the cleanliness of the house was generally poor with short periods of heightened compliance. Likewise, mother was essentially non-compliant with mental health counseling and medication issues, although one review order entered in August of 2003 indicates some temporary improvement in that area as well. In addition, mother refused to abide by the court's requirement that she not associate or bring into the house persons associated with substance abuse. Mother resumed a relationship with an individual who was recently released from prison on drug charges ("Smith") and eventually married him and brought him into her home. Additional issues of non-compliance involved mother's failure to obtain her GED or complete vocational rehabilitation. In at least one review order, the trial court incorporated findings indicating mother's mental health was a "major issue" and paramount concern and listed mental health considerations in each of the review orders. The trial court removed L.W. from the home and placed him in foster care for these concerns.

On 15 April 2004, DSS petitioned to terminate mother's parental rights. After conducting a hearing, the trial court terminated mother's parental rights in an order dated 27 September 2004. In that order, the trial court enumerated the services made available to mother, includ-

ing rental subsidies, vocational rehabilitation, transportation, in-home services, case management, and trips to stores to acquire needed household items. Mother's attendance at mental health therapy continued to be sporadic, and she resisted compliance. Although mother completed anger management counseling, she refused to take medication for emotional problems and was subsequently hospitalized. Regarding employment, mother failed to finish a GED program or vocational rehabilitation despite a finding by the trial court that "her mental abilities would permit her to complete the GED program." Mother abused assistance by DSS when she sold an air conditioning unit that was provided to her. Despite a court order to desist her relationship with Smith due to his connections with drugs and the effect this might have on L.W., mother subsequently married him and was expecting a second child with him. Continued problems with the cleanliness of the house were evident in the trial court's findings that the house was often "filthy" and the floor was "littered with trash and dirty diapers." In addition, mother was not keeping all of her counseling appointments.

Based on these findings, the trial court concluded that, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (a)(2), grounds existed to terminate mother's parental rights in that mother had neglected L.W. and wilfully left L.W. in the custody of DSS in excess of twelve months with no reasonable progress towards correcting the conditions leading to L.W.'s removal. Mother appeals, asserting the trial court erred in failing to appoint a guardian ad litem despite her mental health disorders, in concluding mother wilfully left L.W. in foster care for more than twelve months without reasonable progress despite insufficient evidence, and in concluding respondent neglected L.W. despite insufficient evidence.

The dispositive issue presented on appeal is whether the court committed reversible error by failing to hold a hearing to determine mother's entitlement to the appointment of a guardian ad litem at the termination hearing where L.W. was adjudicated neglected. Mother cites N.C. Gen. Stat. § 7B-1101 (requiring appointment of a guardian ad litem to a parent where it is alleged the parent's rights should be terminated under N.C. Gen. Stat. § 7B-1111(a)(6)), N.C. Gen. Stat. § 7B-602(b)(1) (requiring appointment of a guardian ad litem to a parent where it is alleged that the juvenile is dependent because of, *inter alia*, the parent's substance abuse, mental retardation or illness, or other condition impacting the proper care and supervision of the juvenile by the parent), and prior cases from our

appellate courts reversing adjudications of dependency by a parent incapable of supervising the juvenile due to mental impairment. We note parenthetically that our General Assembly has amended the language concerning the appointment of a guardian ad litem to a parent under both N.C. Gen. Stat. § 7B-1101 and N.C. Gen. Stat. § 7B-602(b). However, those amendments are applicable only to actions or petitions filed on or after 1 October 2005. 2005 N.C. Sess. Laws 398. Consequently, we apply the pre-amendment statutory language and interpretive case law.

Mother concedes that these authorities are not directly controlling because her rights were not terminated under N.C. Gen. Stat. § 7B-1111(a)(6) nor was L.W. adjudicated dependent. Mother nonetheless argues that the underlying evidence, the number of findings regarding mental health by the trial court, and the trial court's incorporation of previous petitions involving dependency all tend to show that "[mother's] mental health status was at issue" in determining whether to terminate her parental rights.

Terminating a parent's rights involves a two-stage process of adjudication and disposition. *In re J.A.O.*, 166 N.C. App. 222, 224, 601 S.E.2d 226, 228 (2004). The adjudicatory stage requires the petitioner to show clear and convincing evidence of the existence of one of the statutory grounds under N.C. Gen. Stat. § 7B-1111 for terminating parental rights. *Id.* If any one of those grounds is found to exist, the trial court proceeds to the dispositional stage and considers whether termination is in the best interests of the child. *Id.* "[This Court] reviews the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

Our Juvenile Code provides that "a guardian ad litem shall be appointed . . . to represent a parent" where termination is sought "pursuant to G.S. 7B-1111[(a)](6), and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition." N.C. Gen. Stat. § 7B-1101 (2003). In relevant part, grounds exist under N.C. Gen. Stat. § 7B-1111(a)(6) (2003) to terminate a parent's rights where "substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition" renders the parent incapable ("unable or unavailable to parent the juvenile" and without "an appropriate alternative child care arrangement") of providing proper care and supervision of the juvenile, "such that the juvenile is a dependent

juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future." A dependent juvenile is one "in need of assistance or placement because the juvenile has no parent . . . responsible for the juvenile's care or supervision or whose parent . . . is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2003).

Although these statutory provisions concern dependency, this Court has previously noted that they may be implicated where neglect is the ground pursued by DSS and found by the trial court to terminate a parent's rights. For example, we have utilized these statutory provisions where "there [is] some evidence that tend[s] to show that [a] respondent's mental health issues and the child's neglect were so intertwined at times as to make separation of the two virtually, if not, impossible." *In re J.D.*, 164 N.C. App. 176, 182, 605 S.E.2d 643, 646, *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). We have further stated that reference to N.C. Gen. Stat. § 7B-1111(a)(6) in an order terminating parental rights is not necessary to trigger a trial court's duty to appoint a guardian ad litem where a 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" and where it was "clear that the trial court believed respondent was unable to care for or parent the minor children due, in part, to her mental illness." *In re T.W.*, 173 N.C. App. 153, 160, 617 S.E.2d 702, 705-06 (2005). In both *J.D.* and *T.W.*, it was the substance of the trial court's reasoning, not specific citations to or allegations of dependency, that controlled whether the appointment of a guardian ad litem to a parent with mental health issues was statutorily required.

The same is true in the instant case. Although the trial court did not terminate mother's parental rights by specifically relying on dependency, the issues that were present throughout the permanency planning reviews and that culminated in the termination order were intertwined in such a way as to obviate consideration of the termination order without concurrent consideration of the mental issues that were present. For example, the trial court incorporated findings from previous orders concerning specific instances of conduct indicating the need for "serious therapy" in its order terminating mother's parental rights. The trial court referenced mother's poor attendance and compliance with mental health therapy and anger management. Mother's failure to take medication for emotional problems was con-

sidered by the court in the termination order. In addition, the record indicates mother was hospitalized a couple of months prior to the termination proceeding for suicidal tendencies, was placed on prescription medication for depression, and receives social security disability for bipolar disorder, ADHD, and oppositional defiant disorder. Significant portions of the social worker's testimony and mother's cross-examination at the hearing dealt with mother's mental health. Given these facts and the trial court's emphasis and reliance on mother's mental health issues, we hold the trial court erred in failing to conduct a hearing regarding the appointment of a guardian ad litem for mother. Accordingly, we reverse the termination order and remand for appointment of a guardian ad litem for respondent and a new hearing on the petition to terminate respondent's parental rights to L.W.

Reversed and remanded.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY FRADY

No. COA05-446

(Filed 3 January 2006)

1. Sentencing— prior record level—prior convictions where courts files destroyed

The trial court did not err in a double second-degree kidnapping sentencing hearing by denying defendant's motion to suppress the use of two prior convictions for which the court files had been destroyed to calculate his prior record level even though defendant contends there was no proof of a knowing and voluntary waiver of his right to counsel, because: (1) defendant failed to carry his burden of proof to show by a preponderance of evidence that the convictions were obtained in violation of his right to counsel; and (2) neither of the cases defendant relies upon involves, as does the instant case, a collateral attack on prior convictions used for calculation of defendant's record level for purposes of resentencing him for a later offense.

2. Sentencing— prior record level—prior convictions—purchase or possession of beer or wine by underage individual

The trial court did not err in a double second-degree kidnapping sentencing hearing by utilizing defendant's prior conviction in 1987 for purchase or possession of beer or wine by an eighteen-year-old underage individual even though defendant contends it is not classified as a Class A1 or Class 1 misdemeanor, because: (1) N.C.G.S. § 15A-1340.14(c) provides that in determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed; and (2) as it is undisputed that defendant was eighteen years old in 1987 at the time of the misdemeanor offense, the classification of that offense for prior record level calculation purposes was a Class 1 misdemeanor.

Appeal by defendant from judgments entered 6 January 2005 by Judge Robert C. Ervin in Burke County Superior Court. Heard in the Court of Appeals 28 November 2005.

Roy Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State.

James N. Freeman, Jr. for defendant-appellant.

MARTIN, Chief Judge.

Michael Anthony Frady ("defendant") appeals from judgments imposed upon his convictions of two counts of second-degree kidnapping and following a resentencing hearing after defendant's motion for appropriate relief was allowed. We affirm the judgments.

The record discloses that, on 28 January 2003, defendant was convicted of two counts of second-degree kidnapping and was sentenced to two consecutive sentences of thirty-two to forty-eight months each. Although the prior record level worksheet for these sentences was not included in the record on appeal, defendant was calculated to be a prior record level three offender for sentencing. It appears that in calculating defendant's prior record level, the trial court considered five misdemeanor convictions, two of which were for assault on a female.

It is sufficient for purposes of appeal to note that upon resentencing, defendant's assault convictions, and the corresponding

points for his prior record level calculation, were removed, reducing the remaining record level points to correspond to a prior record level two. However, while the State agreed that the assault convictions should be removed for purposes of prior record level calculation, it asserted it had erroneously omitted two additional convictions in the original prior record level worksheet and argued the inclusion of the two additional convictions would result in no net change to defendant's retaining his prior record level three offender classification. Specifically, the State asserted defendant had five record level points as a result of (1) an unauthorized use of a conveyance conviction in 1987, (2) two DWI convictions in 1989 and 1990, (3) an assault on a government official conviction in 2001, and (4) a conviction for purchase or possession of beer or wine by an eighteen-year-old, underage individual in 1987.

Defendant moved to suppress the use of the 1989 DWI conviction and the 1987 conviction for purchase or possession of beer or wine on the grounds that the corresponding court files had been destroyed; therefore, there was no evidence of defendant's knowing and voluntary waiver of counsel. The trial court denied defendant's motion to suppress and used the five convictions proffered by the State in calculating defendant's sentence as a prior record level three offender in the presumptive range. Defendant appeals, asserting the trial court erred by (I) denying defendant's motion to suppress the prior convictions for which the court files had been destroyed and (II) utilizing the prior conviction for purchase or possession of beer or wine because that conviction does not amount to a class one misdemeanor for purposes of prior record level calculation.

I.

[1] In his first assignment of error, defendant asserts the trial court violated his constitutional right to counsel by using two prior convictions to calculate his prior record level despite the fact that the court files corresponding to those two convictions had been destroyed, and therefore, there was no proof of a knowing and voluntary waiver of his right to counsel. Specifically, defendant relies on *Carnley v. Cochran*, 369 U.S. 506, 8 L. Ed. 2d 70 (1962) and *State v. Williams*, 65 N.C. App. 498, 309 S.E.2d 721 (1983) in asserting that his motion to suppress the use of the prior convictions at issue under N.C. Gen. Stat. § 15A-980 should have been granted because "the State must prove a defendant's knowing and intelligent waiver of counsel." We disagree.

"A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use . . . will . . . [r]esult in a lengthened sentence of imprisonment." N.C. Gen. Stat. § 15A-980(a) (2003). Subsection (c) further provides that "[w]hen a defendant has moved to suppress use of a prior conviction . . ., he has the burden of proving by a preponderance of the evidence that the conviction was obtained in violation of his right to counsel." In order to do so, a defendant must show that at the time of his conviction he was indigent, had no counsel, and had not waived his right to counsel. *State v. Brown*, 87 N.C. App. 13, 22, 359 S.E.2d 265, 270 (1987). Our courts have previously upheld and applied this delegation of the burden of proof upon a defendant. *State v. Fulp*, 355 N.C. 171, 181, 558 S.E.2d 156, 162 (2002); *Brown*, 87 N.C. App. at 22, 359 S.E.2d at 270. Moreover, neither of the cases upon which defendant relies involve, as does the instant case, a collateral attack on prior convictions used for calculation of a defendant's record level for purposes of re-sentencing him for a later offense.

In the instant case, defendant has failed to carry his burden of proof. Prior to the hearing and by letter to the trial court, defendant moved to suppress the use of the possession and DWI convictions. However, defendant did not include with that letter a supporting affidavit. While such an affidavit is contained in the record on appeal, the transcript of the trial makes clear that (1) the trial court never received the affidavit into evidence at the hearing and (2) defendant neither testified nor presented other evidence as to the required showing that the conviction was obtained in violation of defendant's right to counsel. This assignment of error is, therefore, overruled.

II.

[2] By his final assignment of error, defendant asserts the conviction for purchase or possession of beer or wine was improperly used by the trial court because it is not classified as a Class A1 or Class 1 misdemeanor. We disagree.

"In determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." N.C. Gen. Stat. § 15A-1340.14(c) (2003). Any Class A1 or Class 1 non-traffic misdemeanor offense is assigned one point in a prior record level calculation. N.C. Gen. Stat. § 15A-1340.14(b)(5) (2003).

In the instant case, defendant was sentenced for the two second-degree kidnapping offenses committed on 9 November 2001.

Accordingly, we look to the classification of the misdemeanor offense of purchase or possession of beer or wine by an underage individual as of that date. North Carolina General Statutes section 18B-302(b)(1) (2001) prohibits a person less than twenty-one years of age to purchase or possess beer or wine. Unlike for individuals who are nineteen or twenty years of age, N.C. Gen. Stat. § 18B-302 does not provide a specific classification for the misdemeanor offense for an individual who is 18 years of age. Nonetheless, N.C. Gen. Stat. § 18B-102(b) (2001) provides that "[u]nless a different punishment is otherwise expressly stated, any person who violates any provision of this Chapter shall be guilty of a Class 1 misdemeanor." As it is undisputed that defendant was eighteen years old in 1987 at the time of the misdemeanor offense, the classification of that offense for prior record level calculation purposes was a Class 1 misdemeanor. Accordingly, the trial court did not err in assigning the misdemeanor offense one point when calculating defendant's record level. This assignment of error is overruled.

Affirmed.

Judges McGEE and ELMORE concur.

IN THE MATTER OF: R.D.R., A MINOR CHILD

No. COA05-651

(Filed 3 January 2006)

1. Obstructing Justice— intimidating a witness—motion to dismiss—sufficiency of evidence

The trial court did not err by failing to dismiss the charge of intimidating a witness against a juvenile, because the evidence sufficiently revealed that: (1) while another juvenile was sitting in court and after he agreed to be a witness for the State against the juvenile concerning his charge of breaking and entering, the juvenile stood up, turned toward the other juvenile, and mouthed a threat; and (2) court counselor saw the juvenile mouth his threat at the other juvenile, went over to the other juvenile to ask whether the juvenile threatened him, and the other juvenile responded yes. N.C.G.S. § 14-226.

2. Juveniles— delay in disposition hearing—ordering juvenile into custody

The trial court did not abuse its discretion in a juvenile delinquency case by delaying the disposition hearing following the adjudication on 3 September 2004 and by ordering the juvenile into custody allegedly without adequate justification, because: (1) a new charge of intimidating a witness was filed against the juvenile arising out of his actions during the adjudication hearing; (2) postponing disposition upon the three adjudicated misdemeanors would allow the district court to take a more comprehensive view of the interests of both the juvenile and the State, and it was thus reasonable for the district court to continue the disposition hearing until after the juvenile's adjudication on the charge of intimidating a witness; and (3) the district court adjudicating the juvenile delinquent on three different charges was sufficient to support ordering the juvenile into secure custody.

Appeal by juvenile from a disposition order entered 20 September 2004 by Judge James K. Roberson in Alamance County District Court. Heard in the Court of Appeals 7 December 2005.

Attorney General Roy Cooper, by Assistant Attorney General Christine Goebel, for the State.

Kathryn L. VandenBerg for juvenile-appellant.

BRYANT, Judge.

On 21 July and 17 August, 2004 three petitions were filed against R.D.R.[1] (the juvenile), charging him with breaking and entering, trespass, and injury to real property. A fourth petition was filed against the juvenile on 2 September 2004, charging him with intimidating a witness. An adjudication hearing for the charges of breaking and entering, trespass, and injury to real property was held on 2 and 3 September 2004 before the Honorable Bradley Reid Allen, Sr. At the close of the adjudication hearing, the district court found the juvenile delinquent of all charges alleged in the petitions before the court.

After adjudicating the juvenile as delinquent on the three misdemeanor charges, the district court reviewed the petition charging the juvenile with intimidation of a witness and heard from both the State and the juvenile on the issue of custody. The district court then con-

1. Initials have been used throughout to protect the identity of the juvenile.

tinued the disposition hearing for one week and ordered the juvenile into secure custody until 9 September 2004, the date of his scheduled hearing on the charge of intimidating a witness.

On 9 September 2004, an adjudication hearing on the charge of intimidating a witness was held before the Honorable James K. Roberson. The juvenile was found delinquent and Judge Roberson proceeded to a disposition hearing on all offenses and entered a disposition order on 20 September 2004. The juvenile appeals.

The juvenile presents two issues on appeal: (I) whether the district court erred in failing to dismiss the charge of intimidating a witness; and (II) whether the district court erred in delaying the disposition hearing following the 3 September 2004 adjudication and in ordering the juvenile into custody without adequate justification.

I

[1] The juvenile first argues the district court erred in failing to dismiss the charge of intimidating a witness because the evidence was insufficient as a matter of law to show he made a threat or intended to intimidate a witness from testifying. We disagree.

The law governing a ruling on a motion to dismiss is well established.

> "The trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995). The trial court must also resolve any contradictions in the evidence in the State's favor. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. *Id.*

State v. Parker, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001). "If the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's

motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979).

To withstand the juvenile's motion to dismiss in the instant case, the State was required to show substantial evidence of each essential element of the crime of intimidating a witness:

> If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, he shall be guilty of a Class H felony.

N.C. Gen. Stat. § 14-226 (2003). The juvenile argues the evidence of the alleged threat was insubstantial, and further that there was no evidence showing the alleged threat was intended to intimidate a witness from testifying.

In the instant case, B.T., another juvenile, had admitted the allegations that he and the juvenile had broken into and entered a local mill. In open court and in the juvenile's presence, B.T. agreed to be a witness for the State against the juvenile concerning his charge of breaking and entering. While B.T. was sitting in court and after he agreed to be a witness for the State, the juvenile stood up, turned toward B.T. and mouthed the words "I'm going to kick your ass." Court Counselor Heather Maddry saw the juvenile mouth his threat at B.T. Maddry went over to B.T. and asked if the juvenile threatened him and B.T. responded "Yes." This is sufficient evidence to establish that the juvenile attempted to intimidate B.T. by threats to prevent or deter B.T. from acting as a witness testifying against the juvenile at his upcoming hearing. This assignment of error is overruled.

II

[2] The juvenile also argues that the district court erred in delaying the disposition hearing following the adjudication on 3 September 2004 and in ordering him into custody without adequate justification. We disagree.

The juvenile first argues that as the court counselor's recommended disposition report was completed and ready for the district court's review and no party sought a delay in the disposition hearing, the district court was required to immediately hold a disposition hear-

ing. N.C. Gen. Stat. § 7B-2413 (2003) ("The court shall proceed to the dispositional hearing upon receipt of the predisposition report.") However, Section 7B-2406 of the North Carolina General Statutes directly addresses the issue of continuances for a hearing involving a juvenile matter: "[t]he court for good cause may continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile . . . ." N.C. Gen. Stat. § 7B-2406 (2003). As the district court may continue a juvenile hearing for "good cause", our review is whether the district court abused its discretion. *See*, *e.g.*, *State v. Beck*, 346 N.C. 750, 756, 487 S.E.2d 751, 755 (1997). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

"The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public." N.C. Gen. Stat. § 7B-2500 (2003). In the instant case, a new charge of intimidating a witness was filed against the juvenile arising out of his actions during the adjudication hearing. As postponing disposition upon the three adjudicated misdemeanors would allow for the district court to take a more comprehensive view of the interests of both the juvenile and the State, it was reasonable for the district court to continue the disposition hearing until after the juvenile's adjudication on the charge of intimidating a witness. The juvenile has shown no abuse of discretion by the district court.

The juvenile also argues it was error for the district court to order him into secure custody until his hearing on the charge of intimidating a witness. "When a juvenile has been adjudicated delinquent, the court may order secure custody pending the dispositional hearing . . . ." N.C. Gen. Stat. § 7B-1903(c) (2003). In its Order for Secure Custody the district court indicated two separate findings to support the juvenile's detention: (1) "The juvenile is charged with a felony and has demonstrated that he or she is a danger to property or persons"; and (2) "The juvenile has been adjudicated delinquent and the juvenile should be in secure custody pending the disposition hearing or pending placement pursuant to G.S. 7B-2506." As the district court had just adjudicated the juvenile delinquent on three different charges, the second reason is sufficient to support the district court's order. This assignment of error is overruled.

Affirmed.

Judges CALABRIA and JACKSON concur.

MELANIE J.G. ZIZZO, INDIVIDUALLY, NICKY JAMES ZIZZO, BY AND THROUGH GUARDIAN AD LITEM MELANIE J.G. ZIZZO, AND JOHN NICHOLAS ZIZZO, INDIVIDUALLY, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS v. PENDER COUNTY BOARD OF EDUCATION, DEFENDANT AND THIRD-PARTY PLAINTIFF v. LITTLE DIVERSIFIED ARCHITECTURAL CONSULTING, INC. (FORMERLY LITTLE & ASSOCIATES ARCHITECTS, INC.), SOUTHERN PIPING COMPANY, R.L. CASEY, INC., AND R.J.W. CONSTRUCTION, INC., THIRD-PARTY DEFENDANTS

No. COA04-1652

(Filed 3 January 2006)

Appeal and Error— moot appeal—dismissal of third-party complaint—original claim voluntarily dismissed

An appeal by a defendant and third-party plaintiff (Pender County) was dismissed as moot after the original plaintiffs dismissed their claims against Pender County. Pender County's claim was for derivative damages under N.C.G.S. § 1A-1, Rule 14(a), rather than for direct damages under N.C.G.S. § 1A-1, Rule 18(a).

Appeal by defendant and third-party plaintiff from order entered 28 July 2004 by Judge D. Jack Hooks, Jr., in Pender County Superior Court. Heard in the Court of Appeals 30 November 2005.

No brief filed for plaintiffs-appellees.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Scott Lewis and Ellen J. Persechini, for defendant and third-party plaintiff-appellant.

Hamilton, Fay, Moon, Stephens, Steele & Martin, PLLC, by David B. Hamilton, David G. Redding, and Andrianne Huffman Colgate, for third-party defendant-appellee Little Diversified Architectural Consulting, Inc. (Formerly Little & Associates Architects, Inc.).

No brief filed for third-party defendants-appellees Southern Piping Company, Sigma Construction Co., Inc., M.B. Kahn Construction Co., Inc., and SE&M Constructors, Inc.

TYSON, Judge.

Pender County Board of Education ("Pender County") appeals from order entered dismissing its claims against Little Diversified Architectural Consulting, Inc. (Formerly Little & Associates Architects, Inc.) ("Little"). We dismiss this appeal.

I. Background

Melanie J.G. Zizzo, Nicky James Zizzo, and John Nicholas Zizzo (collectively, "plaintiffs") filed a complaint against Pender County on 27 November 2002 alleging they were injured by exposure to mold in North Topsail Elementary School. Pender County filed third-party complaints against Little, the architectural firm that designed and supervised the construction of the school, and others. Pender County claimed breach of contract, negligence, breach of express warranties, and negligence *per se*. Pender County prayed the court as follows:

> WHEREFORE, defendant and third party plaintiff prays the Court that *in the event the defendant is found liable to the plaintiffs, it have complete indemnity and/or contribution from the third party defendants*; that judgment be entered against the third party defendants for the costs incurred by third party plaintiff in the remediation of South Topsail Elementary School, which sum is in excess of $10,000.00[.]

(Emphasis supplied).

The trial court dismissed with prejudice all of Pender County's claims against Little on 21 July 2004. Pender County appeals. On 4 May 2005, plaintiffs dismissed without prejudice their claims against Pender County. On 2 June 2005, Little moved to dismiss Pender County's appeal.

II. Issues

Pender County argues: (1) the trial court erred in granting Little's motion to dismiss; and (2) the trial court properly granted Pender County's motion to continue Little's motion for summary judgment.

III. Motion to Dismiss

After plaintiffs dismissed their complaint against Pender County, Little filed a motion in this Court to dismiss Pender County's appeal on 2 June 2005. Little argues plaintiffs' dismissal of all claims against

Pender County renders any claim Pender County may have against Little moot because Pender County has no claim to derivative damages. We agree.

Pender County's complaint against Little is entitled, "Third Party Complaint." In the complaint, Pender County states, "Pursuant to Rule 14(a) of the North Carolina Rules of Civil Procedure, defendant, by and through counsel, alleges and says . . . ."

Rule 14(a) of the North Carolina Rules of Civil Procedure provides:

> At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him*.

N.C. Gen. Stat. § 1A-1, Rule 14(a) (2003) (emphasis supplied). Under this rule, an original defendant may implead a party for the purposes of indemnification and contribution "for all or part of the plaintiff's claim against him." *Id.* "If the original defendant is not liable to the original plaintiff, the third-party defendant is not liable to the original defendant." *Jones v. Collins*, 58 N.C. App. 753, 756, 294 S.E.2d 384, 385 (1982). "A claim which is independent of the defendant's possible liability to the plaintiff cannot be the basis of impleader under Rule 14." Alan D. Woodlief, Jr., *Shuford North Carolina Civil Practice and Procedure* § 14:2 (6th ed. 2003) (citing *Horn v. Daniel*, 315 F.2d 471 (10th Cir. 1962)); *see also Hunter v. Kennedy*, 128 N.C. App. 84, 86, 493 S.E.2d 327, 328 (1997) (The issue was whether an uninsured motorist carrier may file a third-party complaint seeking contribution and/or indemnification in defending an uninsured motorist. This Court dismissed the third-party complaint holding that the third-party complaint was "an affirmative claim and not an action taken in an effort to defeat the original claim asserted by [the plaintiff]").

In *Lord v. Customized Consulting Specialty, Inc.*, the original defendant filed a third-party complaint against the third-party defendant. 164 N.C. App. 730, 732, 596 S.E.2d 891, 893 (2004). The original plaintiff's claims against the original defendant were subsequently dismissed. *Id.* This Court stated, "When plaintiffs' claims against defendant were voluntarily dismissed, defendant's third party claims ceased to exist. All of the claims of plaintiffs and defendant were part of the same action." *Id.* at 733, 596 S.E.2d at 894.

In *In re Peoples*, our Supreme Court stated:

> 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.

296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) (citations omitted). If issues become moot at any time during the proceedings, the action should be dismissed. *Id.* at 148, 250 S.E.2d at 912.

Here, plaintiffs dismissed all claims against Pender County. Because Pender County has filed a third-party complaint under Rule 14 against Little, it asserted no viable claim against Little for direct damages. N.C. Gen. Stat. § 1A-1, Rule 14(a).

Pender County could have joined its claims against Little pursuant to N.C. Gen. Stat. § 1A-1, Rule 18 (a). Rule 18(a) states, "A party asserting a claim for relief *as an original claim*, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party." N.C. Gen. Stat. § 1A-1, Rule 18 (a) (2003) (emphasis supplied). Pender County solely asserted claims "[p]ursuant to Rule 14(a)," prayed for "complete indemnity and/or contribution," and did not assert any claims against Little or the other third-party defendants under Rule 18(a). Plaintiffs' dismissal of all claims against Pender County renders this appeal moot. This appeal is dismissed.

IV. Conclusion

In filing a third-party complaint against Little under Rule 14, Pender County pled derivative and not direct damages against Little. Because plaintiffs have dismissed all claims against Pender County, Pender County has not asserted any remaining claims against Little. This appeal is moot. Little's motion to dismiss Pender County's appeal is granted. This appeal is dismissed. In light of our decision, it is unnecessary to address Pender County's assignments of error.

Dismissed.

Judges BRYANT and CALABRIA concur.

AMERICAN GENERAL FINANCIAL SERVICES, INC. AND ROBERT FORQUER, SUBSTITUTE TRUSTEE, PLAINTIFFS v. TIMOTHY H. BARNES, LORI A. BARNES, AND PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA05-478

(Filed 3 January 2006)

Equity— equitable subrogation—refinancing—docketed judgment missed—innocent third party

Where borrowers executed promissory notes and deeds of trust in favor of two lenders, the liens of those deeds of trust had priority over a subsequent judgment lien, the borrowers refinanced the promissory notes with one of the original lenders, executed a third deed of trust, and the first two deeds of trust were cancelled of record, and a title search by the refinancing lender did not reveal the judgment lien, the doctrine of equitable subrogation did not apply to give the lien of the third deed of trust priority over the judgment lien because it would be inequitable to put the judgment creditor in the inferior position.

Appeal by plaintiffs from order entered 21 January 2005 by Judge W. Allen Cobb in Onslow County Superior Court. Heard in the Court of Appeals 16 November 2005.

Robertson, Haworth & Reese, P.L.L.C., by Christopher C. Finan and Alan B. Powell, for plaintiffs-appellants.

Shirley and Adams, P.L.L.C., by A. Graham Shirley, and Post & Schell, P.C. by Gary Wilson, for defendants-appellees.

CALABRIA, Judge.

American General Financial Services, Inc. ("American General") and Substitute Trustee, Robert A. Forquer ("Forquer"), (collectively "plaintiffs") appeal from an order granting summary judgment in favor of defendant Pennsylvania National Mutual Insurance Company ("Penn National"). We affirm.

Timothy H. Barnes and Lori A. Barnes (collectively "the Barnes family") acquired property in Onslow County by a deed recorded on 7 March 1994. The street address of the property is 701 Deppe Road, Maysville, North Carolina. On 22 April 1999, the Barnes family executed a promissory note in the amount of $75,200.00, secured by a

deed of trust in the property to Branch Banking and Trust ("BB&T") as the beneficiary, and BB&T's deed of trust was recorded on 27 April 1999 in the public land records of Onslow County. On 7 July 2000, the Barnes family executed a promissory note, secured by a deed of trust in the property to American General as the beneficiary. The American General deed of trust was recorded on 7 July 2000 in the public land records of Onslow County. Subsequently, on 12 December 2001, the Barnes family executed, pursuant to Rule 68.1 of the North Carolina Rules of Civil Procedure, a confession of judgment to Penn National. The Barnes family admitted to breach of fiduciary duty, and they previously agreed to indemnify Penn National, issuing a probate and fiduciary bond. On 17 January 2002, the confession of judgment was properly entered, filed, and docketed in the office of the Clerk of Superior Court of Onslow County in the amount of $430,230.00, together with attorney's fees and interest.

The Barnes family then sought to refinance the BB&T and American General deeds of trust and to obtain additional funds in the amount of approximately $1,573.00. On 18 January 2002, the Barnes family executed a second promissory note, secured by a second deed of trust, to American General in the amount of $116,819.00, which paid $69,834.20 to BB&T and $44,238.00 for their first deed of trust. Immediately prior to recordation, American General updated a previous title search on the Barnes family's property. This title search did not reveal the 17 January 2002 judgment entered for Penn National against the Barnes family's property. Later that day, American General paid in full both the BB&T deed of trust and the initial American General deed of trust. American General also disbursed additional funds of approximately $1573.00 directly to the Barnes family. American General's second deed of trust was properly recorded in the public land records of Onslow County on 18 January 2002. Since both the BB&T deed of trust and the initial American General deed of trust were paid in full, both deeds of trust were cancelled of record, and the public land records of Onslow County indicated that Penn National's docketed judgment was a first-priority lien on the Onslow County property.

Plaintiffs commenced an action seeking to quiet title to the Onslow County property though a determination that American General, not Penn National, held a first-priority lien on the property. The Barnes family failed to answer the complaint. Plaintiffs filed a motion for default, and the trial court entered a default judgment against the Barnes family in August 2003. Subsequently, plaintiffs

filed a motion for summary judgment against Penn National. In an order entered 21 January 2005, the trial court denied plaintiff's motion for summary judgment and granted summary judgment, *sua sponte*, in favor of Penn National. Plaintiffs appeal.

On appeal, plaintiffs argue that the trial court erred in granting summary judgment in favor of Penn National because Penn National's judgment should be subrogated to American General's lien under the doctrine of equitable subrogation. A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). When a trial court rules on a motion for summary judgment, "the evidence is viewed in the light most favorable to the non-moving party," *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986), and all inferences of fact must be drawn against the movant and in favor of the nonmovant. *Furr v. K-Mart Corp.*, 142 N.C. App. 325, 327, 543 S.E.2d 166, 168 (2001). We review *de novo* a trial court's granting of a summary judgment motion. *See Hlasnick v. Federated Mut. Ins. Co.*, 136 N.C. App. 320, 323, 524 S.E.2d 386, 388 (2000).

Equitable subrogation is applicable "when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable." *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders, Inc.*, 78 N.C. App. 108, 114, 336 S.E.2d 694, 697-98 (1985) (citations omitted). The doctrine will not be invoked in favor of mere volunteers; rather, a plaintiff must show that he paid another's obligation for the purpose of "protecting some real or supposed right or interest of his own." *Jamestown Mut. Ins. Co. v Nationwide Mut. Ins. Co.*, 277 N.C. 216, 221, 176 S.E.2d 751, 755 (1970) (citations omitted). Our Supreme Court has set forth the general rule that:

> [O]ne who furnishes money for the purpose of paying off an encumbrance on real or personal property, at the instance either of the owner of the property or of the holder of the encumbrance, either upon the express understanding or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, [is not a mere volunteer and] will be subrogated to the rights of the prior lienholder as against the holder of an intervening lien, of which the lender was excusably ignorant.

Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 15, 86 S.E.2d 745, 755 (1955). When the equities of a case favor equitable subrogation, "the party in whose favor [the right to subrogation] exists is entitled to all of the remedies and security which the creditor had against the person whose debt was paid." *Trustees of Garden of Prayer Baptist Church*, 78 N.C. App. at 114, 336 S.E.2d at 698.

The doctrine of equitable subrogation does not apply in this case because Penn National has no liability for plaintiff's inferior lien position. When Penn National docketed its judgment on 17 January 2002, its lien was subordinate to two prior deeds of trust. Plaintiffs failed to properly search the public records and caused Penn National's $430,230.00 judgment to move from third priority to first priority by cancelling the two prior deeds of trust. Plaintiff's could have refused to refinance the Barnes family outstanding deeds of trust, and Penn National did not compel them to refinance. Accordingly, Penn National is an innocent third party, and even assuming, *arguendo*, that American General was "excusably ignorant," the equities do not favor subordinating Penn National's judgment to American General's lien. If we were to subrogate Penn National's judgment to American General's second deed of trust, we would place Penn National in a worse position because it would be subordinate to the additional sum of $1,573.00 that American General provided to the Barnes family. It would be inequitable to place an innocent third party in an inferior position. *See* 73 Am. Jur. 2d *Subrogation* § 11 (2005) (saying, "relief by way of subrogation will not be granted where it would work injustice"). Accordingly, we hold that the trial court did not err in determining that the doctrine of equitable subrogation was inapplicable in this case and properly granted summary judgment in Penn National's favor.

Plaintiffs have failed to argue their remaining assignments of error on appeal, and we deem them abandoned pursuant to N.C. R. App. P. 28(b)(6) (2003).

Affirmed.

Judges BRYANT and JACKSON concur.

ANGELA SPEARMAN, INDIVIDUALLY, BRITTANY SPEARMAN, BY AND THROUGH HER GUARDIAN AD LITEM ANGELA SPEARMAN, SABRINA SPEARMAN, BY AND THROUGH HER GUARDIAN AD LITEM ANGELA SPEARMAN, AND JEFFREY SPEARMAN, INDIVIDUALLY, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS V. PENDER COUNTY BOARD OF EDUCATION, DEFENDANT AND THIRD-PARTY PLAINTIFF V. LITTLE DIVERSIFIED ARCHITECTURAL CONSULTING, INC. (FORMERLY LITTLE & ASSOCIATES ARCHITECTS, INC.), SOUTHERN PIPING COMPANY, SIGMA CONSTRUCTION CO., INC., M.B. KAHN CONSTRUCTION CO., INC., AND SE&M CONSTRUCTORS, INC., THIRD-PARTY DEFENDANTS

No. COA04-1638

(Filed 3 January 2006)

Appeal and Error— moot appeal—dismissal of third-party complaint—original claim voluntarily dismissed

An appeal by a defendant and third-party plaintiff (Pender County) was dismissed as moot after the original plaintiffs dismissed their claims against Pender County. Pender County's claim was for derivative damages under N.C.G.S. § 1A-1, Rule 14(a), rather than for direct damages under N.C.G.S. § 1A-1, Rule 18(a).

Appeal by defendant and third-party plaintiff from order entered 28 July 2004 by Judge D. Jack Hooks, Jr., in Pender County Superior Court. Heard in the Court of Appeals 30 November 2005.

No brief filed for plaintiffs-appellees.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Scott Lewis and Ellen J. Persechini, for defendant and third-party plaintiff-appellant.

Hamilton, Fay, Moon, Stephens, Steele & Martin, PLLC, by David B. Hamilton, David G. Redding, and Andrianne Huffman Colgate, for third-party defendant-appellee Little Diversified Architectural Consulting, Inc. (Formerly Little & Associates Architects, Inc.).

No brief filed for third-party defendants-appellees Southern Piping Company, Sigma Construction Co., Inc., M.B. Kahn Construction Co., Inc., and SE&M Constructors, Inc.

TYSON, Judge.

Pender County Board of Education ("Pender County") appeals from order entered dismissing its claims against Little Diversified

Architectural Consulting, Inc. (Formerly Little & Associates Architects, Inc.) ("Little"). We dismiss this appeal.

I. Background

Angela Spearman, Brittany Spearman, Sabrina Spearman, and Jeffrey Spearman (collectively, "plaintiffs") filed a complaint against Pender County on 14 November 2002 alleging they were injured by exposure to mold in South Topsail Elementary School. Pender County filed third-party complaints against Little, the architectural firm that designed and supervised the construction of the school, and others. Pender County claimed breach of contract, negligence, breach of express warranties, and negligence *per se*. Pender County prayed the court as follows:

> WHEREFORE, defendant and third party plaintiff prays the Court that *in the event the defendant is found liable to the plaintiffs, it have complete indemnity and/or contribution from the third party defendants*; that judgment be entered against the third party defendants for the costs incurred by third party plaintiff in the remediation of South Topsail Elementary School, which sum is in excess of $10,000.00[.]

(Emphasis supplied).

The trial court dismissed with prejudice all of Pender County's claims against Little on 21 July 2004. Pender County appeals. On 4 May 2005, plaintiffs dismissed without prejudice their claims against Pender County. On 2 June 2005, Little moved to dismiss Pender County's appeal.

II. Issues

Pender County argues: (1) the trial court erred in granting Little's motion to dismiss; and (2) the trial court properly granted Pender County's motion to continue Little's motion for summary judgment.

III. Motion to Dismiss

After plaintiffs dismissed their complaint against Pender County, Little filed a motion in this Court to dismiss Pender County's appeal on 2 June 2005. Little argues plaintiffs' dismissal of all claims against Pender County renders any claim Pender County may have against Little moot because Pender County has no claim to derivative damages. We agree.

Pender County's complaint against Little is entitled, "Third Party Complaint." In the complaint, Pender County states, "Pursuant to

Rule 14(a) of the North Carolina Rules of Civil Procedure, defendant, by and through counsel, alleges and says . . . ."

Rule 14(a) of the North Carolina Rules of Civil Procedure provides:

> At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.*

N.C. Gen. Stat. § 1A-1, Rule 14(a) (2003) (emphasis supplied). Under this rule, an original defendant may implead a party for the purposes of indemnification and contribution "for all or part of the plaintiff's claim against him." *Id.* "If the original defendant is not liable to the original plaintiff, the third-party defendant is not liable to the original defendant." *Jones v. Collins*, 58 N.C. App. 753, 756, 294 S.E.2d 384, 385 (1982). "A claim which is independent of the defendant's possible liability to the plaintiff cannot be the basis of impleader under Rule 14." Alan D. Woodlief, Jr., *Shuford North Carolina Civil Practice and Procedure* § 14:2 (6th ed. 2003) (citing *Horn v. Daniel*, 315 F.2d 471 (10th Cir. 1962)); *see also Hunter v. Kennedy*, 128 N.C. App. 84, 86, 493 S.E.2d 327, 328 (1997) (The issue was whether an uninsured motorist carrier may file a third-party complaint seeking contribution and/or indemnification in defending an uninsured motorist. This Court dismissed the third-party complaint holding that the third-party complaint was "an affirmative claim and not an action taken in an effort to defeat the original claim asserted by [the plaintiff]").

In *Lord v. Customized Consulting Specialty, Inc.*, the original defendant filed a third-party complaint against the third-party defendant. 164 N.C. App. 730, 732, 596 S.E.2d 891, 893 (2004). The original plaintiff's claims against the original defendant were subsequently dismissed. *Id.* This Court stated, "When plaintiffs' claims against defendant were voluntarily dismissed, defendant's third party claims ceased to exist. All of the claims of plaintiffs and defendant were part of the same action." *Id.* at 733, 596 S.E.2d at 894.

In *In re Peoples*, our Supreme Court stated:

> 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.

296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) (citations omitted). If issues become moot at any time during the proceedings, the action should be dismissed. *Id.* at 148, 250 S.E.2d at 912.

Here, plaintiffs dismissed all claims against Pender County. Because Pender County has filed a third-party complaint under Rule 14 against Little, it asserted no viable claim against Little for direct damages. N.C. Gen. Stat. § 1A-1, Rule 14(a).

Pender County could have joined its claims against Little pursuant to N.C. Gen. Stat. § 1A-1, Rule 18 (a). Rule 18(a) states, "A party asserting a claim for relief *as an original claim*, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party." N.C. Gen. Stat. § 1A-1, Rule 18 (a) (2003) (emphasis supplied). Pender County solely asserted claims "[p]ursuant to Rule 14(a)," prayed for "complete indemnity and/or contribution," and did not assert any claims against Little or the other third-party defendants under Rule 18(a). Plaintiffs' dismissal of all claims against Pender County renders this appeal moot. This appeal is dismissed.

IV. Conclusion

In filing a third-party complaint against Little under Rule 14, Pender County pled derivative and not direct damages against Little. Because plaintiffs have dismissed all claims against Pender County, Pender County has not asserted any remaining claims against Little. This appeal is moot. Little's motion to dismiss Pender County's appeal is granted. This appeal is dismissed. In light of our decision, it is unnecessary to address Pender County's assignments of error.

Dismissed.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF: O.S.W.

No. COA05-466

(Filed 3 January 2006)

Termination of Parental Rights— failure to enter order within thirty days of hearing

The trial court erred by failing to enter the order terminating respondent father's parental rights within thirty days from the date of the hearing as required by N.C.G.S. § 7B-1110, and the order is vacated and the cause is remanded for a new hearing.

Appeal by respondent from order entered 2 December 2004 by Judge John W. Smith in New Hanover County District Court. Heard in the Court of Appeals 29 November 2005.

Annick Lenoir-Peek for respondent-appellant.

No brief filed on behalf of petitioner New Hanover County Department of Social Services.

No brief filed on behalf of guardian ad litem.

SMITH, Judge.

Respondent-father ("respondent") appeals the trial court order terminating his parental rights to his minor son, O.S.W. Because we conclude the trial court erred by failing to enter its order within thirty days in violation of N.C. Gen. Stat. § 7B-1110, we vacate the order of the trial court and remand this matter for a new hearing.

The facts and procedural history relevant to the appeal in this case are as follows: O.S.W. was born on 22 November 2002 and tested positive for cocaine at his birth. Upon his discharge from the hospital, the juvenile was placed in foster care pursuant to a nonsecure custody order entered 25 November 2002. Respondent appeared at the adjudication hearing on 6 March 2003 and stipulated to the allegations of neglect and dependency. Respondent did not contest paternity but sought a study of his home in South Carolina as a placement for the juvenile. On 7 January 2004, the New Hanover County Department of Social Services filed a petition to terminate the parental rights of respondent to the minor child. A hearing was scheduled for 26 April 2004 but the matter was continued until 7 June 2004 upon appointment of counsel for respondent. At the hearing on 7

June 2004, the trial court concluded that sufficient grounds existed to terminate respondent's parental rights to O.S.W. and that it was in the juvenile's best interests to do so. The written order terminating respondent's parental rights to O.S.W. was entered 7 December 2004. Respondent appeals.

The dispositive issue on appeal is whether the trial court erred by failing to enter its order terminating respondent's parental rights within the time period directed by N.C. Gen. Stat. § 7B-1110.

N.C. Gen. Stat. § 7B-1110 governs the disposition phase of termination proceedings and provides as follows:

> (a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the Court shall issue an order . . . . Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

This Court has held that where the thirty-day time requirement for entry of an order terminating parental rights has not been met, "prejudice must be shown before the late entry will be deemed reversible error." *In re C.J.B.*, 171 N.C. App. 132, 134, 614 S.E.2d 368, 369 (2005); *see In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391, *disc. review denied*, 359 N.C. 68, 607 S.E.2d 698 (2004). "[T]he need to show prejudice in order to warrant reversal is highest the fewer number of days the delay exists. . . . And the longer the delay in entry of the order beyond the thirty-day deadline, the more likely prejudice will be readily apparent." *In re C.J.B.*, 171 N.C. App. at 135, 614 S.E.2d at 370. *Compare In re A.D.L.*, 169 N.C. App. 701, 612 S.E.2d 639 (2005) (no prejudice found where order entered forty-five days after hearing) *and In re J.L.K.*, *supra*, (no prejudice resulting from order entered eighty-nine days later) *with In re L.E.B.*, 169 N.C. App. 375, 379, 610 S.E.2d 424, 426 (2005) (order entered 180 days later found "highly prejudicial") *and In re T.L.T.*, 170 N.C. App. 430, 612 S.E.2d 436 (2005) (respondent prejudiced by a seven month delay).

In the case *sub judice*, the trial court entered its order approximately six months after the termination hearing. Respondent argues he was prejudiced in that his relationship with his son remained severed and he was unable to give notice of his appeal and have this Court consider the matter during the six-month delay. In addition, respondent notes the delay has adversely affected the child and the

foster parents in that the child's placement is not permanent and the foster parents have been precluded from adopting the juvenile. We conclude the trial court's failure to enter its termination order in a timely manner was prejudicial to respondent, the minor child, and the foster parents. The trial court erred in failing to enter the order terminating respondent's parental rights within thirty days from the date of the hearing as required by N.C. Gen. Stat. § 7B-1110. In light of the foregoing, we do not reach respondent's other assignments of error. The trial court's order is vacated and this cause is remanded for a new hearing.

Vacated and remanded.

Judges WYNN and STEELMAN concur.

LEO MAY, PLAINTIFF v. DOWN EAST HOMES OF BEULAVILLE, INC., D/B/A DOWN EAST HOMES OF JACKSONVILLE, DEFENDANT

No. COA05-547

(Filed 3 January 2006)

Appeal and Error—assignments of error—broad, vague, and unspecific—appeal dismissed

Assignments of error asserting that the trial court's rulings were "contrary to the caselaw of this jurisdiction" were too broad, did not identify the issues briefed on appeal, and resulted in dismissal of the appeal.

Appeal by plaintiff from order entered 24 January 2005 by Judge Charles H. Henry in Jones County Superior Court. Heard in the Court of Appeals 1 December 2005.

Albert L. Willis, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by Brian M. Williams and White & Allen, P.A., by Gregory E. Floyd, for defendants-appellees.

LEVINSON, Judge.

Leo May (plaintiff) appeals the dismissal of his cause of action and his Rule 11 motion for sanctions against Down East Homes (defendant). We dismiss the appeal.

On 2 June 2004 plaintiff filed a verified complaint against defendant asserting it negligently performed a contract of 1 July 2002 between plaintiff and defendant for installation of septic services to plaintiff's newly purchased mobile home. Plaintiff alleged that, in hooking up the new septic system, defendant encroached on the property of a third party, Sue Mallard. Plaintiff further alleged Sue Mallard "has demanded $5,323.00 as payment for said encroachments."

Defendant filed an unverified answer denying all claims and moved pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss plaintiff's cause of action. Plaintiff filed a Rule 11 motion seeking sanctions against defendant "and or its[] representative[.]"

On 24 January 2005 the trial court entered an order granting defendant's 12(b)(6) motion, dismissing plaintiff's Rule 11 motion, and dismissing plaintiff's action against defendant with prejudice. From this order, plaintiff appeals.

We first review certain provisions of N.C.R. App. P. 10:

> (a) . . . [T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. . . .
>
> (c) (1) . . . 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.

N.C.R. App. P. 10(a) and (c)(1). "[A]ssignments of error [that are] . . . broad, vague, and unspecific . . . do not comply with the North Carolina Rules of Appellate Procedure[.]" *In re Appeal of Lane Co.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002).

In the instant case, the plaintiff makes the following assignments of error:

1. The court's allowance of defendant's motion to dismiss, on the grounds said allowance is contrary to caselaw of this jurisdiction.

2. The court's denial of plaintiff's motion for sanctions, on the grounds said denial was contrary to both the factual circumstances of the case and caselaw of this jurisdiction.

3. The court's retaining jurisdiction for determination of costs, on the grounds same is contrary to the caselaw of this jurisdiction.

None of these assignments of error preserve an issue for appellate review. Plaintiff's repeated assertions that the trial court's rulings were "contrary to the caselaw of this jurisdiction" fail to identify the issues briefed on appeal. We conclude these assignments or error are too "broad, vague, and unspecific" to comport with the North Carolina Rules of Appellate Procedure. *See Walker v. Walker*, 174 N.C. App. ——, —— S.E.2d —— (COA04-1601, filed 6 December 2005) (dismissing appeal where appellant's assignments of error merely reiterated that the "finding, conclusion, or decretal paragraph was 'erroneous as a matter of law.' "). "Such an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. 'This assignment—like a hoopskirt—covers everything and touches nothing.' " *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005) (quoting *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970)).

Because plaintiff failed to properly preserve for appellate review the issues presented on appeal, his appeal is

Dismissed.

Judges HUDSON and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 3 JANUARY 2006

ADDISON v. FERRELL No. 05-221	Durham (04CVS5491)	Reversed
BLAKE v. PARKDALE MILLS No. 05-75	Ind. Comm. (I.C. #826228)	Affirmed
BOST v. BOST No. 05-360	Lee (00SP178)	Affirmed
CAPITAL FACTORS, INC. v. DAVIS No. 04-1186	Mecklenburg (03CVS15618)	Affirmed
CITY OF WASHINGTON v. MOORE No. 04-1423	Beaufort (01CVS657)	Reversed and remanded
ETTER v. PIGG No. 05-626	Henderson (01SP287)	Reversed and remanded
GOKAL v. PATEL No. 05-616	New Hanover (04CVS1361)	Affirmed
GRAY v. GRAY No. 05-277	Davidson (99CVD79)	Affirmed
IN RE A.J.L. No. 04-1452	Durham (03J264)	Reversed and remanded
IN RE A.L.W.A. No. 05-163	Burke (03J66)	Affirmed
IN RE D.S.W. No. 05-304	Lenoir (03J73)	Affirmed
IN RE E.F.C.W. No. 05-440	Forsyth (03J271)	Affirmed
IN RE I.D.C. No. 05-27	Buncombe (03J248)	Affirmed
IN RE J.K.S-L. No. 04-1475	Onslow (04J59)	Affirmed
IN RE J.L.G. No. 05-107	Watauga (03J36)	Appeal dismissed
IN RE J.L.G. No. 05-240	Watauga (03J36)	Affirmed
IN RE J.S. & P.S. No. 04-1517	Cumberland (01J255) (01J256)	Dismissed

IN RE K.H.H. No. 05-407	Anson (03J52)	Affirmed in part and reversed in part
IN RE S.L.H. No. 05-594	New Hanover (04J248)	Affirmed
IN RE T.P. No. 05-182	Cabarrus (01J152)	Affirmed
KILIAN v. KILIAN No. 04-413	Davidson (01CVD1473)	Affirmed
MACEACHERN v. MACEACHERN No. 04-1453	Wake (01CVD14668)	Affirmed in part, reversed in part and remanded
MELVIN v. STONE No. 05-428	Sampson (02CVS1292)	Affirmed
MIDLAND FIRE PROT., INC. v. CLANCY & THEYS CONSTR. CO. No. 05-214	Wake (03CVS440)	Affirmed
NGO v. PARK No. 04-847	Wake (00CVS14722)	Affirmed
PERRY v. U.S. ASSEMBLIES, RTP No. 05-83	Ind. Comm. (I.C. #752385)	Affirmed
REEP v. BECK No. 03-961-2	Wake (02CVS16880)	Affirmed
SNOWDEN v. CAPKOV VENTURES, INC. No. 05-585	Orange (04CVS594)	Affirmed
STATE v. ALLEN No. 05-198	Guilford (02CRS79461)	No error
STATE v. BLANKENSHIP No. 05-453	Davie (03CRS51226)	No error
STATE v. BOSTICK No. 04-1619	Richmond (02CRS50461) (02CRS2675)	Affirmed
STATE v. BOYKIN No. 05-338	Cumberland (00CRS26295) (00CRS26296) (00CRS26297) (00CRS51849)	Affirmed
STATE v. DEAN No. 05-469	Guilford (02CRS101498) (02CRS101499)	No error

STATE v. DOZIER No. 05-15	Franklin (00CRS51945) (00CRS51935) (01CRS1730)	Affirmed
STATE v. HILL No. 05-537	Halifax (04CRS56292)	No prejudicial error
STATE v. HOLIFIELD No. 04-1513	Forsyth (02CRS56313)	No error in part, no prejudicial error in part
STATE v. KELLY No. 05-486	Johnston (03CRS59225) (04CRS1247)	No prejudicial error
STATE v. LEWIS No. 05-262	Henderson (03CRS54076) (03CRS54079)	No error
STATE v. McCLURE No. 05-619	Mecklenburg (03CRS29306) (03CRS29307) (03CRS29308)	No error
STATE v. McGEE No. 05-301	Forsyth (04CRS52872) (04CRS54934) (04CRS54935) (04CRS54936)	No error
STATE v. MOORE No. 04-1727	Cumberland (03CRS51568) (03CRS51569)	No error
STATE v. NESBITT No. 05-520	Craven (03CRS53113) (03CRS53114)	Affirmed
STATE v. ROWE No. 05-566	Carteret (04CRS50432) (04CRS50433) (04CRS50434)	No error in part, reversed and remanded for a new trial on the charge of attempted felonious breaking or entering
STATE v. SMITH No. 04-1331	New Hanover (03CRS2455) (03CRS2437) (03CRS2438) (03CRS2121)	No error
STATE v. STEELE No. 05-506	Cabarrus (04CRS2797)	No error

STATE v. UMSTEAD No. 05-6	Durham (02CRS50596) (02CRS50597) (02CRS50598) (02CRS50599)	No error
STATE ex rel. ROSS v. TILLEY No. 05-524	Orange (04CVS976)	Affirmed
TEER v. TEER No. 05-399	Guilford (02CVD2258)	Affirmed in part, reversed and remanded in part
WRIGHT v. ANDERSON No. 04-1510	Carteret (00CVD1052)	Affirmed in part, remanded in part
YANDLE v. FALLS No. 05-376	Mecklenburg (04CVS12633)	Affirmed

SYLVA SHOPS LIMITED PARTNERSHIP, PLAINTIFF v. LOANNE G. HIBBARD, STANLEY L. HIBBARD, AND LINDA GEDNEY, DEFENDANTS

No. COA04-1485

(Filed 17 January 2006)

1. Landlord and Tenant— commercial lease—clause relieving landlord of duty to mitigate—enforceable

A clause in a commercial lease that relieves the landlord from its duty to mitigate damages is not against public policy and is enforceable. Plaintiff was entitled to judgment on its breach of contract claim without any offset for a failure to mitigate.

2. Landlord and Tenant— commercial lease—amount of rent and damages—affidavit with summary judgment motion—higher amount than complaint

Plaintiff was entitled to a judgment of $35,511.70 in an action for rent on a commercial lease where the complaint specified $14,170.00 as the amount due, but plaintiff attached an affidavit to the motion for summary judgment alleging that damages totaled $35,511.70. Defendants did not demonstrate either that they preserved the question for review or that they were prejudiced, and there is no authority that prohibits entry of summary judgment on damages when there is no genuine issue of material fact as to those damages.

Appeal by plaintiff and cross-appeal by defendants from order entered 29 September 2003 by Judge James U. Downs and judgment entered 13 August 2004 by Judge Zoro J. Guice, Jr. in Jackson County Superior Court. Heard in the Court of Appeals 11 May 2005.

Howard, Stallings, From & Hutson, P.A., by John N. Hutson, Jr., for plaintiff.

Ridenour, Lay & Earwood, PLLC, by Eric Ridenour, for defendants.

GEER, Judge.

This appeal arises out of a suit for unpaid rent after defendants Loanne G. Hibbard, Stanley L. Hibbard, and Linda Gedney were forced to close their bagel shop in a shopping center of plaintiff Sylva Shops Limited Partnership. Both plaintiff and defendants have appealed from the jury verdict and judgment awarding plaintiff

$13,110.00. Defendants do not contest their liability for rent under their lease with plaintiff, but contend that plaintiff failed to mitigate its damages—a contention with which the jury agreed. Plaintiff, on the other hand, argues that the trial court erred in not enforcing a clause in the parties' lease specifying that plaintiff "shall have no obligations to mitigate Tenant's damages by reletting the Demised Premises." We hold that this clause, in a commercial lease, is not contrary to law or public policy and was, therefore, enforceable. Accordingly, we vacate the judgment below and remand for entry of judgment in the amount of $35,511.70, the amount properly determined by the trial court to be plaintiff's total damages prior to any set-off for a failure to mitigate.

Facts

On 2 January 2002, defendants entered into a lease agreement for space at plaintiff's Sylva Shopping Center, a Wal-Mart shopping center located in Sylva, North Carolina. Defendants planned to open a bagel shop and, based upon the advice of a consultant, signed a five-year lease for an out-parcel space that had good visibility from the road. An out-parcel space is normally more expensive than other locations in the rest of the shopping center.

Defendants opened their business, The Bagel Bin and Sandwich Shop, in April 2002. Initially, the shop was quite successful, but when summer came and the local college students left, there was a sharp decline in sales. Defendants were forced to close the shop on 30 September 2002 with four and a half years remaining on their lease with plaintiff.

Shortly after the bagel shop closed, plaintiff began to look for a new tenant using a leasing agent, Ann Smith. Smith testified that she placed a "For Lease" sign in the window of the space, sent mailings to national tenants, and called other local businesses about leasing the space. Smith ultimately negotiated with a Mexican restaurant, but the restaurant never signed a lease for the space. Eventually, the space was rented to a sandwich restaurant. Defendants contended below that plaintiff's difficulties in re-leasing the space were the result of plaintiff's unwillingness to agree to a lower rent.

On 16 January 2003, plaintiff filed a complaint against defendants for unpaid rent, late fees, common area maintenance fees, insurance, and taxes in the amount of $14,170.00, together with interest and

attorneys' fees. Defendants filed an answer on 27 March 2003, denying that they were in breach of contract or that they owed the amount sought by plaintiff.

Plaintiff subsequently served a motion for summary judgment on 27 August 2003, attaching an affidavit indicating that plaintiff's damages totaled $35,511.70.[1] Following a hearing on 15 September 2003, Judge James U. Downs entered partial summary judgment in favor of plaintiff on 29 September 2003. The court found that defendants admitted the execution and validity of the lease, that defendants had "not disputed the Plaintiff's calculation of the amounts due from the Defendants under the Lease in either an affidavit or in oral argument," and that plaintiff had "presented affidavits and arguments which raise an issue of fact as to whether the Plaintiff has acted properly to mitigate its damages." The court then concluded that defendants were indebted to plaintiff in the amount of $35,511.70 as of 15 September 2003, but that defendants were "entitled to claim at trial that they are entitled to an offset from the above amount based on their claim that the Plaintiff failed to act reasonably in mitigating its damages."

The case proceeded to trial on 2 August 2004, with Judge Zoro J. Guice, Jr. presiding. Following the close of the evidence, plaintiff moved for a directed verdict, arguing that (1) because there was a clause in the lease that relieved plaintiff from the duty to mitigate damages, plaintiff was entitled to judgment as a matter of law; and (2) even if the court considered the mitigation issue, defendants had offered insufficient evidence that plaintiff failed to mitigate its damages. The court denied plaintiff's motion, and the jury ultimately determined that plaintiff had failed to use ordinary care to mitigate the consequences of defendants' breach of contract and that plaintiff could reasonably have avoided $22,401.70 in damages had it properly mitigated its damages.

Plaintiff moved for judgment notwithstanding the verdict on the same grounds made in its directed verdict motion. After denying the motion, the court, on 13 August 2004, entered judgment against defendants in the sum of $13,110.00, consistent with the jury verdict. Plaintiff filed a notice of appeal on 8 September 2004, while defendants filed a notice of appeal on 15 September 2004.

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1. The affidavit stated that the total rent, late fees, and interest equaled $44,515.40, but that plaintiff had received a payment of $9,003.70 from the bankruptcy court in connection with the bagel shop's Chapter 7 bankruptcy petition.

Plaintiff's Appeal

[1] Plaintiff contends that the trial court erred in not granting its motion for a directed verdict or later its motion for judgment notwithstanding the verdict because the lease entered into by the parties contained the following clause:

> In no event shall Landlord's termination of this Lease and/or Tenant's right to possession of the Premises abrogate Tenant's agreement to pay rent and additional charges due hereunder for the full term hereof. Following re-entry of the Demised Premises by Landlord, Tenant shall continue to pay all such rent and additional charges as same become due under the terms of this Lease, together with all other expenses incurred by Landlord in regaining possession until such time, if any, as Landlord relets same and the Demised Premises are occupied by such successor, *it being understood that Landlord shall have no obligations to mitigate Tenant's damages by reletting the Demised Premises.*

(Emphasis added.) Defendants argue, however, that this clause is unenforceable. The question for this Court is whether parties to a commercial lease may, in this State, validly contract away the landlord's duty to mitigate damages.

We first observe that because one superior court judge may not overrule another superior court judge, Judge Guice could not revisit Judge Downs' determination that defendants were "entitled to claim at trial that they are entitled to an offset from the above amount based on their claim that the Plaintiff failed to act reasonably in mitigating its damages." *See State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) ("[I]t is well established in our jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." (internal quotation marks omitted)). Plaintiff has, however, properly appealed from the denial of its motions for a directed verdict and judgment notwithstanding the verdict since our Supreme Court has held that denial of a motion for summary judgment is not reviewable following a trial on the merits:

> The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. After there has been a

> trial, this purpose cannot be served. Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (internal citations omitted).

The right to enter into a binding contract, such as a lease, belongs to every person not under a legal disability. *Chambers v. Byers*, 214 N.C. 373, 377, 199 S.E. 398, 401 (1938). As a result, courts will rarely inquire into the soundness of the bargain itself: "Liberty to contract carries with it the right to exercise poor judgment as well as good judgment. It is the simple law of contracts that as a man consents to bind himself, so shall he be bound." *Troitino v. Goodman*, 225 N.C. 406, 414, 35 S.E.2d 277, 283 (1945) (internal citation and quotation marks omitted). As a result, when parties contract at arm's length, the provisions in the parties' contract are "the law of their case," and courts are without power to revise the contract. *Harold Suits v. Old Equity Life Ins. Co.*, 249 N.C. 383, 386, 106 S.E.2d 579, 582 (1959) (refusing to strike a provision in a disability insurance policy that precluded the totally-disabled plaintiff from receiving benefits even though other states had struck the clause). So long as the contract itself and the terms within that contract are not "contrary to public policy or prohibited by statute," parties are free to contract as they deem appropriate. *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 242-43, 539 S.E.2d 274, 276 (2000).

Defendants first argue that a clause relieving a landlord of its duty to mitigate damages is contrary to the law of this State, citing *Isbey v. Crews*, 55 N.C. App. 47, 284 S.E.2d 534 (1981). In *Isbey*, this Court held: "With respect to the question of mitigation of damages, the law in North Carolina is that the nonbreaching party to a lease contract has a duty to mitigate his damages upon breach of such contract." *Id.* at 51, 284 S.E.2d at 537. The duty to mitigate requires 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.' " *United Labs., Inc. v. Kuykendall*, 102 N.C. App. 484, 489, 403 S.E.2d 104, 108 (1991) (quoting *Watson v. Storie*, 60 N.C. App. 736, 739, 300 S.E.2d 55, 58 (1983)), *aff'd on other grounds*, 335 N.C. 183, 437 S.E.2d 374 (1993).

Defendants assert that because this Court has held that a landlord has a duty to mitigate upon a tenant's default, a provision that

relieves the landlord of this duty is contrary to the law and not allowed. The existence of a common law duty of care does not, however, absolutely preclude parties from agreeing in a contract to relieve a party of that duty. As our Supreme Court has explained in discussing clauses exculpating parties from liability for their own negligence:

> While contracts exempting persons from liability for negligence are not favored by the law, and are strictly construed against those relying thereon, nevertheless, the majority rule, to which we adhere, is that, subject to certain limitations hereinafter discussed, a person may effectively bargain against liability for harm caused by his ordinary negligence in the performance of a legal duty arising out of a contractual relation.

Hall v. Sinclair Refining Co., 242 N.C. 707, 709, 89 S.E.2d 396, 397 (1955) (internal citations omitted). This principle arises out of "the broad policy of the law which accords to contracting parties freedom to bind themselves as they see fit . . . ." *Id.*, 89 S.E.2d at 397-98.

This Court has since held that a contract exculpating persons from liability for negligence "will be enforced unless it violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest." *Fortson v. McClellan*, 131 N.C. App. 635, 636, 508 S.E.2d 549, 551 (1998). If a party may—subject to the specified limitations—contract to insulate itself from liability for a failure to exercise due care, we can perceive no basis for precluding a party from contracting to relieve itself from a duty of due care to minimize its damages.

Defendants have not argued that the clause was obtained through an inequality of bargaining power. The lease represents an arm's length commercial transaction with both parties using brokers or advisors to assist them in obtaining the best possible bargain. Defendants were not forced to lease this particular space. They picked the space in question because it was the best location and admitted that "[n]obody was holding a gun to [our] head" to sign the lease. *See Martin v. Sheffer*, 102 N.C. App. 802, 805, 403 S.E.2d 555, 557 (1991) (in upholding a contractual clause expanding a seller's damages beyond those in the Uniform Commercial Code, observing that the merchant buyer did "not argue that he lacked meaningful choice in negotiating the terms of the contract").

The question remains whether the mitigation clause violates the public policy of this State or is otherwise contrary to a substantial

public interest. "Public policy has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175 n.2, 381 S.E.2d 445, 447 n.2 (1989).

This lease involves a private contract between businesses relating to a bagel shop. The clause does not create a risk of injury to the public or the rights of third parties. As this Court explained in holding that an exculpatory clause did not violate public policy when it relieved one business from liability for negligence to another business:

> [S]uch an indemnity provision is not against public policy where, as in the case at bar, the contract is private and the interest of the public is not involved and where there is no gross inequality in bargaining power. No rights of third parties are involved in the instant case, and the plaintiff was under no obligation or compulsion to take advantage of the service which the defendant offered to its customers free of charge. By entering into the 'Service Agreement', the plaintiff clearly accepted the conditions defendant annexed to its offer.

New River Crushed Stone, Inc. v. Austin Powder Co., 24 N.C. App. 285, 287, 210 S.E.2d 285, 287 (1974) (internal citations omitted).

Defendants argue that allowing such clauses "would cripple the small business and residential tenant." We emphasize that this opinion does not address the viability of such a clause in a residential lease, which presents an entirely different situation. With respect to the risk to the business community, we note that a number of states do not impose any duty to mitigate. *See* Christopher Vaeth, Annotation, *Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant*, 75 A.L.R.5th 1, 103-17 (2005).

In examining commercial real estate lease transactions in light of public policy considerations, we recognize that negotiations generally involve relatively equal bargaining power due to the availability of other space and the fact that neither party is compelled to make a deal. Each lessee has to determine whether the lease offered is acceptable in business terms. Through negotiations, the parties to a commercial lease often include specific provisions for almost every contingency that could arise from their agreement and exact from each other concessions in order to obtain the desired provisions.

Ultimately, if the rent is too high or the provisions unacceptable to the lessee, a prospective commercial tenant can always look for another location.

Other jurisdictions have relied upon these considerations in determining that provisions relieving a landlord of a duty to mitigate do not violate public policy and should be enforced based upon ordinary contract principles. *See*, *e.g.*, *Weingarten/Arkansas*, *Inc. v. ABC Interstate Theatres*, *Inc.*, 306 Ark. 64, 67, 811 S.W.2d 295, 297 (1991) (holding that the parties to a lease agreement can provide that the landlord has no duty to mitigate damages upon the tenant's default); *Comar Babylon Co. v. Goldberg*, 116 A.D.2d 551, 552, 497 N.Y.S.2d 405, 405 (App. Div. 2d Dep't 1986) (in affirming amount of damages noting that the lease provided that the landlord was under no obligation to mitigate damages); *New Towne Ltd. P'ship v. Pier 1 Imports (U.S.) Inc.*, 113 Ohio App. 3d 104, 108, 680 N.E.2d 644, 647 (1996) (after noting the rule in Ohio that a commercial landlord has the duty to mitigate damages, holding that a provision in the lease which specifically annulled that duty was enforceable because such provision "does not violate any principle of law. . . . [and] does not injure the welfare of the public in any way"); *Austin Hill Country Realty*, *Inc. v. Palisades Plaza*, *Inc.*, 948 S.W.2d 293, 299 (Tex. 1997) ("We therefore recognize that a landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property, *unless the commercial landlord and tenant contract otherwise*." (emphasis added)), *superceded by statute as stated by Lunsford Consulting Group v. Crescent Real Estate Funding VIII*, 77 S.W.3d 473 (Tex. App. 2002).[2] Although not controlling, we find these decisions persuasive. Accordingly, we hold that a clause in a commercial lease that relieves the landlord from its duty to mitigate damages is not against public policy and is enforceable.

Defendants, however, also argue that public policy is violated by the combination of the mitigation clause and a second clause requiring the tenant to obtain the landlord's approval before assigning or subletting the lease. That second provision specifies:

> Tenant shall not transfer, assign, mortgage or encumber this Lease or sublet or permit the Demised Premises to be used by others, without the prior written consent of Landlord. To obtain such approval, Tenant shall submit to Landlord a copy of the pro-

2. *But see Drutman Realty Co. v. Jindo Corp.*, 865 F. Supp. 1093, 1102 (S.D.N.Y. 1994) (holding, under New Jersey law, that parties to a commercial lease may not contract to relieve the landlord of its duty to mitigate).

> posed Assignee's financial statement, a copy of the Purchase Agreement of Tenant's business and/or any other Agreement between Tenant and said Assignee and a check in the amount of five hundred dollars ($500) payable to Landlord to reimburse Landlord its cost and processing the Assignment. *Landlord may either approve or disapprove said Assignment as Landlord deems necessary in its sole discretion, including the financial capability of the proposed Assignee, the management capability of the proposed Assignee or the protection of Landlord's shopping center. . . . If this Lease is assigned or if the Demised Premises or any part thereof is sublet or occupied by anyone other than Tenant without the express written consent of Landlord, Landlord may collect rent from the assignee, subtenant, or occupant and apply the net amounts collected to all rent herein reserved*, but no assignment, subletting, occupancy or collection shall be deemed a waiver of the covenants contained herein or the acceptance of the assignee, subtenant or occupant as Tenant or a release of the performance of the covenants on Tenant's part herein contained. In the event Landlord's written consent is given to an assignment or subletting, Tenant and any guarantor shall remain liable to perform all covenants and conditions hereof and to guarantee such performance by the assignee or subtenants. . . .

(Emphasis added.) This Court has previously upheld such clauses even when they do not place any limitations on the landlord's ability to withhold consent to an assignment of the lease. *Isbey*, 55 N.C. App. at 49, 284 S.E.2d at 536.

The terms of this particular provision do not alter our reasoning above. The parties entered into this contract on equal footing, neither party was forced to enter into this contract, they bargained over the specific provisions of the lease, and because the clause—which does not affect the public interest—was included after a bargained-for negotiation, it must be enforced between the parties. Under these circumstances, the public policy of this State cannot relieve a party of the consequences of a commercial agreement that, in hindsight, proved not to be advantageous.

While some states have passed statutes that specifically require a landlord to mitigate damages, North Carolina's legislature has not chosen to do so. *See*, *e.g.*, 735 Ill. Comp. Stat. 5/9-213.1 (2005); Tex. Prop. Code Ann. § 91.006 (2004). Whether or not such a stat-

ute is good public policy is a matter for the North Carolina General Assembly.

Because the clause in the contract alleviating plaintiff's duty to mitigate is enforceable, plaintiff was entitled to judgment on its breach of contract claim without any offset for a failure to mitigate. Given our resolution of plaintiff's appeal, we need not address plaintiff's alternative argument that defendants failed to meet their burden of proof with respect to their mitigation defense.

Defendants' Appeal

[2] In their appeal, defendants contend that the trial court erred in concluding, in the partial summary judgment order, that plaintiff's damages totaled $35,511.70. Defendants argue that because plaintiff failed to move to amend its complaint, it should have been limited to the $14,170.00 amount specified in the complaint.

Plaintiff was not required to amend its complaint, but rather should have sought leave to file a "supplemental pleading" as provided in Rule 15(d) of the Rules of Civil Procedure:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Plaintiff, however, neither moved for leave to file a supplemental pleading nor to amend its complaint.

Even assuming, without deciding, that plaintiff was required to do so, the record does not indicate that defendants objected on this basis before entry of the partial summary judgment order. The only mention of this argument by defendants that appears in the record occurs after the jury entered its verdict. The order itself states: "The Defendant [sic] has not disputed the Plaintiff's calculation of the amounts due from the Defendants under the Lease in either an affidavit or in oral argument." Based on this finding, it appears that defendants have failed to preserve this issue for appellate review. *See* N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request,

objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Further, defendants have not demonstrated that they were prejudiced by any error. They received plaintiff's affidavit stating the new amount sought in advance of the summary judgment hearing and, based on that affidavit, were on notice that plaintiff sought a larger sum than sought in the complaint. Defendants argue that had they known plaintiff would be allowed to supplement the amount sought, they would have defaulted so as to fix the amount of damages to the amount asserted in the complaint. Since any default would have occurred long before the trial court entered its partial summary judgment order, defendants' inability to default cannot be attributed to any error in connection with the partial summary judgment order. Moreover, entry of a default judgment would not necessarily have precluded plaintiff from seeking the additional sums that it was ultimately awarded since plaintiff could have sought a trial on damages. *See Potts v. Howser*, 274 N.C. 49, 61, 161 S.E.2d 737, 746 (1968). Because defendants have not demonstrated either that they preserved this question for review or that they were prejudiced by any error, we overrule this assignment of error.

Finally, defendants argue that damages should be decided by a jury and not resolved on a motion for summary judgment. Summary judgment is appropriate, however, when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). Defendants do not cite any authority—and we know of none—that prohibits entry of summary judgment on the issue of damages when there is no genuine issue of material fact as to those damages. Since defendants did not argue to the trial court and do not argue on appeal any basis for challenging plaintiff's calculation of its damages, we hold that the trial court properly entered summary judgment on that issue.

Conclusion

Because plaintiff was entitled to judgment as a matter of law on defendants' claim that plaintiff failed to mitigate its damages, the judgment below must be vacated and this case remanded for entry of judgment in favor of plaintiff in the amount of $35,511.70.

Vacated and remanded.

Judges HUNTER and HUDSON concur.

STATE OF NORTH CAROLINA v. HUU THE CAO, DEFENDANT

No. COA05-191

(Filed 17 January 2006)

1. Constitutional Law; Evidence— laboratory report—admission without lab tech—right to confront witnesses

Laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial business records (and thus admissible without the technician) only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents is objective and does not involve opinions or conclusions drawn by the analyst. The record in this case did not contain enough information about the procedures involved in identifying cocaine to allow a determination of whether that portion of the test meets the criteria. However, there was no prejudice because defendant did not challenge the identity of the substance at trial, but portrayed himself instead as a homeless person making a delivery.

2. Sentencing— appellate review—insufficient evidence as a matter of law—no objection at trial

Error based on insufficient evidence as a matter of law does not require an objection at a sentencing hearing to be preserved for appellate review.

3. Sentencing— out-of-state convictions—computer printouts—equivalence to N.C. felonies

Computer printouts were sufficient to prove defendant's out-of-state prior convictions during sentencing, but the State did not satisfy its burden of proving that defendant's out-of-state convictions were felonies. N.C.G.S. § 15A-1340.14(f)(4).

Judge MCGEE concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 27 July 2004 by Judge Timothy S. Kincaid in Superior Court, Mecklenburg County. Heard in the Court of Appeals 18 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General Richard G. Sowerby, for the State.

Russell J. Hollers III, for defendant-appellant.

WYNN, Judge.

"Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). In this case, Defendant contends the trial court committed plain error in admitting laboratory reports without the testing laboratory technician present for cross-examination and therefore violated his Sixth Amendment right to confrontation. We hold that even assuming error by the trial court in the admission of the laboratory reports concluding that the substances obtained from Defendant were cocaine, any error was harmless beyond a reasonable doubt.

However, we remand this case for resentencing because the State failed to satisfy its burden that Defendant's prior out-of-state convictions were felonies and that the crimes were substantially similar to crimes classified as felonies in North Carolina.

Facts relevant to this appeal show that on 1 March 2004, Detective Eric Duft went to a neighborhood in Charlotte, North Carolina, which was known for drug sales, for the purpose of trying to buy crack cocaine. A man named Guadalupe Morales approached his car and asked what he wanted. Detective Duft replied he wanted crack cocaine. In response, Morales summoned Defendant Huu The Cao, who appeared from behind a dumpster. Defendant asked Detective Duft what he wanted, and Detective Duft responded that he wanted forty dollars worth of crack cocaine. After four or five minutes, Defendant returned with a bag of crack cocaine and completed the sale.

Three days later, Detective Duft returned to the same location and asked Morales where he could find Defendant so that he could buy more crack cocaine. Morales called for Defendant, who came running from nearby apartments. Detective Duft again gave Defendant money, and Defendant obtained and sold crack cocaine to Officer Duft.

After the drug transactions, Detective Duft placed the crack cocaine he received from Defendant in an evidence envelope, sealed

it, turned it over to property control, and requested that the substances be tested for the presence of cocaine. The testing laboratory technician did not testify at trial; instead, the State had Detective Duft read the results of the tests to the jury.

The jury found Defendant guilty of two counts of selling cocaine and two counts of possession with intent to sell or deliver cocaine. The trial court classified Defendant as a Level IV offender and sentenced him to consecutive sentences of sixty-two to seventy-six months imprisonment.

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[1] On appeal to this Court, Defendant argues that the trial court committed plain error by permitting Detective Duft to read into evidence laboratory reports identifying the substances purchased from Defendant as cocaine without the testing laboratory technician present for cross-examination. Defendant argues that under the United States Supreme Court's decision in *Crawford*, 541 U.S. 36, 158 L. Ed. 2d 177, such reading violated his Sixth Amendment right to confront the witnesses against him.

"Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *See Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. However, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law[.]" *Id.* Therefore, the pivotal question in this instance is whether under the *Crawford* analysis, the laboratory reports were testimonial or nontestimonial in nature.

Although the *Crawford* court expressly declined to provide a comprehensive definition of "testimonial," *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203, it did provide the following analysis:

> [v]arious formulations of this core class of 'testimonial' statements exist: 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' (citation omitted); 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' (citation omitted); 'statements that were made under circumstances which would lead an objective witness reasonably to

believe that the statement would be available for use at a later trial,' (citation omitted).

Crawford, 541 U.S. at 51-52, 158 L. Ed. 2d at 192-93.

Our Supreme Court recently addressed the question of what constitutes testimonial evidence under *Crawford* in *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830 (2005). The Court observed that "[t]he United States Supreme Court determined in *Crawford* that 'at a minimum' the term testimonial applies to 'prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*." *Id.* at 15, 619 S.E.2d at 839, (quoting *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203) (emphasis in original). The Court then addressed what falls within each of these categories. While it is debatable whether a laboratory report requested by the police constitutes a response to structured police questioning—which *Lewis* holds constitutes "police interrogation" within the meaning of *Crawford*, 360 N.C. at 17, 619 S.E.2d at 840—the *Lewis* Court's analysis of "police interrogations" persuades this Court to conclude that laboratory reports, in some instances, may constitute "testimonial evidence."

In *Lewis*, the Court reviewed the admissibility of statements made by the now deceased victim to an officer who responded to the scene of a crime and that same witness' identification of the defendant in response to a photographic lineup. The Court held that a trial court must consider two factors in determining whether statements made to the police constitute testimonial evidence: (1) the stage of the proceedings at which the statement was made and (2) the declarant's knowledge, expectation, or intent that his or her statements would be used at a subsequent trial. *Id.* at 19-21, 619 S.E.2d at 842-43.

With respect to the first factor, the Court distinguished between statements "made as a result of a patrol officer's preliminary questioning," which would "likely be nontestimonial," and statements "when police questioning shifts from mere preliminary fact-gathering to eliciting statements for use at a subsequent trial," at which point "any statements elicited [would be] testimonial in nature." *Id.* at 19-20, 619 S.E.2d at 842. As for the declarant's statement of mind, the Court held that the question is whether "considering the surrounding circumstances, . . . a reasonable person in the declarant's position would know or should have known his or her statements would be used at a subsequent trial." *Id.* at 21, 619 S.E.2d at 843. The test is an objective one. *Id.*

The *Lewis* Court concluded that the statements to the patrol officer were not barred by the Confrontation Clause, but the subsequent identification was. The Court explained:

> By conducting the photographic lineup, [the detective] crossed the line between making preliminary observations about an alleged crime and structured police questioning. The lineup served as a continued investigation, based on and occurring after the preliminary investigation conducted by [the patrol officer]. At the time of the lineup, [the detective] knew what allegedly happened to [the victim] and had previously narrowed the scope of potential suspects. His purpose in conducting the interview was to establish probable cause to obtain a warrant specifically for [the defendant's] arrest. Additionally, at the time of the interview, based upon the specific circumstances, [the victim] knew an investigation was underway, and a reasonable person in [the victim's] position would expect her statements could be used at a subsequent trial. Thus, the circumstances surrounding [the detective's] interview of [the victim] at the hospital tip the scales in favor of the interview's being structured police questioning.

Id. at 24, 619 S.E.2d at 845.

We cannot discern a meaningful distinction between Detective Duft's request in this case for the Charlotte-Mecklenburg crime laboratory to test the substances he obtained from Defendant for the presence of cocaine and the detective's request in *Lewis* for the victim to respond to a photographic lineup and identify the defendant. The sole purpose of Detective Duft's request was to obtain evidence to support the charges at trial, and a reasonable lab technician would expect that his or her conclusions would be used at the subsequent trial. *See People v. Lonsby*, 2005 Mich. App. LEXIS 2533 (No. 250559) (13 Oct. 2005) (holding a non-testifying serologist's notes and lab report constitute testimonial hearsay and their introduction through another witness violated the Confrontation Clause); *People v. Rogers*, 8 A.D.3d 888, 891, 780 N.Y.S.2d 393, 397 (2004) ("Defendant had the right to cross-examine witnesses regarding the authenticity of the sample for foundation purposes [and] . . . regarding the testing methodology . . . . Because the [blood] test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial. . . .")

This view is consistent with *Crawford* itself. The *Crawford* Court stressed first that the fact evidence may be generated by law enforce-

ment does not mitigate Confrontation Clause concerns: "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out of time and again throughout a history with which the Framers were keenly familiar." *Crawford*, 541 U.S. at 56, 158 L. Ed. 2d at 196. Further, the Court confirmed that the key focus of the Confrontation Clause is ensuring the availability of cross-examination. The Court stated:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. 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. at 61, 158 L. Ed. 2d at 198.

However, *Crawford* suggests that business records "by their nature" may not be testimonial. *Id.* at 56, 158 L. Ed. 2d at 195-96. *See also State v. Windley*, 173 N.C. App. 187, 194, 617 S.E.2d 682, 686 (2005) (holding that a fingerprint card maintained in a national database, the Automated Fingerprint Identification System ("AFIS"), was a business record and, therefore, nontestimonial).

In *State v. Smith*, 312 N.C. 361, 323 S.E.2d 316 (1984), our Supreme Court addressed the admissibility of an affidavit setting out the results of a Breathalyzer test. The Court observed:

> In short, the scientific and technological advancements which have made possible this type of analysis have removed the necessity for a subjective determination of impairment, so appropriate for cross-examination, and have increasingly removed the operator as a material element in the objective determination of blood alcohol concentration.

Id. at 373, 323 S.E.2d at 323. In holding that the chemical analyst's affidavit was "precisely the sort of evidence that the traditional business and public records exceptions to the hearsay rule intended to make admissible," *id.* at 374-75, 323 S.E.2d at 324, the Court stressed:

> In the present case, N.C.G.S. § 20-139.1(e1) permits the chemical analyst to attest by affidavit to certain objective facts which he or

> she has a statutory duty to record after complying with certain procedures and guidelines adopted by the Commission for Health Services. *The analyst is at no time called upon to render an opinion or to draw conclusions.* The analyst is required at the time of testing to record the alcohol concentration *as indicated by the machine*, the time of collection, the type of analysis performed, the type and status of his permit, and the date of the most recent preventive maintenance.

Id. at 374, 323 S.E.2d at 324 (internal citation omitted) (emphasis added). The Court concluded that the nature of the test for blood alcohol concentration and the objective nature of the facts recorded in the affidavit rendered "the need for *and* the utility of confrontation at trial in District Court appear minimal." *Id.* at 376, 323 S.E.2d at 324 (emphasis in original).

Based on our Supreme Court's decisions in *Lewis* and *Smith*, we hold that laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial business records only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst.[1] While cross-examination may not be necessary for blood alcohol concentrations, the same cannot be said for fiber or DNA analysis or ballistics comparisons, for example.

In the case *sub judice*, the laboratory reports' specification of the weight of the substances at issue would likely qualify as an objective fact obtained through a mechanical means. The record on appeal, however, does not contain enough information about the procedures involved in identifying the presence of cocaine in a substance to allow this Court to determine whether that portion of the testing meets the same criteria.

Nevertheless, even assuming error by the trial court in the admission of the laboratory reports concluding that the substances ob-

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1. *See also* N.C. Gen. Stat. § 8C-1, Rule 803(8) (2004) (emphases added) ("Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel*, or (C) in civil actions and proceedings and *against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law*, unless the sources of information or other circumstances indicate lack of trustworthiness.")

tained from Defendant were cocaine, any error was harmless beyond a reasonable doubt. Defendant seeks plain error review because he did not object to the admissibility of the reports or to the testimony by Detective Duft about the report. *See State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached."). Indeed, Defendant never disputed that the material was cocaine. He chose not to defend on that basis, but rather focused on portraying himself as a homeless person making a delivery in exchange for beer and cigarettes. Since the identity of the substance was not challenged, the admission of the laboratory reports was harmless error. *See State v. Edwards*, —— N.C. App. ——, ——, 621 S.E.2d 333, 337 (2005), (holding that failure to require production of DNA testing protocols was harmless beyond a reasonable doubt when the defendant did not dispute that he committed the crimes at issue, but rather argued that he was mentally impaired); *State v. Thompson*, 110 N.C. App. 217, 225, 429 S.E.2d 590, 595 (1993) (court's failure to allow defendant's fingerprint expert to testify was harmless error when the prosecution did not need to use the fingerprints to link defendant to the crime). Defendant's assignment of error is therefore overruled.

[2] Defendant next argues that the trial court committed reversible error in sentencing him as a Level IV offender because the State did not prove the existence of the out-of-state convictions, that the convictions were for felonies, and that one of the convictions was substantially similar to a North Carolina Class I felony.

Preliminarily, we address the State's contention that Defendant did not properly preserve this error for appellate review because he failed to object to the prosecution's calculation of his prior record level at the sentencing hearing. However, this assignment of error is not evidentiary; rather, it challenges whether the prosecution met its burden of proof at the sentencing hearing. Error based on insufficient evidence as a matter of law does not require an objection at the sentencing hearing to be preserved for appellate review. *See* N.C. Gen. Stat. § 15A-1446(d)(5), (18) (2004). We therefore address the merits of Defendant's argument.

[3] North Carolina General Statute section 15A-1340(e) provides:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified

> as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. . . . If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2004). Section 15A-1340.14(f) provides that a prior conviction may be proved by: (1) stipulation of the parties; (2) an original or copy of the Court record of the prior action; (3) a copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts; or (4) any other method found by the Court to be reliable. N.C. Gen. Stat. § 15A-1340.14(f) (2004).

Here, the State submitted computer printouts as evidence of Defendant's prior criminal convictions from the United States and Texas. The documents state that they contain information from "NLETS", "Crime Records Service DPS Austin TX" and the FBI. The FBI printout contains a detailed description of Defendant, including his fingerprint identifier number and FBI number, sex, race, birth date, height and weight. It also indicates that Defendant has been convicted of multiple offenses and has an additional criminal history record in Texas. We hold that these computer printouts are sufficient to prove Defendant's prior convictions under section 15A-1340.14(f)(4). *See State v. Rich*, 130 N.C. App. 113, 116, 502 S.E.2d 49, 51, *disc. review denied*, 349 N.C. 237, 516 S.E.2d 605 (1998) (holding that a computerized printout with the heading "DCI Record" and containing various identifying characteristics of the defendant was competent to prove prior convictions).

However, the State has failed to satisfy its burden to prove that Defendant's out-of-state convictions were felonies. Although it can be inferred from the FBI printouts that Defendant is a convicted felon, the State failed to present any evidence that Defendant has been convicted of four out-of-state felonies as calculated on the State's prior record level worksheet. Furthermore, the State presented no evidence to show that Defendant's convictions in Texas were substantially similar to corresponding Class I North Carolina felony offenses. Although the State presents an argument in its brief that Texas Penal Code § 31.07 (2002) states that a conviction for unauthorized use of

a vehicle is classified as a "State jail felony," no such argument was presented to the trial court during Defendant's trial. Instead, the trial court considered only the State's worksheet and a copy of Defendant's criminal record, and improperly concluded that "the State has satisfied the Court by the applicable standard that the [d]efendant has 13 prior conviction points," and then sentenced him as a Level IV offender.

Thus, this case is remanded for a resentencing hearing, at which the State must prove by the preponderance of the evidence that Defendant's out-of-state convictions are felonies, and that the felonious convictions are substantially similar to North Carolina offenses that are classified as Class I felonies or higher. *See State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004) (citing *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000)). If the State is unable to satisfy its burden, the out-of-state felony convictions must be classified no higher than Class I felonies for sentencing purposes. The State and Defendant may offer additional evidence at the resentencing hearing. *Id.*

No error in part; Remanded for resentencing.

Judge GEER concurs.

Judge McGEE concurs in part and concurs in the result in part.

McGEE, Judge, concurring in part and concurring in the result in part.

I fully concur with the majority opinion except for the reasons set forth in the dissenting portion of my opinion filed 3 January 2006 in *State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006). I conclude that upon remand, a determination of whether defendant's out-of-state convictions are substantially similar to North Carolina offenses should be determined by the trial court in the event the trial court can conduct a comparison of the elements of the two states' statutes without undertaking any type of factual analysis of the circumstances underlying defendant's prior convictions. However, in the event a factual inquiry into, or analysis of, defendant's conduct is necessary to resolve whether defendant would have been convicted under a similar North Carolina law, that determination must be made by a jury under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and *Shepard v. United States*, 544 U.S. ——, 161 L. Ed. 205 (2005).

STATE OF NORTH CAROLINA v. PHILLIP EUGENE ANDERSON, DEFENDANT

No. COA04-1537

(Filed 17 January 2006)

1. Evidence— expert ballistics testimony—North Carolina not a *Daubert* state—reliability

The trial court did not abuse its discretion in a first-degree murder case by admitting expert ballistics testimony under N.C.G.S. § 8C-1, Rule 702, because: (1) defendant's arguments are based on *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and our Supreme Court has held the principles of that case do not apply in North Carolina; (2) under the three-part test applicable in North Carolina, defendant failed to demonstrate at trial that the expert testimony at issue was unreliable; (3) defendant cannot, as he attempted to do on appeal, challenge the witness's reliability by attempting to introduce on appeal scientific literature that was not first presented to the trial court; (4) once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable and relevant, any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility; and (5) defendant's arguments regarding the discoloration of the bullets resulting from the bodily fluids of the victim, the corrosion of the gun, and the subjective nature of an agent's examination go to the weight of the agent's testimony and not its admissibility.

2. Evidence— photographs—victim's body—different illustrative purposes

The trial court did not abuse its discretion in a first-degree murder case by admitting fifteen photographs of the victim's body taken at the crime scene and during the autopsy, because: (1) the photographs were illustrative of and relevant to testimony of the crime scene investigator and the medical examiner; (2) even though some of the pictures looked similar, the individual photographs each show a different view of the body, a different injury inflicted, and different pieces of evidence found around the body; and (3) defendant cannot on appeal contend that a witness should have walked through and explained each photograph when he failed to make this argument at trial, and further this argument cannot be reconciled with defendant's contention that

these photographs were so prejudicial that they should have been excluded under N.C.G.S. § 8C-1, Rule 403.

3. Criminal Law— prosecutor's argument—reasonable inferences drawn from evidence—harmless error to assert personal belief

The trial court did not abuse its discretion in a first-degree murder case by overruling defendant's objection to two of the prosecutor's remarks during closing arguments that defendant contends went beyond the evidence offered at trial and by failing to intervene ex mero motu when the prosecutor expressed a personal opinion regarding defendant's defense, because: (1) the State's suggestion that the victim met defendant to settle matters with him and that defendant shot the victim on the side of the road before dragging her into the woods were inferences reasonably drawn from the evidence presented; and (2) although the prosecutor's comment that the defense was "just crazy" was an improper remark under N.C.G.S. § 15A-1230 since it expressed a personal belief as to the truth or falsity of defendant's arguments, the comment did not rise to the level of fundamental unfairness given the evidence presented at trial.

4. Homicide— voluntary manslaughter—failure to give instruction—harmless error

Although defendant contends the trial court erred in a first-degree murder case by denying defendant's request for a jury instruction on voluntary manslaughter, any possible error was harmless because when a jury is properly instructed on both first-degree murder and second-degree murder and returns a verdict of guilty of first-degree murder, the failure to instruct on voluntary manslaughter is harmless error.

Appeal by defendant from judgment entered 29 April 2004 by Judge Donald W. Stephens in Durham County Superior Court. Heard in the Court of Appeals 8 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General Stephen F. Bryant, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

GEER, Judge.

Defendant Phillip Eugene Anderson appeals from his conviction for first degree murder. Defendant argues primarily that the trial court erred in admitting expert ballistics testimony. Defendant's arguments are, however, based upon *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), even though our Supreme Court has held that the principles of *Daubert* do not apply in this State. *See Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). Under the test applicable in North Carolina, as set forth in *State v. Morgan*, 359 N.C. 131, 159, 604 S.E.2d 886, 903 (2004), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 79, 126 S. Ct. 47 (2005), defendant failed to demonstrate at trial that the expert testimony at issue was unreliable. Defendant cannot, as he attempts in this appeal, challenge the witness' reliability by attempting to introduce on appeal scientific literature that was not first presented to the trial court. Since we find defendant's other arguments also to be unpersuasive, we conclude that defendant received a trial free of error.

Facts

The State's evidence tended to show the following. Prior to the fall of 2001, defendant and Teresa Adams had been dating in an on-again, off-again relationship. In the fall of 2001, both defendant and Adams were living in Durham, but Adams had started dating Matthew Jacobie, defendant's next door neighbor.

On a Sunday afternoon that fall, defendant came to Jacobie's house looking for Adams. Jacobie's roommate, Stacy Wong, told Adams that defendant was outside, and Adams went with defendant into his house. Subsequently, Adams told Wong and Jacobie that defendant had said that somebody was going to get hurt if she kept visiting Jacobie's house and that defendant had tried to choke her.

The following Tuesday, 2 October 2001, Adams told her roommate, Patricia Andrus, that she was going out for a few hours and if she was not back by midnight, to go ahead and put the alarm on. Andrus stayed awake until about 1:00 a.m., but Adams had not yet returned home. By lunchtime the next day, Andrus still had not seen Adams, and there was no indication that Adams had slept in her room. Three days later, on 5 October 2001, Andrus filed a missing persons report with the Durham Police.

Ramal Lowery, a friend of defendant's, testified that defendant called him several times on the night of 2 October and in the early

morning hours of 3 October. During the last call, defendant asked Lowery to come to his house so that they could talk about something important. When Lowery arrived, defendant told him that he had killed Adams. Because Lowery did not believe him, defendant had Lowery drive the two of them to an area off Hillandale Road in Durham. Defendant told Lowery to park in a wooded area beyond a parking lot, and Lowery could see a body laying on the ground when he got out of his car. As Lowery drove back to defendant's home, defendant kept saying, "I'm a piece of shit, I shouldn't have done it."

Defendant also told Lowery that he needed to get rid of the gun used to kill Adams. Once they reached defendant's house, defendant went inside and came out with a duffle bag. They drove down Highway 751 to a bridge. Defendant took a brown paper bag out of the duffle bag and threw it over the bridge. Defendant told Lowery that a gun was inside the bag.

On 5 October 2001, the police received a call that there was a body on the side of the road near the intersection of Hillandale Road and Horton Road. Officers found Adams' body, which was already decomposing, in a ditch about five to 10 feet off the road. Adams had suffered two gunshot wounds, one to the right side of the back of the head and the other to her neck. The medical examiner estimated that the time of death was approximately two to three days before the body was discovered.

The Durham police subsequently found a gun near a creek that ran underneath Highway 751 in Chatham County. Teresa Powell, an agent with the State Bureau of Investigation, conducted tests on the gun found near the creek and the bullets removed from Adams' body. In Powell's opinion, the bullets were fired from the gun recovered near the creek.

Defendant was indicted for the first degree murder of Teresa Adams. At trial, defendant did not present any evidence. The jury found defendant guilty of first degree murder, and defendant was sentenced to life imprisonment without parole.

I

[1] Defendant contends that the trial court erred under Rule 702 of the Rules of Evidence by admitting Powell's ballistics testimony.[1]

1. Defendant also argues on appeal that the expert testimony violated his constitutional rights. Defendant did not, however, make this constitutional argument below, and "[i]t is well settled that this Court will not review constitutional questions that

Defendant argues that Agent Powell did not comply with "normally accepted scientific methodology" and that "Ms. Powell's results should not have been accepted under *Daubert*." Defendant further objects that "[f]or scientific evidence to be admissible, the expert must point to external sources that validate the methodology," citing *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311 (9th Cir.), *cert. denied*, 516 U.S. 869, 133 L. Ed. 2d 126, 116 S. Ct. 189 (1995), the Ninth Circuit's decision on remand from *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). Defendant has, however, argued the wrong standard. As our Supreme Court confirmed in *State v. Morgan*, 359 N.C. 131, 159, 604 S.E.2d 886, 903 (2004) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004)), "North Carolina is not a *Daubert* state."

Instead of evaluating expert witnesses under the standard set out in *Daubert*, courts in this State must conduct a three-step inquiry when considering whether to admit expert testimony pursuant to Rule 702 of the Rules of Evidence: "(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." *Morgan*, 359 N.C. at 160, 604 S.E.2d at 903-04. When making determinations about the admissibility of expert testimony, the trial court is given wide latitude and "rulings under Rule 702 will not be reversed on appeal absent an abuse of discretion." *Id.*, 604 S.E.2d at 904.

Defendant does not argue that Agent Powell was not qualified as an expert or that the evidence was not relevant. Defendant challenges only the reliability of Agent Powell's testimony. Reliability in this State is "a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony. This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence." *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687.

In order to assess reliability, a trial court may look to expert testimony regarding reliability, may take judicial notice, or may use a combination of the two approaches. *Id.* at 459, 597 S.E.2d at 687. The Supreme Court has indicated that the trial court should first review precedent "for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Id.*

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were not raised or passed upon in the trial court." *State v. Carpenter*, 155 N.C. App. 35, 41, 573 S.E.2d 668, 673 (2002) (internal quotation marks omitted), *disc. review denied*, 356 N.C. 681, 577 S.E.2d 896 (2003).

"[W]hen specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied." *Id.*

If no precedent exists, such as when an expert is proposing "novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques," the trial court is required to focus on "indices of reliability" to determine reliability, including the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury, and independent research conducted by the expert. *Id.* at 460, 597 S.E.2d at 687. These indices are not, however, exclusive. *Id.*

Our Supreme Court has previously upheld the admission of similar firearms or ballistics testimony. *See State v. Gainey*, 355 N.C. 73, 88-89, 558 S.E.2d 463, 473-74 (holding that the trial court did not err in admitting testimony of SBI agent regarding rifling characteristics of particular bullets based on his experience and the fact that he had tested the bullets upon which he based his opinion), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165, 123 S. Ct. 182 (2002); *State v. Felton*, 330 N.C. 619, 638, 412 S.E.2d 344, 356 (1992) (upholding admissibility of SBI agent's testimony regarding rifling characteristics of particular bullets). Defendant does not address this precedent, but rather argues that the State did not meet its burden because "[t]he State presented no evidence substantiating the scientific validity" of Agent Powell's comparisons of the bullets and the gun.[2] As *Howerton* and *Morgan* establish, however, the State was not necessarily required to do so.

In challenging Agent Powell's methodology at trial, defendant did not offer any expert testimony or scientific literature. On appeal, however, defendant relies upon a series of journal articles that he contends establish that Agent Powell improperly failed to use photographs to document her work and that her methodology failed to comply with accepted scientific methods. Those articles were not, however, presented to the trial judge. A defendant cannot establish an abuse of discretion by the trial judge based on scientific literature never provided to that judge. Defendant's literature review thus does not demonstrate that the trial judge abused his discretion in making his preliminary determination that Agent Powell's testimony was suf-

2. The case cited by defendant, *Sexton v. State*, 93 S.W.3d 96 (Tex. Crim. App. 2002), employs a *Daubert* approach not applicable in North Carolina.

ficiently reliable to meet the requirements of Rule 702 of the Rules of Evidence.

According to our Supreme Court, "once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688. Questions of weight are for a jury to determine, *id.* at 460, 597 S.E.2d at 687, and " '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence,' " *id.* at 461, 597 S.E.2d at 688 (quoting *Daubert*, 509 U.S. at 596, 125 L. Ed. 2d at 484, 113 S. Ct. at 2798).

Defendant's arguments regarding the discoloration of the bullets resulting from the bodily fluids of the victim, the corrosion of the gun, and the subjective nature of Agent Powell's examination go to the weight of Agent Powell's testimony and not its admissibility. *See Felton*, 330 N.C. at 638, 412 S.E.2d at 356 (holding that uncertain length of time the bullets had been in an abandoned water heater and the fact that several types of guns could have produced the rifling characteristics at issue "impact the weight of the evidence, not its admissibility"). Defendant cross-examined Agent Powell about the accuracy of her methods and also questioned the witness about whether ballistic evidence was a scientific certainty. It was for the jury to decide how to weigh Agent Powell's testimony. *See Howerton*, 358 N.C. at 468, 597 S.E.2d at 692 ("[W]e are concerned that trial courts asserting sweeping pre-trial 'gatekeeping' authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence."). We, therefore, hold that the trial court did not abuse its discretion in admitting the expert testimony.

II

[2] Defendant next argues that the trial court erred in admitting 15 photographs taken of the victim's body at the crime scene and taken during the autopsy because the photographs were minimally probative, highly prejudicial, and meant to inflame the passions of the jury to the detriment of defendant. Defendant objected at trial, but the trial court found that "all of the photographs that are before the Court show separate and distinct views of the body, or of items of evidence close to the body, or in proximity to the body, or on

the body. They're all different. They are not unduly duplicative. They are not unfairly prejudicial, and their probative value outweigh any prejudice in this case."

Pictures of a victim's body may be introduced "even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). While noting that there is no bright line test to determine what is an excessive amount of photographs, *Hennis* instructs that courts should examine the "content and the manner" in which the evidence is used and the "totality of circumstances" comprising the presentation. *Id.* at 285, 372 S.E.2d at 527. The decision as to whether evidence, including photographic evidence, is more probative than prejudicial under Rule 403 of the Rules of Evidence and what constitutes an excessive number of photographs lies within the sound discretion of the trial court. *State v. Sledge*, 297 N.C. 227, 232, 254 S.E.2d 579, 583 (1979).

After reviewing the photographs at issue and the other evidence in the record, we conclude that the trial court did not abuse its discretion in allowing the jury to view the 15 photos. The photographs were illustrative of and relevant to testimony of the crime scene investigator and the medical examiner. Additionally, even though some of the pictures looked similar, the individual photographs each show a different view of the body, a different injury inflicted, and different pieces of evidence found around the body. We cannot say that the trial judge abused his discretion in determining that the pictures were not unduly duplicative, unfairly prejudicial, or of limited probative value. *See State v. Trull*, 349 N.C. 428, 509 S.E.2d 178 (1998) (allowing the use of multiple, gory photographs of victim's body that were admitted for different illustrative purposes), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80, 120 S. Ct. 95 (1999); *State v. Wynne*, 329 N.C. 507, 406 S.E.2d 812 (1991) (holding there was no abuse of discretion in admitting multiple pictures and testimony regarding decomposition of the body).

Defendant also argues that the photographs were not properly explained to the jury. He contends that a witness should have walked through and explained each photograph. Defendant, however, failed to make this argument to the trial court: "As has been said many times, 'the law does not permit parties to swap horses between courts in order to get a better mount,' . . . meaning, of course, that a contention not raised and argued in the trial court may not be raised and

argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)), *disc. review denied*, 358 N.C. 550, 600 S.E.2d 469 (2004). Moreover, this argument cannot be reconciled with defendant's contention that these photographs were so prejudicial that they should have been excluded under Rule 403. We cannot see how defendant would have benefitted from having the photographs displayed to the jurors over a more prolonged period of time, such as would be required to provide the more detailed explanation sought by defendant on appeal. Accordingly, this assignment of error is overruled.

III

[3] Defendant next challenges certain statements made by the prosecutor during closing arguments. Defendant argues that the trial court erred in overruling his objection to two remarks that he contends went beyond the evidence offered at trial. Defendant further argues that the trial court erred in not acting *ex mero motu* when the prosecutor expressed a personal opinion regarding defendant's defense.[3]

During closing arguments, trial counsel is allowed "wide latitude" in his remarks to the jury and may argue the law, all the facts in evidence, and any reasonable inference drawn from the law and facts. *State v. Craig*, 308 N.C. 446, 454, 302 S.E.2d 740, 745, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247, 104 S. Ct. 263 (1983). N.C. Gen. Stat. § 15A-1230(a) (2003) sets forth the boundaries that counsel must adhere to during a closing argument:

> [A]n attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

The propriety of counsel's argument is left largely to the control and discretion of the trial judge, and we review any ruling by the trial court only for abuse of discretion. *State v. Roache*, 358 N.C. 243, 301, 595 S.E.2d 381, 418 (2004).

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3. Defendant also argues that these errors violated his constitutional rights. Because he did not assert these constitutional arguments below, they are not properly before this Court. *Carpenter*, 155 N.C. App. at 41, 573 S.E.2d at 673.

Defendant first points to the following argument as unsupported by the evidence:

> [PROSECUTOR]: So that Tuesday night, when [the victim] got a phonecall, put on her old sandals, old skirt, threw on a jacket, picked up her keys and her cell phone, probably going to meet outside and talk. *I'm going to settle this once and for all.* Go out there and talk.
>
> [DEFENSE COUNSEL]: There's no evidence of that, Your Honor.
>
> THE COURT: Overruled.

(Emphasis added.) Subsequently, the State made the second argument challenged by defendant as not supported by the evidence:

> [PROSECUTOR]: What do you think Mr. Anderson was doing? He didn't just bring his keys and his cell phone, did he? What did he bring? A loaded .357. What kind of love is that? In his mind it was until death do us part. See, if he couldn't have her, nobody would. And he drove her out right down the street from her house. You all saw that blood on the side of the road over here. *Shot her there and drug her in the woods.*
>
> [DEFENSE COUNSEL]: There's no evidence of that either, Your Honor. Objection.
>
> THE COURT: She may argue any inference from the evidence.

(Emphasis added.) We believe that the State's suggestion that Adams met defendant to settle matters with him and that defendant shot Adams on the side of the road before dragging her into the woods are inferences that reasonably can be drawn from the evidence presented. Even if that were not the case, in light of the evidence, any error from the statements was harmless.

Defendant also points to the prosecutor's expression of opinion on defendant's possible theory of the case:

> Now, I'm going to sit down and let you all listen to [the defense attorney]. And he'll bring up a lot of things that Ramal said that were different, not a hundred percent like he likes them. He may even try to throw out there maybe Ramal killed him. *I mean that is just crazy.* He might do that.

(Emphasis added.) Defendant argues this is an impermissible expression of the prosecutor's personal beliefs. We agree that this

remark was improper under N.C. Gen. Stat. § 15A-1230 because it expressed a personal belief as to the truth or falsity of defendant's arguments.

Because, however, defendant did not object to this comment at trial, he "must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *State v. Braxton*, 352 N.C. 158, 202, 531 S.E.2d 428, 454 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797, 121 S. Ct. 890 (2001). To establish such an abuse, "defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219, 119 S. Ct. 2053 (1999). After reviewing the record, we cannot conclude that this comment rises to the level of fundamental unfairness given the evidence presented at trial. Accordingly, this assignment of error is overruled.

IV

[4] Finally, defendant argues that the trial court erred in denying his request for a jury instruction on voluntary manslaughter. Any possible error in failing to give this instruction was, however, harmless. "It is well-settled law in this state that when a jury is properly instructed on both first-degree and second-degree murder and returns a verdict of guilty of first-degree murder, the failure to instruct on voluntary manslaughter is harmless error." *State v. East*, 345 N.C. 535, 553, 481 S.E.2d 652, 664, *cert. denied*, 522 U.S. 918, 139 L. Ed. 2d 236, 118 S. Ct. 306 (1997). In this case the court instructed the jury on first degree and second degree murder, and the jury returned a guilty verdict on first degree murder. This situation is identical to *East*, and accordingly this assignment is overruled.

No error.

Judges CALABRIA and ELMORE concur.

FORBIS v. NEAL

[175 N.C. App. 455 (2006)]

LAMARR GARLAND FORBIS, CO-EXECUTOR OF THE ESTATE OF BONNIE S. NEWELL; LAMARR GARLAND FORBIS, ATTORNEY-IN-FACT FOR AUGUSTA LEE SUSTARE, PLAINTIFF v. BEVERLY LEE NEAL, DEFENDANT

No. COA04-1495

(Filed 17 January 2006)

Fiduciary Relationship— attorney-in-fact—co-executor of estate—joint accounts with right of survivorship—payable on death beneficiary—rebuttable presumption of fraud—dead man's statute

The trial court did not err by granting summary judgment in favor of defendant and by denying the same to plaintiff in an action alleging that defendant fraudulently diverted property while acting as his aunt's attorney-in-fact and also after her death as co-executor of her estate, because: (1) although a presumption of fraud on the part of defendant arose in the establishment of various joint accounts with right of survivorship or payable on death beneficiary status between defendant and his aunt when defendant was a fiduciary who benefitted from his transactions with his two aunts, defendant's affidavit rebuts any presumption of fraud or undue influence to the other accounts which left plaintiff to shoulder the burden of producing actual evidence of fraud; (2) no genuine issues of fact remained since plaintiff failed to forecast any evidence of fraud; and (3) contrary to plaintiff's assertion, defendant's affidavit did not violate the dead man's statute under N.C.G.S. § 8C-1, Rule 601(c), and in any event, the trial judge is presumed to disregard incompetent evidence in making decisions.

Judge STEELMAN concurring in part and dissenting in part.

Appeal by plaintiff from order entered 5 August 2004 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 June 2005.

Eugene C. Hicks, III, for plaintiff-appellant.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by James F. Wood, III, for defendant-appellee.

HUDSON, Judge.

On 18 December 2002, plaintiffs LaMarr Garland Forbis and Augusta ("Gussie") Lee Sustare instituted this action seeking to

recover property from defendant Beverly Lee Neal, contending that defendant fraudulently diverted property belonging to his aunt Bonnie Sustare Newell ("Bonnie") while acting as her attorney-in-fact, and after her death on 19 December 1999, as her co-executor along with plaintiff Forbis. Defendant answered and moved to dismiss, which motions the court denied on 28 August 2003. On 11 June 2004, following discovery, defendant moved for summary judgment; plaintiffs filed for summary judgment on 15 June 2004. The court granted summary judgment to defendant and denied plaintiff's motion by order entered 5 August 2004. Plaintiff appeals. As discussed below, we affirm.

Defendant served as attorney-in-fact for his two elderly aunts, sisters Bonnie and Gussie Sustare. A number of Gussie's and Bonnie's assets were placed into bank and stock accounts, including a Paine Webber account, owned jointly by Bonnie and defendant with right of survivorship or with defendant named as a "payable on death" (POD) beneficiary. The sisters executed similar wills in 1995, each leaving the majority of their estates for the care of the other. Following Bonnie's death on 19 December 1999 at age ninety, plaintiff, Bonnie's niece, and defendant, Bonnie's nephew, were appointed co-executors. After her death, the property in Bonnie's joint accounts became the sole property of defendant, not passing through her estate. The parties filed the inventory on 8 May 2000 and the final account on 15 February 2001, closing the estate.

On 17 October 2002, Gussie revoked her prior power-of-attorney naming defendant her attorney-in-fact and appointed plaintiff as her attorney-in-fact, executed a new will and cancelled her joint accounts with defendant. On 17 December 2002, plaintiff reopened Bonnie's estate and instituted this suit the following day seeking recovery of the property from Bonnie's joint accounts from defendant, individually, rather than as co-executor. The majority of the recovery would go to the estate of Gussie, who died on 8 December 2004 subsequent to the filing of this action.

Plaintiff first argues that the court erred in granting summary judgment to defendant and denying same to plaintiff. We disagree.

On appeal from summary judgment, our standard of review 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.

> *Wilmington Star News v. New Hanover Regional Medical Center*, 125 N.C. App. 174, 178, 480 S.E.2d 53, 55, *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997). Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant. *Id.* 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) (1990).

Bruce-Terminix Co. v. Zurich Ins. Co., 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Issues of credibility are usually for the jury, and not properly decided on summary judgment. *Lewis v. Blackman*, 116 N.C. App. 414, 418-19, 448 S.E.2d 133, 136 (1994).

An attorney-in-fact serves as an agent to his principal. *Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816, 818, 487 S.E.2d 166, 167 (1997).

> An agent is a fiduciary with respect to matters within the scope of his agency. In an agency relationship, at least in the case of an agent with the power to manage all the principal's property, it is sufficient to raise a presumption of fraud when the principal transfers property to the agent. Self dealing by the agent is prohibited.

Id. at 820, 487 S.E.2d at 168 (internal citations omitted). When circumstances establish a presumption of fraud, the burden is upon the fiduciary to show that the transaction was open, fair, honest and a voluntary act by the principal. *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 616-17 (1943).

> When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit. 37 *Am. Jur. 2d* Fraud and Deceit § 442, at 602 (1968). "This presumption arises not so much because [the fiduciary] has committed a fraud, but [because] he may have done so." *Atkins v. Withers*, 94 N.C. 581, 590 (1886). The superior party may rebut the presumption by showing, for example, "that the confidence reposed in him was not abused, but that the other party acted on independent advice." 37 *Am. Jur. 2d* Fraud and Deceit § 442, at 603. *Once rebutted, the presumption evaporates*,

> *and the accusing party must shoulder the burden of producing actual evidence of fraud.*

Watts v. Cumberland County Hospital System, Inc., 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986) (emphasis supplied). In *Watts*,

> the history of plaintiff's seeking and acquiring numerous second opinions from several other specialists dispel[ed] the presumption of reliance and intentional deceit that arises from the fiduciary relation itself.

Id. The Court then held that the plaintiff had "failed to produce a sufficient forecast of evidence to support a claim based upon constructive fraud." *Id.*

Here, plaintiff alleged that a presumption of fraud and undue influence on the part of defendant arose in the establishment of various joint accounts with right of survivorship or POD between defendant and Bonnie. Because defendant was a fiduciary who benefitted from his transactions with Bessie and Gussie, a presumption of fraud does arise. However, defendant's affidavit rebuts any presumption of fraud or undue influence to the other accounts. In his affidavit, defendant avers that he "never took any action on behalf of [the sisters] without their knowledge and consent," and that he never converted any assets to his own benefit or engaged in inappropriate conduct as attorney-in-fact for Bonnie and Gussie. Defendant's averment makes no exceptions and denies fraud in "any action" taken on the sisters' behalf. This statement covers defendant's actions with regard to Bonnie's Paine Webber account along with all other financial dealings. The dissent notes that while defendant's affidavit states that defendant discussed the survivorship feature of the Paine Webber account with Gussie, nowhere does it mention that this was discussed with Bonnie. However, this omission does not contradict or outweigh defendant's blanket statement quoted above. The defendant's affidavit rebutted the presumption of fraud, which "evaporate[d]", leaving plaintiff to shoulder the burden of producing actual evidence of fraud. Plaintiff here has failed to forecast any evidence of fraud. Thus, no genuine issue of fact remains and the court properly granted summary judgment to defendant and denied same to plaintiff.

Plaintiff also argues that the court erred in considering defendant's affidavit because it violates the dead man's statute. We disagree.

Dead man's statutes "exclude evidence of the acts or statements of deceased persons, since those persons are not available to

respond." *Culler v. Watts*, 67 N.C. App. 735, 737, 313 S.E.2d 917, 919 (1984) (referring to N.C. Gen. Stat. § 8-51, the predecessor to N.C. Gen. Stat. § 8C-1, Rule 601(c), the current dead man's statute). We conclude that defendant's affidavit does not violate N.C. Gen. Stat. § 8C-1, Rule 601 (2001). In any event, the trial judge is presumed to disregard incompetent evidence in making decisions. *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-15 (1971). Plaintiff does not explain what portions of defendant's affidavit supposedly violate the dead man's statute nor does she show that the court improperly considered incompetent evidence. This assignment of error is overruled.

Affirmed.

Judge JACKSON concurs.

Judge STEELMAN concurs in part and dissents in part.

STEELMAN, Judge, concurring in part and dissenting in part.

I concur with the majority opinion's holding that plaintiff has failed to show how defendant's affidavit violates N.C. Gen. Stat. § 8C-1, Rule 601 (dead man's statute). I respectfully dissent from the portion of the majority opinion holding that summary judgment was properly granted in favor of defendant as to the Paine Webber account. I concur in the granting of summary judgment as to the remaining accounts.

Factual Background

Bonnie Sustare Newell (Bonnie) and Gussie Lee Sustare (Gussie) were elderly sisters. Defendant was the nephew of the two sisters. On 5 November 1991 both Bonnie and Gussie executed powers of attorney naming defendant as their attorney in fact. Defendant managed the financial affairs of Bonnie until her death on 19 December 1999. Defendant managed the financial affairs of Gussie until she revoked the power of attorney on 17 October 2002. She subsequently died on 8 December 2002. Neither power of attorney contained a provision authorizing the power of attorney to make gifts on behalf of the principal. Bonnie and Gussie had wills that made a number of specific bequests, but which left the bulk of their estates to the other through residuary clauses.

On 26 June 1998, defendant established an account with Paine Webber with Bonnie shown as the "primary account holder." Bonnie executed none of the paperwork establishing this account, defendant signing her name in his capacity as a power of attorney. The account was set up with Bonnie and defendant as "joint tenants with rights of survivorship." At Bonnie's death, the proceeds of this account, amounting to $175,204.00, passed outside of Bonnie's will to the defendant by operation of law under the survivorship feature. In addition, $17,130.88 in dividends from the stocks held in this account inured to the benefit of defendant through the end of 2003. Defendant also established an account at Paine Webber for Gussie, which also had a survivorship feature. Gussie assumed control of this account at the time she revoked the power of attorney, and no assets from the account passed to defendant at her death.

Question Presented

Did the trial court err in granting summary judgment in favor of defendant as to the Paine Webber account.

Standard of Review

> Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The moving party bears the burden of showing that no triable issue of fact exists. . . . Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. In reviewing the evidence at summary judgment, "all inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion."

Southeastern Shelter Corp. v. BTU, Inc., 154 N.C. App. 321, 326, 572 S.E.2d 200, 204 (2002). Issues of credibility are usually issues for the jury, and not properly decided on summary judgment. *Lewis v. Blackman*, 116 N.C. App. 414, 418-19, 448 S.E.2d 133, 136 (1994). Our review of the trial court's grant or rejection of summary judgment is *de novo*. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005).

Fiduciary Relationship and Presumption of Fraud

A power of attorney stands in a fiduciary relationship with his or her principal, and has an obligation to act in the best interests of the

principal. *Estate of Graham v. Morrison*, 168 N.C. App. 63, 73, 607 S.E.2d 295, 302 (2005).

> This fiduciary relationship gives rise to a presumption of fraud.
>
> When a party, complaining of a particular transaction, such as a gift, sale, or contract, has shown to the Court the existence of a fiduciary or a confidential relation between himself and the defendant, and that the defendant occupied the position of trust or confidence therein, the law raises a . . . presumption, arising as matter of law, that the transaction brought to the notice of the Court was effected through fraud or, what comes to much the same thing, undue influence by reason of his occupying a position affording him peculiar opportunities for taking advantage of the complaining party. Having special facilities for committing fraud upon the party whose interests have been intrusted to him, the law, looking to the frailty of human nature, requires the party in the superior situation to show that his action has been honest and honorable." This presumption is raised where there have been dealings between the parties, because of the advantage which the situation of the parties respectively gives to one over the other. The doctrine rests on the idea, not that there actually was, but that there may have been fraud, and an artificial effect is given to the fiduciary relation beyond its natural tendency to produce belief of the fact that fraud really existed.

Smith v. Moore, 142 N.C. 277, 296, 55 S.E. 275, 281 (1906).

When circumstances establish a presumption of fraud, the burden is upon the fiduciary to show that the transaction was open, fair, honest and a voluntary act by the principal. *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 616-17 (1943).

In the instant case, defendant stood in a fiduciary relationship with Bonnie. The evidence before the court on summary judgment showed that the Paine Webber account was established in order to allow defendant, as power of attorney, to sell stocks owned by Bonnie to pay for her living expenses in a nursing home. Setting up this account as a joint tenancy with rights of survivorship inuring to the benefit of defendant was not required to fulfill this purpose. This designation was in fact a gift of a valuable interest in the property of Bonnie to defendant by the defendant, acting as power of attorney. These facts are sufficient to raise a presumption of fraud before the trial court.

Affidavit of Defendant

The majority asserts that defendant's affidavit rebutted the presumption of fraud and that it was proper for the trial court to enter summary judgment in favor of defendant. This analysis is untenable for two reasons. First, it improperly resolves issues of credibility at the summary judgment stage of the proceedings. Second, it confuses the manner in which presumptions are to be handled at trial under Rule of Evidence 301 with the applicable standard for granting summary judgment under Rule 56 of the Rules of Civil Procedure.

The majority relies upon the blanket assertion in defendant's affidavit that he "never took any action on behalf of [the sisters] without their knowledge and consent," and that he never converted any assets to his own benefit or engaged in inappropriate conduct as attorney in fact for Bonnie and Gussie. Based upon these assertions the majority concludes that defendant rebutted the presumption of fraud.

It is not the role of the trial court to resolve issues of credibility on a motion for summary judgment. *Lewis*, 116 N.C. App. at 418-19, 448 S.E.2d at 136. A close examination of defendant's affidavit reveals questions concerning the opening of the Paine Webber account for Bonnie:

> 31. On June 26, 1998, an account was opened for Bonnie with Paine Webber (hereinafter "PW"), that named me as the joint account holder.
>
> 32. This PW account was opened to facilitate the periodic sale of BB&T stock owned by Bonnie so that the proceeds of those sales could be used to pay her living expenses.
>
> 34. Guss instructed me to establish a Paine Webber account for her that was identical to Bonnie's PW account. I discussed with her the fact that Bonnie's account was a joint account with a right of survivorship, and again explained what that meant.

While the affidavit states that defendant discussed the survivorship feature of the Paine Webber account with Gussie, nowhere does it mention that this was discussed with Bonnie.

I would hold that the trial court resolved issues of the defendant's credibility and improperly granted summary judgment as to the Paine Webber account.

Even assuming *arguendo* that defendant has successfully rebutted the presumption of fraud, that does not provide a basis for

upholding the trial court's granting of summary judgment on this issue. Because defendant was acting in a fiduciary capacity when he was made a joint owner with right of survivorship on the Paine Webber account, he had an *additional* burden to succeed on summary judgment, not an entirely *different* burden, and certainly not a *reduced* burden. According to Rule 301: "When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact." N.C. Gen. Stat. § 8C-1, Rule 301. Defendant does not prevail on this issue simply because he rebuts the presumption of fraud; the presumption merely evaporates. *Watts v. Cumberland County Hospital System, Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986); *Estate of Smith by & Through Smith v. Underwood*, 127 N.C. App. 1, 9-10, 487 S.E.2d 807, 812-13 (1997) (rebuttal of presumption is not an affirmative defense to constructive fraud). Once the presumption evaporates, the trial court must still determine if the evidence establishes a *prima facie* case, and "must consider all the presented evidence 'in a light most favorable to the nonmoving party,' and 'all inferences of fact must be drawn against the movant and in favor of the nonmovant[.]' " *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 682, 565 S.E.2d 140, 146 (2002).

I believe plaintiffs have alleged facts and circumstances establishing a *prima facie* case of constructive fraud, in that

> viewing the foregoing evidence in the light most favorable to plaintiffs, [the trial court] could not properly conclude as a matter of law that plaintiffs have not shown "the slightest trace of undue influence or unfair advantage . . ." by defendant in the [transaction]. Plaintiffs have alleged and established sufficient facts and circumstances to satisfy the . . . requirements for maintaining an action for constructive fraud based on breach of a confidential relationship.

Brisson v. Williams, 82 N.C. App. 53, 59, 345 S.E.2d 432, 436 (1986).

Were we to allow defendant to succeed on summary judgment simply because he rebutted the presumption of fraud, we would in effect be reducing defendant's burden on summary judgment from the established burden of proving no genuine issue of material fact, viewing all evidence in the light most favorable to the non-moving party, N.C. Gen. Stat. § 1A-1, Rule 56(c), to the much less demanding burden of presenting evidence in rebuttal equal in weight to that of plaintiffs, *In re Will of Campbell*, 155 N.C. App. 441, 451-52, 573 S.E.2d 550, 558

(2002). Under this scheme, fiduciaries accused of defrauding their principals would be required to make a much lesser showing to succeed on summary judgment than those who have no fiduciary obligation. I am not prepared to endorse this outcome.

Further, the power of attorney did not specifically grant defendant the authority to make gifts of Bonnie's property, and he was therefore prohibited from doing so. *Whitford v. Pittman*, 345 N.C. 475, 480 S.E.2d 690 (1997); *Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816, 820, 487 S.E.2d 166, 168 (1997). He was certainly not authorized to make gifts to himself. It is undisputed that Bonnie did not sign the application for the Paine Webber account, and defendant signed it as her attorney in fact. If defendant made gifts of Bonnie's property, he was in breach of his fiduciary duty, and thus committed constructive fraud. *Compton v. Kirby*, 157 N.C. App. 1, 16, 577 S.E.2d 905, 914-15 (2003). I believe these issues need to be decided by the trier of fact, and that summary judgment was improperly granted.

I have thoroughly reviewed defendant's additional arguments in support of summary judgment on this issue, and find them unconvincing. I would hold that the trial court erred in granting summary judgment as to the Paine Webber account, and would remand for further proceedings.

JO ANN GRADY GREER, PLAINTIFF v. EDWARD ALLEN GREER II, DEFENDANT

No. COA05-378

(Filed 17 January 2006)

Child Support, Custody, and Visitation— custody—tender years presumption

The trial court erred in a child custody case by two of its findings of fact, including the court's personal notice of the natural bond that develops between infants and a mother especially when a mother breastfeeds and the fact that the court finds that the placement with defendant father would be a negative aspect based on the very nature of the age and gender of the minor child (28-month-old female), and the case is remanded for a determination based on the best interests of the child standard, because:

(1) the trial court's beliefs cannot be distinguished from the "tender years presumption" that was abolished in 1977 by an amendment to N.C.G.S. § 50-13.2(a), and it cannot be resurrected under the guise of the court taking judicial notice of the assumptions underlying the doctrine; (2) the trial court did not view the father as equal to the mother and did not evaluate the evidence independent of any presumptions in favor of the mother; and (3) the record did not reflect specific evidence of findings as to the closeness of the minor child and her mother or a particular bond that existed between the two, but instead the trial court relied on personal experience.

Appeal by defendant from order entered 15 July 2004 by Judge Lonnie W. Carraway in Lenoir County District Court. Heard in the Court of Appeals 16 November 2005.

William C. Coley III for plaintiff-appellee.

Dal F. Wooten for defendant-appellant.

GEER, Judge.

Edward Allen Greer II, the defendant father, appeals from an order providing for joint legal custody and split physical custody of his daughter with plaintiff Joanne Grady Greer. A review of the trial court's findings of fact reveals that a substantial factor in the court's decision was the court's "personal notice of the natural bond that develops between infants and a mother, especially when the mother breast-feeds the infant" and the fact "[t]he Court believes and finds that by the very nature of the age and gender of the minor child (28-month-old female), as it relates to the Defendant, that placement with the Defendant would be a negative aspect in the weighing of the positives and negatives."

These beliefs cannot be distinguished from the "tender years presumption" that was abolished in 1977 by an amendment to N.C. Gen. Stat. § 50-13.2(a) (2003). It has been the law for 30 years that a court may not base a custody decision, as between parents, on any presumption in favor of either the mother or the father, but instead must focus only on the best interests of the child as determined from the actual evidence before the court. We reverse and remand so that the trial court may make a "best interests" determination based on the evidence presented at trial.

Facts

The plaintiff mother and defendant father were married in June 1998, but separated in June 2002. They had one child, M.G., who was born in January 2002. On 21 August 2002, the mother initiated this action by filing a complaint seeking temporary and permanent custody of M.G. The father responded with an answer and counterclaim also seeking permanent custody of M.G. The case was heard over three days: 28 January 2004, 5 April 2004, and 24 May 2004. On 15 July 2004, the district court entered its order making detailed findings of fact.

With respect to the mother, the trial court found that she is a single mother raising M.G. as well as an older son A.V., a child from a previous marriage. She depends upon her family to provide care for her children, such that her mother has been the primary caregiver for A.V. and is "established as a daytime and extended caregiver" for both A.V. and M.G. Along with a strong extended family, the mother also has a strong support system in her church.

The trial court found that, throughout her life, the mother has consistently been diagnosed with an adjustment disorder and has sought and received long-term treatment for "depression and [a] psychological disorder." The court found that although the mother has shown an ability to overcome her psychological problems in the work environment, she "is self-centered, has difficulty controlling her temper, has difficulty modifying her behavior appropriately for the occasion, has difficulty controlling her emotions, and that she depends upon her extended family to provide the family structure instead of the other way around."

Further, the court found that the mother "does not comprehend or does not care about the consequences of her actions" and "has been involved in excessive confrontations throughout her lifetime." The court found that, on at least one occasion, she cursed at a doctor while at work in the hospital. More significantly, the court found that the mother has on occasion: "[s]lapped or backhanded her older son, [A.V.]"; slapped the defendant father; "[k]icked the Defendant between the legs in an angry manner"; "forked the Defendant in the hand in an angry manner"; and slapped her first husband. The trial court specifically noted that "any one of the aforementioned actions could constitute a criminal assault" and that "the slapping or backhanding of the older son, [A.V.], would justify a petition for child abuse or child neglect."

With respect to the mother's ability to parent, the trial court found that the mother's "attitude or adjustment disorder could hamper her ability to parent [M.G.], especially as this child grows and develops into a young woman who begins to think for herself and develops her own attitude." The court stressed that the mother must modify her behavior in order to be able to handle mother-daughter conflicts in an appropriate manner, but ultimately stated: "The Court is unable to determine whether the Plaintiff will be able to deal with these conflicts in an appropriate manner in the future as the child matures."

With respect to the father, the court found that he voluntarily left the marital residence, thus removing himself from the mother and his child. According to the trial court, the father has a relatively secure life in which he appears well-adjusted and exhibits no signs of a psychological disorder. The trial court found, however, that the "Defendant's maturity level is not age appropriate at times," based on the fact that he "occasional[ly] physically and verbally picked at the Plaintiff" and on occasion "called her fat."

Although the father has a stable work environment as a farmer, which he enjoys, the nature of his profession requires long hours during a considerable portion of the year. The court noted that, like the mother, the father has a substantial family support system close by to help with M.G. Although the father's girlfriend had also been helping the father with M.G., the court observed that her future relationship status with the father is unclear. The trial court also found that the father "has not established an independent track record to demonstrate his parenting abilities" without the assistance of his girlfriend. On the other hand, the court recognized that the father has had a very limited opportunity to parent because he has had to endure "a difficult environment in order to obtain visitation with M.G" due to obstacles the mother placed in his way.

Based on these findings of fact, together with findings regarding the general relationship between a mother and a child, discussed in detail below, the trial court ultimately concluded that both the mother and father were fit and proper persons for custody. The court determined that "the best interests of the minor child would be promoted by awarding joint legal custody and split physical custody between the parties." The father filed a timely appeal to this Court.

Discussion

On appeal, the father contends that, in determining custody, the trial court erred by making the following two findings of fact:

> 16. . . . The Court takes judicial, personal notice of the natural bond that develops between infants and a mother, especially when the mother breast-feeds the infant.
>
> . . . .
>
> 33. The Court believes and finds that by the very nature of the age and gender of the minor child (28-month-old female), as it relates to the Defendant, that placement with the Defendant would be a negative aspect in the weighing of the positives and negatives.
>
> Further, that the natural law of birthing and breast-feeding gives the mother a distinct advantage for the opportunity to parent a newborn. With regard to the foregoing statement, the Court offers the following statement:
>
> ". . . [I]t seems to me that when you're looking at the best interest of the child, you're looking at parenting. That we talk about and we place emphasis on parents' ability to parent and it struck me in thinking about this case this morning that it seems to me that parenting is not an ability so much as it is a desire.
>
> And that desire is broken down and you can categorize in general terms to say a desire to meet the needs of the minor child. And we've heard that, and we've heard that in our arguments. But when you break that down, what it means is a desire to spend time with the child. It means a desire to discipline the child so that when the child grows up, he or she knows what the boundaries are; a desire to cook and clean for the child; a desire to take them to parties; a desire to cry with them when they are unhappy; a desire to laugh with them when they are happy; a desire to kiss away their hurts; to get along with the other parent so that child does not have to choose one over the other.
>
> Parenting is a lifetime responsibility, and, as it relates to Mrs. Greer and Mr. Greer, I think your parents can tell you that and the fact that they have sat in this courtroom since September, demonstrates that they understand that responsibility.
>
> For the two (2) of you, this responsibility is just [the] beginning. As it relates to younger children in a domestic dispute, the

> law of nature dictates that early in the life of a child, the mother has a distinct advantage in the opportunity to care for that child. The mother carries the child; she must withstand the vigors and the rigors of the nine (9) months; she must endure the pain of labor and delivery. The man can only look on with sympathy, excitement and encouragement, also understanding when the mother's hormones change. Normally, when the child is first born, the doctor places the child on the mother's stomach and then in her arms.
>
> The man may be allowed to hold the child briefly during that interlude. If the mother is breast-feeding, all the man can do is get up, bring the baby to bed for her and take the child back when the child is finished.
>
> During the first two (2) years, at best, the man has very few opportunities to parent a child, especially when the parties separate. It is almost impossible to demonstrate those skills, especially when the child stays with the mother and especially as in this case I find the mother at times blocks attempts to visit."

The father argues: (1) the two findings of fact effectively amount to an application of the tender years presumption that was abolished by N.C. Gen. Stat. § 50-13.2(a), and (2) the assertions contained in those findings of fact are not a proper subject for judicial notice. We agree.

Early common law first recognized a maternal preference in custody disputes concerning illegitimate children, with the mother having a right to custody unless it was clearly and manifestly in the best interest of the child to award custody to another person, including the father. 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.6b(b)(ii), at 13-29 (5th ed. 2002). This maternal preference was eventually extended to all custody disputes involving young children. Courts presumed "that, at least for a child of tender years, the mother served the best interest of the child"—a doctrine that became known as "the tender years presumption." *Id.* § 13.6b(b)(iii), at 13-30. This presumption "appears to have shaped North Carolina custody law for most of the twentieth century." *Id.* § 13.6b(b)(iii), at 13-31.

The presumption was described by our Supreme Court:

> [I]t is said: "It is universally recognized that the mother is the natural custodian of her young. . . . If she is a fit and proper person to have the custody of the children, other things being equal, the mother should be given their custody, in order, that the children

> may not only receive her attention, care, supervision, and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute. A mother's care and influence is regarded as particularly important for children of tender age and girls of even more mature years."

Spence v. Durham, 283 N.C. 671, 687, 198 S.E.2d 537, 547 (1973) (quoting 2 Nelson, *Divorce and Annulment* § 15.09, at 226-29 (2d ed. 1961)), *cert. denied*, 415 U.S. 918, 39 L. Ed. 2d 473, 94 S. Ct. 1417 (1974). *See also In re King*, 11 N.C. App. 418, 419, 181 S.E.2d 221, 221 (1971) (affirming award of custody to mother in part because given "the tender age of said child, the welfare of the child, . . . would best be served by placing him in the temporary custody of his mother").

As, however, recognized by this Court in 1994, "[t]his 'tender years' doctrine is no longer the law in North Carolina." *Westneat v. Westneat*, 113 N.C. App. 247, 251, 437 S.E.2d 899, 901 (1994). In 1977, the General Assembly amended N.C. Gen. Stat. § 50-13.2 to eliminate any presumption in favor of either the mother or the father so that only a best interests of the child test would be applied. The statute now states in pertinent part:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. *Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child.* Joint custody to the parents shall be considered upon the request of either parent.

N.C. Gen. Stat. § 50-13.2(a) (emphasis added). *See also* Reynolds, *supra* § 13.6b(c), at 13-32 ("Out of fear that the tender years presumption would remain the standard in practice, in 1977, the General Assembly underscored that the court was not to presume that either mother or father was the better custodian.").

Our Supreme Court has, relatively recently, re-emphasized that trial courts must decide custody as between the parents based solely

on the best interests of the child, which is to be determined from the actual facts without reference to any presumptions. In *Rosero v. Blake*, 357 N.C. 193, 581 S.E.2d 41 (2003), *cert. denied*, 540 U.S. 1177, 158 L. Ed. 2d 78, 124 S. Ct. 1407 (2004), the trial court had awarded custody to the father of an illegitimate child after applying the best interests test. The Court of Appeals reversed, holding that the presumption in favor of the mother survived the enactment of N.C. Gen. Stat. § 50-13.2(a) when the child at issue was illegitimate. *Rosero v. Blake*, 150 N.C. App. 250, 260, 563 S.E.2d 248, 256 (2002), *rev'd*, 357 N.C. 193, 581 S.E.2d 41 (2003). The Supreme Court, however, reversed yet again, holding that the statute abrogated the common law presumption in favor of the mother both as to legitimate and as to illegitimate children. *Rosero*, 357 N.C. at 207, 581 S.E.2d at 49. Instead, "the best interest of the child, illegitimate or legitimate, not the relationship, or lack thereof, between natural or adoptive parents, is the district court's paramount concern. For, as between natural or adoptive parents, '[t]he welfare of the child has always been the polar star which guides the courts in awarding custody.' " *Id.* at 207, 581 S.E.2d at 49-50 (quoting *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998)). The Court emphasized:

> [T]he father's right to custody of his illegitimate child is legally equal to that of the child's mother, and, as dictated by section 50-13.2, if the best interest of the child is served by placing the child in the father's custody, he is to be awarded custody of that child.

Id. at 208, 581 S.E.2d at 50.

In this case, however, the trial court did not view the father as equal to the mother and did not evaluate the evidence independent of any presumptions in favor of the mother. Instead, the trial court used language in the order that cannot be distinguished from the abolished presumption and that is eerily reminiscent of language used in early cases applying the presumption such as *Spence*. The court in *Spence* held that "the mother is the natural custodian of her young" and "other things being equal, the mother should be given their custody, in order that the children may not only receive her attention, care, supervision, and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute." *Spence*, 283 N.C. at 687, 198 S.E.2d at 547. Similarly, the trial judge in the present case remarked that "the law of nature dictates that early in the life of a child, the mother has a distinct advantage in the opportunity to care for that child" and "that by the very nature of

the age and gender of the minor child (28-month-old female), as it relates to the Defendant, that placement with the Defendant would be a negative aspect in the weighing of the positives and negatives." These "findings," not based on the actual evidence of the case, cannot be meaningfully distinguished from the abrogated tender years presumption.

The trial court—and the mother on appeal—invoke the doctrine of "judicial notice" to justify the trial court's reliance on his view of "the natural law of birthing." Once, however, a presumption or doctrine has been abolished, a court does not have the authority to resurrect that doctrine under the guise of taking judicial notice of the assumptions underlying the doctrine.

Rule 201(b) of the North Carolina Rules of Evidence specifies that "[a] judicially noted fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." With respect to natural phenomena, our courts have been permitted to take notice of the fact it takes time for a hedge to grow four feet, *Gaffney v. Phelps*, 207 N.C. 553, 559, 178 S.E. 231, 234 (1934), and that pregnant women sometimes miscarry or have stillborn births, *State v. Hall*, 251 N.C. 211, 212, 110 S.E.2d 868, 869 (1959). Such facts are not subject to dispute.

Any subject, however, that is open to reasonable debate is not appropriate for judicial notice. *See, e.g.*, *Hinkle v. Hartsell*, 131 N.C. App. 833, 837, 509 S.E.2d 455, 458 (1998) (reversing a trial court's award of primary custody to the mother when the court, in justification of its award, took judicial notice of criminal activity near the father's home without hearing any evidence on that issue). By enacting N.C. Gen. Stat. § 50-13.2(a), the General Assembly established that some of the personal beliefs recited by the trial court in this case are subject to debate in the custody context. In fact, the General Assembly reached the conclusion that such beliefs, regarding the advantages of a mother having custody of a young child, should not supplant analysis of the best interests of the child involved in the custody dispute. As a result, the trial court did not properly rely upon the principle of judicial notice when making findings of fact 16 and 33.

We note that instances may arise when findings as to the benefits of breast-feeding for an infant or evidence of a bond with a particular parent may be appropriate considerations by the trial court in a deter-

mination of the best interests of the child based on the factual evidence presented in a particular case. The record in this case, however, does not reflect specific evidence or findings as to the closeness of M.G. and her mother or a particular bond that exists between the two. Rather, here the trial court appears to rely on personal experience in concluding that a "natural bond . . . develops between infants and a mother especially when the mother breast-feeds the infant." Indeed, the trial court here found that plaintiff's adjustment disorder "could hamper her ability to parent [M.G.], especially as this child grows and develops into a young woman who begins to think for herself and develops her own attitude. . . . The Court is unable to determine whether the Plaintiff will be able to deal with these conflicts in an appropriate manner in the future as the child matures." We hold that the trial court's findings in the instant case as to natural law and breast-feeding were not supported by evidence in the record and were not appropriate matters for judicial notice.

If findings of fact 16 and 33 are omitted, the order is left with findings that raise significant questions regarding both the fitness of the mother to have custody and whether split physical custody is in the best interest of M.G. The trial court may still determine, on remand, that joint legal custody with split physical custody is in the best interests of M.G., but, in light of the trial court's detailed, negative findings with respect to the mother, we cannot conclude that the trial court would necessarily have made the same determination in the absence of the beliefs included in findings of fact 16 and 33. When a court makes its findings of fact under a misapprehension of the law, the affected findings must be set aside and the case remanded so that the remaining evidence may be considered in its "true legal light." *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939). Accordingly, we reverse and remand so that the trial court may make a determination of custody in accordance with the best interests of M.G. based on the actual evidence presented at trial.

Reversed and remanded.

Judges HUNTER and McCULLOUGH concur.

PURVIS v. MOSES H. CONE MEM'L HOSP. SERV. CORP.

[175 N.C. App. 474 (2006)]

KEISHA PURVIS, PHILIP PURVIS, AND MONICA COOPER EDWARDS, GUARDIAN AD LITEM FOR AERON PURVIS, A MINOR, PLAINTIFFS V. MOSES H. CONE MEMORIAL HOSPITAL SERVICE CORPORATION, D/B/A MOSES CONE HEALTH SYSTEM, D/B/A THE WOMEN'S HOSPITAL OF GREENSBORO, BERNARD A. MARSHALL, M.D., CHARLES A. HARPER, M.D., AND MCARTHUR NEWELL, M.D., DEFENDANTS

No. COA04-1418

(Filed 17 January 2006)

1. Medical Malpractice— standard of care—contemporaneous knowledge

Summary judgment was correctly granted for defendant in a Greensboro medical malpractice case where the doctor who testified about the standard of care had never been to Greensboro, had no colleagues there, had reviewed no demographic information about Greensboro, and had relied on Internet materials dated about four and a half years after the birth in question. N.C.G.S. § 90-21.12.

2. Estates— survival of action—substitution of executrix—not automatic

A summary judgment in a medical malpractice action was remanded where the defendant died, his executrix was not substituted as a party, and there was no party in favor of whom summary judgment could be granted. The right to defend any action against the deceased survives against the personal representative under N.C.G.S. § 28A-18-1(a), but substitution is not automatic. Furthermore, although the parties urged the Court of Appeals to address the merits of a substitution motion, it must be decided in the first instance by the trial court. N.C.G.S. § 1A-1, Rule 25(a).

Appeal by plaintiffs from orders entered 10 May 2004 and 17 May 2004 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 18 May 2005.

Greeson Law Offices, by Harold F. Greeson; and Shar, Rosen & Warshaw, LLC, by Michael S. Warshaw, for plaintiffs-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten, Leigh Ann Smith, and Kari R. Johnson, for defendant-appellee Bernard A. Marshall, M.D.

Yates, McLamb & Weyher, L.L.P., by Jason D. Newton, for defendant-appellee McArthur Newell, M.D.

GEER, Judge.

Plaintiffs Keisha and Philip Purvis, along with their son Aeron Purvis through his Guardian ad Litem Monica Cooper Edwards, brought a medical malpractice action against defendants Bernard A. Marshall, M.D. and McArthur Newell, M.D., alleging negligence in connection with Aeron's delivery. Plaintiffs appeal from a grant of summary judgment in favor of defendants. While we hold that summary judgment was proper as to Dr. Marshall because plaintiffs failed to establish that their sole standard of care expert was qualified to testify under N.C. Gen. Stat. § 90-20.12 (2003), we must reverse as to defendant Newell. Although Dr. Newell had died during the pendency of the lawsuit, the trial court did not rule on plaintiffs' motion to substitute the executrix for the estate as a party defendant. Without the substitution of the executrix, there was no party to seek summary judgment, and there was no party on whose behalf the court could enter judgment.

Facts

Keisha Purvis became pregnant in 1998. She experienced an uneventful pregnancy under the care of her regular obstetrician/gynecologist, Dr. Marshall. On Saturday, 13 February 1999, Ms. Purvis began experiencing contractions and sought care at The Women's Hospital of Greensboro ("Women's Hospital"). She was first seen by Dr. Charles Harper, who sent her home with instructions to see Dr. Marshall on Monday.

Ms. Purvis returned to Women's Hospital two hours later, in the early morning hours of 14 February 1999, because her water had broken. She was admitted and placed on an electronic fetal monitor. At that time, Dr. Newell was the supervising physician on call. Ms. Purvis remained at Women's Hospital under Dr. Newell's care through 14 February and overnight into 15 February.

Ms. Purvis came under the care of Dr. Marshall at approximately 4:30 a.m. on 15 February. Dr. Marshall monitored her progress through the morning of 15 February until Aeron was delivered in the early afternoon. When Aeron was delivered, his umbilical cord was wrapped around his neck. He appeared blue or gray in color and was "depressed" or oxygen-deprived. Aeron was ventilated and received medication, measures that revived him after about two minutes.

For the first few hours of Aeron's life, he appeared to be a normal infant. In the sixth hour, he had a seizure while he was with his mother, followed by a second one when he was in the nursery. Aeron was transferred to the hospital's neonatal intensive care unit "for further evaluation and management." He was eventually diagnosed with "neurologic problems, including spastic cerebral palsy, mental retardation, seizure disorder, cortical visual impairment, and microcephaly," resulting from "a hypoxic ischemic injury leading to an encephalopathy."

On 9 January 2002, plaintiffs filed a medical malpractice action against four defendants: (1) The Moses H. Cone Memorial Health Service Corporation, d/b/a The Moses Cone Health System, d/b/a The Women's Hospital of Greensboro; (2) Dr. Harper; (3) Dr. Marshall; and (4) Dr. Newell. Plaintiffs alleged generally that defendants were negligent in failing to detect Aeron's fetal distress such that delivery could be initiated in a timely manner.

Dr. Newell passed away on 9 July 2002. On 13 January 2004, plaintiff filed a motion to substitute "Dottie Jean Ambrose Newell, Executrix of the Estate of McArthur Newell, deceased." The trial court never ruled on this motion. Nevertheless, counsel for Dr. Newell filed a motion for summary judgment on 4 February 2004, an amended motion on 16 March 2004, and a second amended motion on 28 April 2004. Dr. Marshall filed a motion for summary judgment on 14 April 2004.

On 10 May 2004, the superior court entered an order granting summary judgment to Dr. Marshall. Likewise, on 17 May 2004, the court entered summary judgment "in favor of defendant McArthur Newell, M.D. (and his estate)." On 3 June 2004, plaintiffs voluntarily dismissed their claims against Women's Hospital without prejudice. They had previously, on 21 October 2003, voluntarily dismissed their claims against Dr. Harper without prejudice. Plaintiffs timely appealed from the two summary judgment orders.

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). In deciding the motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James W. Moore et al.,

Moore's Federal Practice § 56-15[3], at 2337 (2d ed. 1971)). The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* We review a trial court's grant of summary judgment *de novo*. *Coastal Plains Utils., Inc. v. New Hanover County*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004).

Marshall Summary Judgment Order

[1] In a medical malpractice action, a plaintiff has the burden of showing "(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998). Defendant Marshall has argued that summary judgment was proper because plaintiffs failed to offer competent evidence of the standard of care and of proximate cause. We agree with respect to the standard of care.

N.C. Gen. Stat. § 90-21.12 sets forth the standard of care in a medical malpractice case:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among *members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.*

Id. (emphasis added). "Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony." *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003).

In opposing a motion for summary judgment in a medical malpractice case, a plaintiff must demonstrate that his expert witness is

"competent to testify as an expert witness to establish the appropriate standard of care" in the relevant community. *Billings v. Rosenstein*, 174 N.C. App. 191, 196, 619 S.E.2d 922, 925 (2005). In other words, in order "[t]o establish the relevant standard of care for a medical malpractice action, an expert witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care in similar communities." *Id.* at 195-96, 619 S.E.2d at 923. In the absence of such a showing, summary judgment is properly granted. *Whitmer*, 159 N.C. App. at 197, 582 S.E.2d at 673 (holding that because plaintiff's sole expert witness was not sufficiently familiar with the pertinent standard of care under N.C. Gen. Stat. § 90-21.12, his testimony was properly excluded, "render[ing] plaintiff unable to establish an essential element of his claim, namely, the applicable standard of care"). *See also Weatherford*, 129 N.C. App. at 623, 500 S.E.2d at 469 (holding that deposition testimony offered in opposition to a motion for summary judgment in a medical malpractice case must reveal that the witness is competent to testify as to the matters at issue).

We must, therefore, determine whether plaintiffs' sole standard of care expert, Dr. Alphonzo Overstreet, was competent to give standard of care testimony under N.C. Gen. Stat. § 90-21.12. An expert may "testify regarding the applicable standard of care in a medical malpractice case 'when that physician is familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources.' " *Barham v. Hawk*, 165 N.C. App. 708, 712, 600 S.E.2d 1, 4 (2004) (quoting *Henry v. Southeastern OB-GYN Assocs., P.A.*, 145 N.C. App. 208, 213-14, 550 S.E.2d 245, 248-49 (Greene, J., concurring), *aff'd per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001)), *disc. review allowed*, 359 N.C. 410, 612 S.E.2d 316 (2005).

Dr. Overstreet's familiarity with the experience and training of Dr. Marshall is not at issue. Since it is equally undisputed that Dr. Overstreet has no personal knowledge of Greensboro or Women's Hospital, the pertinent question is whether Dr. Overstreet demonstrated a sufficient familiarity with the medical resources available in Dr. Marshall's community and with the standard of care in other communities having access to similar resources. *Id.*

In arguing that Dr. Overstreet had the necessary knowledge, plaintiffs point to the fact that they forwarded to Dr. Overstreet materials obtained on the Internet regarding Women's Hospital. Plaintiffs rely upon the following deposition testimony to establish Dr. Overstreet's competence to testify:

> Q. Dr. Overstreet, do you recall that some months ago I provided you some information that I had obtained off the Internet concerning Women's Hospital of Greensboro?
>
> A. Yes.
>
> Q. And did you review that information when I provided it to you?
>
> A. Yes, I did.
>
> Q. And I happen to know, since we've met earlier today, you don't have that with you today, do you?
>
> A. No.
>
> Q. That information was just for counsel's edification and I'm sure you recall was attached to Dr. Bootstaylor's deposition as an exhibit.
>
> If I were to proffer to you, Dr. Overstreet, that the information provided and placed on the Internet by Women's Hospital represented that hospital to be 130-bed, state of the art facility dedicated to the treatment of women and infants containing a level 2 and level 3 NICU, on staff neonatologist, a perinatologist and 24-hour anesthetic care, do you recall those features of Women's Hospital from what you reviewed?
>
> A. Yeah, that's pretty much what I remember.
>
> Q. Are you familiar with any hospitals here in the Atlanta area that are similar in nature to that description of Women's Hospital?
>
> A. Yes.
>
> Q. And what hospitals would those be?
>
> A. I'm sure there are quite a few, but I've only practiced out of three of them, and all three would fit in that category.
>
> . . . .

> Q. Are you familiar with the standards of care practiced in those facilities here in Atlanta that are comparable to Women's Hospital of Greensboro?
>
> A. Yes.
>
> Q. And in reviewing this case and offering opinions in this case, are you applying the standards of care that you are familiar with that are practiced at facilities that are comparable to Women's Hospital of Greensboro?
>
> . . . .
>
> THE WITNESS: Yes.

Review of Dr. Overstreet's deposition reveals that he had never been to Greensboro, had no colleagues there, had reviewed no demographic information regarding Greensboro, and was relying solely on the Internet materials supplied by plaintiffs' counsel as the source of his information about Women's Hospital.

The Internet materials forwarded to Dr. Overstreet consisted of printouts of web pages from Women's Hospital's website, listing programs and services provided by the hospital and describing the types of specialist care available to patients. The printouts bear the date of 1 August 2003, approximately four and a half years after Aeron's birth in February 1998.

Plaintiffs argue that this testimony is sufficient to establish Dr. Overstreet's competency to give standard of care testimony under *Cox v. Steffes*, 161 N.C. App. 237, 587 S.E.2d 908 (2003), *disc. review denied*, 358 N.C. 233, 595 S.E.2d 148 (2004) and *Coffman v. Roberson*, 153 N.C. App. 618, 571 S.E.2d 255 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003), in both of which cases the expert witness relied upon information obtained from the Internet. N.C. Gen. Stat. § 90-21.12, however, specifically states that the expert must be familiar with the standard of care in the same or similar community "at the time of the alleged act giving rise to the cause of action." Dr. Overstreet only had knowledge of Women's Hospital's resources—and thus the applicable standard of care—at a time more than four years after the alleged malpractice.

The record does not contain any indication that the resources available at Women's Hospital and the standard of care were the same in 1998 as in 2003. We cannot assume—as we would have to do in order to deem Dr. Overstreet competent to testify—that the

resources and standard of care remained unchanged at Women's Hospital for a period of more than four years. Dr. Overstreet has, therefore, failed to meet the requirement of contemporaneousness set forth in the plain language of the statute. *See Cox*, 161 N.C. App. at 244, 587 S.E.2d at 913 ("Dr. Donnelly specifically testified that he was familiar with the standard of care for board-certified physicians such as Dr. Steffes practicing in Fayetteville or a similar community *in 1994* with respect to post-operative care after a Nissen fundoplication procedure." (emphasis added)).

Although summary judgment is a drastic remedy, *Capital Outdoor, Inc. v. Tolson*, 159 N.C. App. 55, 59, 582 S.E.2d 717, 720, *disc. review denied*, 357 N.C. 504, 587 S.E.2d 662 (2003), and it has long been established that "issues of negligence are rarely appropriate for summary judgment," *Diorio v. Penny*, 103 N.C. App. 407, 405 S.E.2d 789 (1991), *aff'd*, 331 N.C. 726, 417 S.E.2d 457 (1992), we are compelled to affirm summary judgment in favor of Dr. Marshall in this case. Dr. Overstreet was plaintiffs' sole standard of care expert. As he was not competent to testify regarding the standard of care under N.C. Gen. Stat. § 90-20.12 as it existed in 1998, the trial court correctly concluded that plaintiffs had failed to forecast sufficient evidence to meet one of the essential elements of their claim and that summary judgment should be granted.

Newell Summary Judgment Order

[2] We cannot, however, reach the merits with respect to the order granting summary judgment as to Dr. Newell. We are confronted with a record in which Dr. Newell passed away in 2002, but the executrix for his estate has not yet been substituted as a party. Under North Carolina law, there is currently no party in favor of whom summary judgment could be granted.

According to the record, it appears that on 19 February 2003, plaintiffs proposed to defendants that Dr. Newell's estate be substituted for Dr. Newell. Counsel for Dr. Newell refused to agree to the substitution unless plaintiffs agreed to limit any recovery to Dr. Newell's insurance coverage, a stipulation to which plaintiffs would not consent. Instead, plaintiffs filed a motion on 28 April 2004, requesting that the trial court substitute the executrix for Dr. Newell's estate as a party defendant without any limitations on the source of recovery. The trial court, however, never ruled on plaintiffs' motion for substitution.

As this Court explained with respect to a lawsuit mistakenly brought against a deceased person named John Daniel Johnson rather than against his estate:

> John Daniel Johnson, a legal entity, is transformed, after death, into the estate of John Daniel Johnson, a legal entity. . . . [T]he life and estate of John Daniel Johnson are inextricably dependent: Death of the person is a point at which a legal transformation to an estate can occur. Once death occurs, the legal entity known as the life of John Daniel Johnson can never again have legal standing.

Pierce v. Johnson, 154 N.C. App. 34, 40, 571 S.E.2d 661, 665 (2002). In recognition of this principle, N.C. Gen. Stat. § 28A-18-1(a) (2003) provides that upon the death of any person, all right to defend any action existing against the deceased "shall survive . . . against the personal representative or collector of his estate."

As a result, when Dr. Newell died, this action did not abate, but it could not be continued against Dr. Newell or his estate generally. The action survived only against the personal representative or collector of Dr. Newell's estate. *Shaw v. Mintz*, 151 N.C. App. 82, 86, 564 S.E.2d 593, 596 (Greene, J., dissenting) ("An injured party's right to proceed with a claim against a person she claims to have negligently caused her injuries is not abated by the death of the party alleged to have been negligent, as the action survives against the personal representative or collector of the decedent's estate."), *adopted per curiam*, 356 N.C. 603, 572 S.E.2d 782 (2002). The personal representative must then be substituted under N.C.R. Civ. P. 25(a). *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 720 (2005) (reversing grant of summary judgment against deceased defendant when the administrator of the estate, although having knowledge of the claim, had not yet been substituted as a party); *In re Estate of Etheridge*, 33 N.C. App. 585, 587, 235 S.E.2d 924, 926 (1977) ("If, as in the case at bar, there is a death of a party to an action, then G.S. 1A-1, Rule 25(a) . . . requires the substitution of either a personal representative *or* a successor in interest.").

Thus, at the present moment, the trial court's summary judgment order with respect to Dr. Newell has no effect: it cannot be effective as to Dr. Newell's estate because the executrix for that estate has never been made a party to the action, and it cannot be effective as to Dr. Newell himself because he passed away. Although the parties urge the Court to address the merits of plaintiffs' substitution motion on

appeal, we cannot do so because the trial court entered no ruling on that motion.

Rule 10 of the North Carolina Rules of Appellate Procedure 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. *It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.*

N.C.R. App. P. 10(b)(1) (emphasis added). Substitution in the event of death is not automatic and, accordingly, whether or not to allow substitution must be decided in the first instance by the trial court. We have no choice but to vacate the trial court's summary judgment order with respect to "Dr. Newell (and his estate)" and remand for further proceedings.

Vacated and remanded in part, and affirmed in part.

Judges HUNTER and HUDSON concur.

QUANTUM CORPORATE FUNDING, LTD., PLAINTIFF v. B.H. BRYAN BUILDING COMPANY, INC., DEFENDANT

No. COA04-1554

(Filed 17 January 2006)

1. Corporations— access to courts—no certificate of authority—no other activity other than filing suit

The courts of North Carolina are open to a foreign corporation, without a certificate of authority, whose sole action in North Carolina is the filing of a lawsuit. Here, the trial court did not err by denying defendant's motion to dismiss plaintiff's action to enforce a New York judgment where defendant offered no evidence of plaintiff engaging in any other business activity in North Carolina.

2. Civil Procedure— order denying motion—no findings—presumed findings not sufficient

An order denying a motion to set aside a New York judgment, and granting plaintiff's motion to enforce the judgment, was remanded for further proceedings where the device of "presumed findings" was not sufficient to permit a fair review of the court's order.

Appeal by defendant from order entered 9 August 2004 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 8 June 2005.

The Law Office of James P. Laurie III, PLLC, by James P. Laurie III, for plaintiff-appellee.

Eisele, Ashburn, Greene & Chapman, PA, by Douglas G. Eisele, for defendant-appellant.

GEER, Judge.

B.H. Bryan Building Company, Inc. ("Bryan Building") appeals an order of the trial court enforcing a foreign judgment from the State of New York in favor of Quantum Corporate Funding, Ltd. ("Quantum"). Bryan Building argues on appeal that the trial court erred by (1) refusing to set aside the foreign judgment due to a lack of personal jurisdiction and (2) denying its motion to dismiss based on Quantum's failure to obtain a certificate of authority to do business in this State. We hold that the trial court properly denied the motion to dismiss, but because we are unable to determine, given the record in this case, whether the trial court properly concluded that the New York judgment should be given full faith and credit, we remand for findings of fact and conclusions of law.

Facts

Defendant Bryan Building was the general contractor on a project at the Mitchell Community College in Mooresville, North Carolina. As part of the project, defendant hired Cypress Alliance, Inc. ("Cypress") as a subcontractor. Cypress subsequently assigned its rights to payment from Bryan Building to plaintiff Quantum.

On 22 May 2003 and again on 4 June 2003, Quantum sent letters (called "estoppel certificates" by the parties) to Bryan Building, stating that Quantum was the assignee of payment for Cypress, setting out the amount that Cypress contended was due, and asking that

Bryan Building acknowledge "that the above invoice Amount(s) are correct and owing; that the work and or merchandise has been ordered from and completed by the captioned Client, and accepted by us; [and] that there are not now, nor will there be, any claims[,] setoffs, or defenses beyond 20% of the Invoice Amount(s) . . . ." The letters also specified that "New York law, jurisdiction and venue shall apply hereto." On the 22 May 2003 letter, Bryan Building's president struck out the amount stated as due ($9,536.90) and wrote in $2,762.40 before signing the letter below the words "Agreed & Accepted." Likewise, on the 4 June 2003 letter, he struck out the $12,001.08 amount indicated as due and substituted $9,000.00 before signing the letter.

On 28 August 2003, Quantum filed suit against Bryan Building in the Civil Court of New York seeking recovery from Bryan Building in the amount of $11,762.40. Quantum served Bryan Building by serving New York's Secretary of State on 23 September 2003. On 6 January 2004, the Civil Court of New York entered a default judgment in favor of Quantum for $12,360.34—the amount claimed by Quantum plus interest and court fees.

On 17 March 2004, Quantum sought to enforce the judgment in this State, pursuant to N.C. Gen. Stat. § 1C-1703 (2003), by filing a properly authenticated copy of the judgment. Bryan Building filed a verified Notice of Defenses to Enforcement of Foreign Judgment on 23 April 2004; a Motion to Set Aside Judgment and Execution on 22 June 2004; and a motion to dismiss on 9 July 2004, arguing that Quantum was not licensed to transact business in this State and, therefore, was not entitled to bring a civil action in the courts of this State. In response, Quantum filed a motion to enforce the foreign judgment on 9 July 2004.

After a hearing, the trial court entered an order on 9 August 2004, denying Bryan Building's motion to set aside the judgment and motion to dismiss and granting Quantum's motion to enforce the judgment. The court directed that Quantum could proceed with enforcement and execution of the foreign judgment in the amount of $12,360.34. Bryan Building filed a notice of appeal from the trial court's order on 7 September 2004.

I

[1] We first address Bryan Building's contention that the trial court erred in denying its motion to dismiss. The parties do not dispute that Quantum did not obtain a license to transact business in this State

under N.C. Gen. Stat. § 55-15-02 (2003) prior to filing this action. Bryan Building argues that Quantum's failure to do so precluded it from maintaining this action and that the trial court was, therefore, required to grant Bryan Building's motion to dismiss.

N.C. Gen. Stat. § 55-15-02(a) provides:

> No foreign corporation transacting business in this State without permission obtained through a certificate of authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless the foreign corporation has obtained a certificate of authority prior to trial.

Thus, this section "closes the courts of the state to suits maintained by corporations which should have but which have not obtained a certificate of authority." *Id.* official commentary.

Bryan Building does not argue that Quantum conducted business in this state other than by filing suit to enforce its foreign judgment. This appeal, therefore, presents the question whether filing a lawsuit, without more, brings a foreign corporation within the scope of N.C. Gen. Stat. § 55-15-02(a). Section 55-15-02(a)'s certificate of authority requirement applies only to a "foreign corporation *transacting business in this State*." (Emphasis added.) This Court held in *Harold Lang Jewelers, Inc. v. Johnson*, 156 N.C. App. 187, 189-90, 576 S.E.2d 360, 361-62, *disc. review denied*, 357 N.C. 458, 585 S.E.2d 765 (2003), that we must look to N.C. Gen. Stat. § 55-15-01(b) (2003) in deciding whether a foreign corporation is transacting business within the meaning of § 55-15-02.

N.C. Gen. Stat. § 55-15-01(b) lists a number of activities that "shall not be considered to be transacting business in this State solely for the purposes of this Chapter." One such activity is "[*m*]*aintaining or defending any action or suit* or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes . . . ." N.C. Gen. Stat. § 55-15-01(b)(1) (emphasis added). Thus, when we read §§ 55-15-01(b)(1) and 55-15-02 together, as we must, it leads to the conclusion that a foreign corporation need not obtain a certificate of authority in order to maintain an action or lawsuit so long as the company is not otherwise transacting business in this State. The courts of this State are open to a foreign corporation, without a certificate of authority, whose sole action in this State is the filing of a lawsuit. *See* N.C. Gen. Stat. § 55-15-01 official com-

mentary ("[A] corporation is not 'transacting business' solely because it resorts to the courts of the state to recover an indebtedness, enforce an obligation, . . . or pursue appellate remedies.").

Bryan Building relies upon *Kyle & Assocs., Inc. v. Mahan*, 161 N.C. App. 341, 587 S.E.2d 914 (2003), *aff'd per curiam*, 359 N.C. 176, 605 S.E.2d 142 (2004), and *Leasecomm Corp. v. Renaissance Auto Care, Inc.*, 122 N.C. App. 119, 468 S.E.2d 562 (1996). Neither case, however, addressed the precise issue presented by this case. In *Kyle*, the foreign corporation had obtained a certificate of authority prior to enforcement of its foreign judgment in North Carolina, but had not obtained the certificate prior to obtaining that judgment in South Carolina. 161 N.C. App. at 343, 587 S.E.2d at 915. Because this Court only held that the plaintiff was not required to obtain a certificate of authority prior to trial in the foreign jurisdiction, this Court was not required to address whether a company not otherwise transacting business in North Carolina was required to obtain a certificate of authority prior to seeking enforcement of a foreign judgment. Similarly, in *Leasecomm*, this Court was not required to address the issue posed by this case since there was no dispute that the foreign corporation in *Leasecomm* was conducting business apart from filing suit to enforce a foreign judgment. 122 N.C. App. at 120-21, 468 S.E.2d at 563-64.

Because the cases did not present the issue, neither opinion was required to consider N.C. Gen. Stat. § 55-15-01(b)(1) and neither did so. To the extent that either case suggests that a foreign corporation not otherwise transacting business in North Carolina must obtain a certificate of authority prior to suing to enforce a foreign judgment, that language constitutes *dicta* and is not controlling.

Accordingly, we hold that Quantum's action of enforcing its foreign judgment was not "transacting business" in North Carolina within the meaning of N.C. Gen. Stat. § 55-15-02. Because Bryan Building has not offered any evidence of Quantum's engaging in any other business activity in this State, the trial court did not err in denying Bryan Building's motion to dismiss.

II

[2] We cannot, however, so readily decide Bryan Building's contention that the trial court erred in denying its motion to set aside the judgment and in granting Quantum's motion to enforce the judgment. The Uniform Enforcement of Foreign Judgments Act provides that a

judgment from another state, filed in accordance with the Act, "has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner." N.C. Gen. Stat. § 1C-1703(c). Once the foreign judgment has been filed and the judgment debtor has notice of the filing, then the judgment debtor has 30 days to file a motion for relief or notice of defenses. N.C. Gen. Stat. § 1C-1705(a) (2003). If the judgment debtor contests the foreign judgment, as Bryan Building did, then the judgment creditor may move for enforcement of the judgment, and the trial court should hold a hearing to determine if the judgment is "entitled to full faith and credit." *HCA Health Servs. of Tex., Inc. v. Reddix*, 151 N.C. App. 659, 663, 566 S.E.2d 754, 756 (2002).

The judgment creditor initially has the burden of proving that the judgment is entitled to full faith and credit, but " '[t]he introduction into evidence of a copy of the foreign judgment, authenticated pursuant to Rule 44 of the Rules of Civil Procedure, establishes a presumption that the judgment is entitled to full faith and credit.' " *Id.* (quoting *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 301, 429 S.E.2d 435, 437 (1993)). The judgment debtor may rebut this presumption by establishing any of the available defenses set forth in the North Carolina Foreign Money Judgments Recognition Act, N.C. Gen. Stat. §§ 1C-1800 to 1808 (2003). *Id.*

In this case, Quantum met its burden by filing the properly authenticated judgment. In order to rebut the presumption that the judgment was entitled to full faith and credit, Bryan Building relied upon the defense that New York lacked personal jurisdiction over it. *See* N.C. Gen. Stat. § 1C-1804(a)(2) ("A foreign judgment is not conclusive if . . . [t]he foreign court did not have personal jurisdiction over the defendant . . . ."). A foreign judgment is not denied enforcement for a lack of personal jurisdiction if "defendant, prior to the commencement of the proceedings, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved . . . ." N.C. Gen. Stat. § 1C-1805(a)(3).

In support of its argument that personal jurisdiction existed in New York, Quantum points to the estoppel certificates, arguing that (1) the certificates establish that Bryan Building consented to jurisdiction in New York within the meaning of N.C. Gen. Stat. § 1C-1805(a)(3), and (2) Bryan Building's forwarding of a counteroffer to a business in New York established sufficient minimum contacts within the state of New York to establish personal jurisdic-

tion. Quantum does not assert any additional basis for jurisdiction apart from the estoppel certificates.

As an initial matter, we address Bryan Building's challenge to the trial court's order settling the record on appeal and requiring that the estoppel certificates be included in the record on appeal. "A trial court's order settling the record on appeal is final and will not be reviewed on appeal. Review of an order settling the record on appeal is available, if at all, only by way of *certiorari*." *Penland v. Harris*, 135 N.C. App. 359, 363, 520 S.E.2d 105, 108 (1999) (internal citation omitted). Because Bryan Building has not filed a petition for writ of certiorari, we do not consider defendant's assignment of error regarding the record on appeal. *Id.* We note, however, that there is no dispute that the estoppel certificates were submitted to the trial judge in support of Quantum's motion and in opposition to Bryan Building's motions.

Turning to the merits, we must first point out that the trial court did not make any findings of fact or conclusions of law in deciding the parties' motions. Rule 52(a)(2) of the Rules of Civil Procedure provides "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b)." When, as here, Rule 41(b) does not apply and no request for findings of fact was made, this Court presumes that the trial judge made those findings of fact necessary to support its judgment. *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 723, 556 S.E.2d 592, 595 (2001). On appeal, this Court "then determines whether there is competent evidence to support the presumed findings of fact." *Id.*

Bryan Building first argues that the record contains no evidence to support a finding of personal jurisdiction. We agree with Quantum that the trial court's order would be supported by a presumed finding that Quantum and Bryan Building entered into a contract, in the form of the estoppel certificates, which included a term providing for jurisdiction in New York. The question on appeal is whether such a presumed finding is supported by competent evidence.

Quantum recognizes that Bryan Building's alteration of those certificates constituted a counteroffer and then states with no citation to the record: "Upon receipt of the signed Estoppel Certificates sent by Bryan to Quantum in New York, Quantum accepted Bryan's counter offers." We have found no evidence in the record supporting Quantum's assertion that it accepted the counteroffers. In the

absence of acceptance of the counteroffers, there is no contract. *See Normile v. Miller*, 313 N.C. 98, 108, 326 S.E.2d 11, 18 (1985) (holding that a counteroffer requires the original offeror to either accept or reject the new offer in order to have a binding contract); *see also Metro. Steel Indus., Inc. v. Citnalta Constr. Corp.*, 302 A.D.2d 233, 233, 754 N.Y.S.2d 278, 279 (App. Div. 1st Dep't 2003) (holding that no contract existed where one party made an offer, and the other party returned it with changes, and the original offeror never formally accepted the counteroffer).

Quantum, however, argues that Bryan Building did in fact agree to jurisdiction in New York because when it altered the amount owed to Quantum, it did not alter the clause dealing with jurisdiction, thus in effect agreeing to this provision. This argument is misplaced. In order for a contract to arise, "the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 657, 267 S.E.2d 584, 586 (1980). Phrased differently, "in order that there may be a valid and enforceable contract between parties, there must be a meeting of the minds of the contracting parties upon all essential terms and conditions of the contract." *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 221, 250 S.E.2d 587, 594 (1978). A party cannot seek to enforce one essential term when it has not agreed to other essential terms. *See Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) ("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."). Thus, there must have been acceptance of Bryan Building's counteroffer for an agreement regarding jurisdiction to exist.

Alternatively, however, Quantum claims that personal jurisdiction existed in New York simply because Bryan Building sent a counteroffer to Quantum in the State of New York, thus availing itself of the privilege of transacting business in that state. Quantum cites only *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298, 78 S. Ct. 1228, 1240 (1958) (holding that personal jurisdiction over a party exists when that party does some "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"). It cites no authority—nor have we found any—suggesting that a counteroffer mailed to another state, without any other activity in that state, is sufficient to support a finding of minimum contacts. The

trial court's order enforcing the foreign judgment thus must depend on a finding that the estoppel certificates constituted a contract between the parties.

We are left with the following conundrum. On the one hand, Bryan Building argues generally that the record contains no evidence to support a finding of personal jurisdiction in New York. Because we can find no evidence in the record before us that Quantum accepted Bryan Building's counteroffer, we have to agree with this general proposition. On the other hand, Bryan Building has not made any specific argument regarding whether its counteroffer was accepted. If we simply reverse the trial court without requiring further proceedings, we risk creating an appeal for Bryan Building on an issue that may not have been in dispute below. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam) ("It is not the role of the appellate courts, however, to create an appeal for an appellant" in part because "an appellee [may be] left without notice of the basis upon which an appellate court might rule."). We have no transcript of the hearing or findings of fact to indicate what may or may not have been argued or conceded.

We note that in connection with its challenge to the order settling the record on appeal, Bryan Building argued that the estoppel certificates should have been excluded as unenforceable under N.C. Gen. Stat. § 22B-3 (2003), which provides:

> Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.

This argument presumes not only that there was a contract, but that it was entered into in North Carolina. Given the state of the record, any finding of fact one way or another regarding where the contract was entered into is not supported by evidence.

If we reverse the order for lack of evidence to support a presumed finding, Bryan Building unfairly prevails based on an argument that it did not specifically make, but if we uphold the or-

der, Quantum prevails despite an apparent lack of evidence to support the order and despite Bryan Building's general objection regarding the sufficiency of the evidence. Further, we have no basis for determining what factual or legal theory the trial court may have embraced in finding personal jurisdiction. It may have concluded that a counteroffer, standing alone, is sufficient—a theory that we have rejected.

Under the circumstances of this case and given the arguments and record on appeal (including the lack of any transcript from the hearing), "we must vacate the order and remand for further proceedings, including an evidentiary hearing if necessary, and a new order with appropriate findings of fact and conclusions of law." *HCA Health Servs.*, 151 N.C. App. at 667, 566 S.E.2d at 758. We recognize that in *HCA*, the parties requested findings of fact, but because, in this case, the device of "presumed findings" is not sufficient to permit a fair review of the court's order, we find ourselves in an identical situation to that of *HCA*.

Vacated and remanded.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. DORSEY IRVIN HADDEN

No. COA04-1606

(Filed 17 January 2006)

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

Defendant's assignments of error two, four, five, and six are deemed under N.C. R. App. P. 28(b)(6) because defendant failed to argue them.

2. Appeal and Error— preservation of issues—guilty plea—writ of certiorari—motion for appropriate relief

Although defendant does not have a statutory right to appeal since he pleaded guilty at trial and now contends the trial court erred in a multiple taking indecent liberties with a child sentencing proceeding by determining without a jury that defendant had ten prior record level points and by failing to consider mitigating

factors, the court can address the first issue because: (1) defendant has a petition for writ of certiorari pending before the Court of Appeals; and (2) defendant addressed the first issue in his motion for appropriate relief.

3. Sentencing— prior record level—preponderance of evidence—similarity of out-of-state convictions—presumption of regularity for prior convictions

The trial court did not err in a multiple taking indecent liberties with a child sentencing proceeding by determining without a jury and by a preponderance of the evidence that defendant had ten prior record level points, because: (1) defendant's prior North Carolina convictions for assault inflicting serious injury and larceny merited one point each since that determination is a fact of a prior conviction; (2) four of defendant's out-of-state convictions were substantially similar to offenses under North Carolina law and these determinations did not offend defendant's Sixth Amendment right to a jury trial; and (3) prior convictions are entitled to a presumption of regularity when challenged under N.C.G.S. § 15A-980 and the burden of overcoming the presumption properly rests with defendant.

Appeal by defendant from judgments entered 26 July 2004 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 24 August 2005.

Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Calloway, for the State.

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

McGEE, Judge.

Dorsey Irvin Hadden (defendant) pleaded guilty to four counts of taking indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1, a class F felony. The State presented the trial court with a prior record level worksheet that included several prior convictions of defendant in North Carolina, New York, and Illinois. The State also presented testimony and exhibits regarding defendant's prior convictions. Based on the State's evidence, the trial court found that defendant had ten prior record points and sentenced defendant at a prior Record Level IV. Defendant presented evidence of mitigating factors, but the trial court found none. The trial court imposed four consecutive sentences ranging from a minimum of twenty-five months to a

maximum of thirty months, the statutory maximum sentence in the presumptive range. Defendant appeals.

At the sentencing hearing, the State presented evidence from Eugene Lepler, a detective with the Office of the District Attorney, concerning defendant's prior criminal history. Detective Lepler testified that he ran a reference check on defendant using the database of the North Carolina Division of Criminal Information (DCI) and the database of the National Crime Information Center (NCIC). Detective Lepler entered defendant's name and date of birth to run a DCI check and obtain defendant's FBI number. Detective Lepler then entered defendant's name and FBI number to run a national check through NCIC. Both DCI and NCIC generated a report listing defendant's prior convictions. The State introduced both reports into evidence. Detective Lepler gave testimony regarding each of the thirteen convictions listed in the reports.

According to Detective Lepler's testimony, defendant had been convicted in the State of New York on the following charges: possession of a dangerous weapon on 11 June 1971; assault, grand larceny and robbery on 19 June 1972; third-degree grand larceny on 8 March 1979; second-degree attempted criminal impersonation on 24 June 1985; obtaining transportation without pay on 14 September 1989; and possession of marijuana in a public place on 29 August 2003. For each charge, Detective Lepler identified the statute number upon which defendant was convicted and the length of the resulting sentence. The State, over objection, offered into evidence a copy of the New York penal code.

Detective Lepler also testified that defendant had been convicted of the following charges in the State of Illinois: assault with a deadly weapon on 10 October 1964, petty theft on 26 July 1965, and burglary on 26 July 1965. The State offered into evidence, over objection, a copy of the Illiois criminal statutes. Detective Lepler testified that defendant had been convicted in North Carolina of assault inflicting serious injury on 9 May 1959 and larceny on 9 January 1961.

Based on Detective Lepler's testimony, the prior conviction records, and copies of the New York and Illinois statutes, the trial court found the following:

> [T]hat all of the evidence is before the Court, and giving the benefit of any doubt to . . . defendant, that the robbery conviction in the State of New York was substantially similar to common law

robbery in North Carolina, and the Court will count that as a class G offense;

That the misdemeanor grand larceny in New York in 1979, all of these were substantiated by sufficient printout with regard to defendant's record, with his Social Security number, with his FBI number, with his date of birth, the Court finds that it is one and the same in these various other states;

And, furthermore, that the four misdemeanors starting with the grand larceny in New York in 1979, going back to North Carolina in the assault inflicting serious injury in 1959 and larceny in 1961 and assault with a deadly weapon in 1964 in Illinois are all substantially similar to the class 1 or A1 misdemeanors in North Carolina; therefore, the Court will assess the appropriate amount of points for each of those;

And, furthermore, the burglary in Illinois, the Court looking at a copy of the statute, holds that such statute is tantamount to and substantially similar to felonious breaking and entering in North Carolina, enough for sentencing purposes.

With these six prior convictions, the trial court assessed defendant with ten prior record points and calculated defendant would be sentenced at a prior Record Level IV.

After the trial court made these determinations, the State introduced the unsworn testimony of the child's grandmother. The grandmother informed the trial court that the child was thirteen years old at the time that defendant took indecent liberties with the child, and that the child was currently in therapy. The State requested that defendant receive the maximum sentence within the presumptive range.

At the sentencing hearing, defendant presented testimony from his brother and sister. Defendant's brother testified that defendant had steady employment, a good support system in North Carolina, and that defendant had good relationships with defendant's "four or five . . . local" children. Defendant's sister agreed with her brother's assessment of defendant's employment history and defendant's support system. However, defendant's sister testified that she knew of only one child of defendant who resided in North Carolina. She further testified that defendant told her he was paying child support for that one child. Based on this testimony and defendant's plea, defense counsel asked the trial court to find as mitigating factors that defend-

ant: (1) voluntarily acknowledged wrongdoing; (2) accepted responsibility for his conduct; (3) supported a family; (4) had a good support system; and (5) had a positive employment history. At the close of defense counsel's argument, defendant personally asked the trial court to take into consideration his employment, his family, and his cooperation during pre-trial release. The trial court found no mitigating factors and sentenced defendant within the Level IV presumptive range. Defendant appeals.

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[1] Defendant presents no arguments for his assignments of error two, four, five and six, and they are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6). Defendant argues two assignments of error on appeal: (I) whether the trial court erred by determining, without a jury, that defendant had ten prior record level points and (II) whether the trial court erred by failing to consider mitigating factors at the sentencing hearing.

[2] After filing his brief, defendant filed a Motion for Appropriate Relief (MAR) with this Court on 6 April 2005. In his MAR, defendant addresses his first assignment of error. Defendant states that while he objected at the sentencing hearing to the trial court's determination, without a jury, of his prior record level, defendant did not specify the basis for his objection. Therefore, defendant filed a MAR to preserve the issue for appellate review. Defendant contends that the determination by the trial court of defendant's contested prior record level, without a jury, violated defendant's right to a jury trial under the Sixth and Fourteenth Amendments to the Constitution. Defendant requests that his sentence be vacated and the case remanded for resentencing by a jury.

Subsequently, defendant filed a Petition for Writ of Certiorari with this Court on 25 April 2005. In his petition, defendant asserts that while his right to an appeal is limited because of his guilty plea, both of his assignments of error present issues of legal significance that should be addressed by our Court. The State filed a response to defendant's petition and a motion to dismiss defendant's petition.

A defendant who has pleaded guilty to a felony is entitled to appeal only two issues as a matter of right: (1) whether a sentence is supported by evidence at trial, if the defendant's resulting minimum sentence is outside the presumptive range for the defendant's prior record or conviction level and class of offense; and (2) whether the sentence imposed resulted from an incorrect finding of the defendant's prior record level or is a type or duration of sentence not auth-

orized by statute. N.C. Gen. Stat. § 15A-1444(a1)-(a2) (2003). In the present case, defendant does not raise either of these two issues on appeal. Rather, defendant makes a procedural, constitutional argument about the determination of his sentence. Therefore, defendant does not have a statutory right to appeal the issues presented.

Except where a defendant has made a motion to withdraw a guilty plea, a defendant who has pleaded guilty to a felony may petition our Court for review by writ of certiorari. N.C. Gen. Stat. § 15A-1444(e) (2003). However, the Rules of Appellate Procedure limit this Court's ability to issue a writ of certiorari to three circumstances: (1) when a defendant's right to appeal has been lost by failure to take timely action; (2) when no right to appeal from an interlocutory appeal exists; and (3) when a trial court has denied a defendant's MAR. N.C.R. App. P. 21(a)(1); *see State v. Nance*, 155 N.C. App. 773, 774, 574 S.E.2d 692, 693 (2003). None of these circumstances apply in the present case. Therefore, this Court is without authority under N.C.R. App. P. 21 to issue a writ of certiorari.

However, since defendant has a petition for writ of certiorari pending before this Court, we may address defendant's MAR. *See State v. Jamerson*, 161 N.C. App. 527, 530, 588 S.E.2d 545, 547 (2003) ("[A]ppellate courts may rule on such a motion [for appropriate relief] under N.C. Gen. Stat. § 15A-1418 only when the defendant has either an appeal of right or a properly pending petition for a writ of certiorari."). Because defendant's MAR addresses his first assignment of error, whether the trial court's determination of his prior record level violated his Sixth Amendment right to a jury trial, we may review this assignment of error. Because defendant does not address his second assignment of error in his MAR, we must dismiss defendant's appeal as to the second assignment of error.

[3] Defendant argues that the trial court erred by determining, without a jury, and by a preponderance of the evidence, that defendant had ten prior record level points. Defendant contends that North Carolina's statutory scheme of calculating prior record levels for sentencing must be reexamined in light of the United States Supreme Court's recent case of *Shepard v. United States*, 544 U.S. 13, 161 L. Ed. 2d 205 (2005). Under North Carolina's structured sentencing scheme, "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the [trial] court finds to have been proved[.]" N.C. Gen. Stat. § 15A-1340.14(a) (2003). The burden of proving the existence of a prior conviction is on the State, which must prove "by

a preponderance of the evidence, that a prior conviction exists and that the offender before the [trial] court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2003). The State may prove a prior conviction by: (1) stipulation of the parties; (2) an original or copy of the trial court record of the prior conviction; (3) a copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts; or (4) any other method found by the court to be reliable. N.C.G.S. § 15A-1340.14(f).

N.C. Gen. Stat. § 15A-1340.14(e) (2003) provides the procedure for classifying prior convictions from other states:

> (e) Classification of Prior Convictions From Other Jurisdictions.—. . . If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

In the present case, the trial court found that defendant had been convicted of two prior misdemeanors under North Carolina law and assigned points to those offenses in accordance with N.C. Gen. Stat. § 15A-1340.14(a)-(b). The trial court also found, pursuant to N.C. Gen. Stat. § 15A-1340.14(e), that defendant's prior Illinois burglary conviction was substantially similar to felony breaking and entering under North Carolina law; defendant's prior New York robbery conviction was substantially similar to common law robbery in North Carolina; and defendant's New York grand larceny conviction and Illinois assault conviction were substantially similar to Class 1 or A1 misdemeanors under North Carolina law. Defendant argues that, in light of *Shepard*, these determinations should have been found by a jury beyond a reasonable doubt.

The issue in *Shepard* was what a trial court, in the context of the enhanced sentencing provisions of the Armed Career Criminals Act of 1986 (ACCA), 18 USC § 924(e), could review to resolve disputed factual issues about a prior conviction. ACCA mandates a fifteen-year

minimum sentence for offenders who possess a firearm after three prior convictions for "violent" felonies. *Shepard*, 544 U.S. at 15, 161 L. Ed. 2d at 211. Burglary is a violent felony under ACCA only if committed in a building or enclosed space. *Id.* Because the defendant in *Shepard* had a prior conviction for burglary under a statute broader than ACCA, the trial court determined whether the defendant's prior burglaries were committed within a building or enclosed space. The Supreme Court held that the trial court's determination of the character of the prior conviction was "a disputed finding of fact about what the defendant and [the trial court] must have understood as the factual basis of the prior plea." *Shepard* at 25, 161 L. Ed. 2d at 217. Because this disputed finding of fact raised Sixth Amendment concerns, the Supreme Court limited the trial court's judicial fact-finding to an examination of "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial [court] to which the defendant assented." *Shepard* at 15, 161 L. Ed. 2d at 211. In the present case, the trial court did not look beyond the "statutory definition" of the out-of-state offenses in making its judicial determination of substantial similarity, thereby acting in accord with *Shepard*. *Cf. United States v. Washington*, 404 F.3d 834 (4th Cir. 2005) (holding that the sentencing court's use of evidence beyond that allowed by *Shepard* in making findings of fact regarding the circumstances of the defendant's prior convictions violated the defendant's Sixth Amendment rights).

Shepard followed *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), in a line of Supreme Court cases involving the Sixth Amendment. Under *Blakely*, " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " *Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)). The rule of *Blakely* as applied to North Carolina's structured sentencing scheme 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." *State v. Allen*, 359 N.C. 425, 437, 615 S.E.2d 256, 265 (2005).

This Court recently held in *State v. Jordan*, 174 N.C. App. 479, 621 S.E.2d 229 (2005), that where the State met its burden of proof of prior North Carolina convictions by presenting a certified DCI printout and DMV records, the trial court was entitled to sentence the

defendant to the presumptive range sentence based on the jury's verdict and the State's evidence of prior convictions. *Jordan* at 488, 621 S.E.2d at 235. Accordingly, we find no error in the trial court's determination in the present case, by a preponderance of the evidence, that defendant's prior North Carolina convictions for assault inflicting serious injury and larceny merited one point each because that determination is a fact of a prior conviction and not precluded by *Blakely* or *Allen*. *Id. See also State v. Poore*, 172 N.C. App. 839, 616 S.E.2d 639 (2005) (holding that a determination by a trial court that all elements of a defendant's current offense were included in a prior North Carolina offense did not violate *Blakely* or *Allen*).

Nor do we find error with the trial court's determination, by a preponderance of the evidence, that four of defendant's out-of-state convictions were substantially similar to offenses under North Carolina law. Our Court recently held in *State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006) that a determination of substantial similarity under N.C. Gen. Stat. § 15A-1340.14(e) is a question of law within the province of the trial court, and we are bound by that decision. *Hanton* at 254, 623 S.E.2d at 604. In the present case, the State presented competent evidence, under N.C. Gen. Stat. § 15A-1340.14(f), of defendant's prior out-of-state convictions. From that evidence, which fell within the mandates of *Shepard*, the trial court determined as a matter of law that defendant's prior burglary conviction under Illinois law was substantially similar to felony breaking and entering under North Carolina law; defendant's prior robbery conviction in New York was substantially similar to common law robbery in North Carolina; and defendant's grand larceny conviction in New York and assault conviction in Illinois were substantially similar to Class 1 or A1 misdemeanors under North Carolina law. These determinations by the trial court do not offend defendant's Sixth Amendment right to a jury trial under *Blakely*, *Shepard*, or *Allen*.

Defendant raises one additional argument in his brief related to his assignment that the trial court erred in determining, without a jury, his prior record level. The additional argument does not appear in defendant's MAR, and so we need not reach it. However, we elect to address defendant's additional point briefly, as it raises an important issue recently addressed by our Court. Defendant argues the trial court erred in assigning prior record points to three misdemeanors in Illinois and North Carolina, where no evidence was presented showing whether defendant was represented by counsel or whether defendant had waived his Sixth Amendment right to an attorney at

those trials. N.C. Gen. Stat. § 15A-980(a) (2003) provides that a defendant has the right to suppress a prior conviction that was obtained in violation of his right to counsel if the use of the conviction will affect the length of imprisonment. Upon moving for suppression of a conviction, a defendant bears the burden of proving by a preponderance of the evidence that the conviction was obtained in violation of his right to counsel. N.C. Gen. Stat. § 15A-980(c) (2003). This Court has held that a defendant must prove: (1) indigence, (2) lack of counsel, and (3) absence of a waiver of the right to counsel. *State v. Rogers*, 153 N.C. App. 203, 216, 569 S.E.2d 657, 666 (2002), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 442-43 (2003). At trial, defendant argued only one ground under *Rogers*: absence of a waiver of the right to counsel. On appeal, defendant argues that the burden of proving the lack of a waiver should fall to the State, rather than to a defendant. Defendant argues that by placing the burden of proof on a defendant, *Rogers* violates *Shepard*. Our Court recently decided this very issue and reaffirmed the *Rogers* burden in *Jordan*, which held that "prior convictions are entitled to a 'presumption of regularity' " when challenged under N.C. Gen. Stat. § 15A-980 and the burden of overcoming the presumption properly rests with the defendant. *Jordan* at 484-85, 621 S.E.2d at 233 (quoting *Parke v. Raley*, 506 U.S. 20, 29-31, 121 L. Ed. 2d 391, 403-04 (1992)).

Affirmed.

Judges McCULLOUGH and JACKSON concur.

GERALD S. BRODERICK, Plaintiff v. VIVIAN L. BRODERICK, Defendant

No. COA05-103

(Filed 17 January 2006)

Appeal and Error— appellate rules violations—failure to limit scope of review—failure to give adequate notice

Plaintiff's appeal is dismissed for failure to comply with N.C. R. App. P. 10(c)(1), because: (1) plaintiff's single assignment of error without record references does not set forth a legal issue for determination and does no more than duplicate the notice of appeal which does not serve its function of limiting the scope of

review; (2) appellee did not receive adequate notice of the basis upon which the appeal might be resolved; and (3) the Court of Appeals cannot invoke N.C. R. App. P. 2 as a means of addressing issues not raised by an appellant.

Judge WYNN concurring in the result.

Appeal by plaintiff from order entered 7 October 2004 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 18 October 2005.

Timothy M. Stokes for plaintiff-appellant.

Susan V. Thomas for defendant-appellee.

GEER, Judge.

"The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). In this case, plaintiff Gerald S. Broderick has failed to comply with Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure, and we therefore dismiss his appeal.

Rule 10(c) of the North Carolina Rules of Appellate Procedure states in relevant part:

> (1) *Form; Record references*. A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

In this case, Mr. Broderick included a single assignment of error in the record on appeal, stating only, "Plaintiff-Appellant assigns as error the following: Entry of the Order for Modification of Alimony filed October 7, 2004." No record references follow this statement.

Contrary to Rule 10(c), Mr. Broderick's assignment of error does not set forth a legal issue for our determination. *See*, *e.g.*, *Dep't of Transp. v. Rowe*, 353 N.C. 671, 674, 549 S.E.2d 203, 207 (2001) (alleged error "not properly presented" to this Court where plaintiff failed to comply with "Rule 10(c) of the North Carolina Rules of Appellate Procedure [which] requires that an appellant state the legal basis for all assignments of error"), *cert. denied*, 534 U.S. 1130, 151 L. Ed. 2d 972, 122 S. Ct. 1070 (2002). Indeed, the assignment of error does no more than duplicate the notice of appeal and, thus, also does not serve its function of limiting our scope of review. N.C.R. App. P. 10(a) ("Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10.").

Viar prohibits this Court from invoking Rule 2 of the Rules of Appellate Procedure as a means of addressing issues not raised by the appellant. Doing so would amount to "creat[ing] an appeal for an appellant" and leaves an appellee "without notice of the basis upon which an appellate court might rule." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. Because Mr. Broderick's assignment of error in this case sets out no legal basis for arguing error, it gives rise to the same problem addressed in *Viar*. The assignment of error places no limit on the legal issues that could be addressed on appeal and the appellee fails to receive adequate notice of the basis upon which the appeal might be resolved. We are, therefore, compelled by *Viar* to dismiss this appeal based on Mr. Broderick's failure to comply with Rule 10(c)(1).

Dismissed.

Judge McGEE concurs.

Judge WYNN concurs in result with separate opinion.

WYNN, Judge, concurring in the result.

Because dismissing this appeal is mandated by our Supreme Court's decision in *Viar*, I most reluctantly join my colleagues in declining to decide the merits of this appeal.

I write separately to urge our Supreme Court to abolish assignments of error under North Carolina Rules of Appellate Procedure 9(a)(1)(k), (a)(2)(h), and (a)(3)(j) pursuant to its exclusive authority to make the rules of practice and procedure for the appellate division

of the courts. *See* N.C. Const. Art. IV, § 13(2); *see also* N.C. R. App. P. 9(a)(1)(k) (providing that the record in civil actions and special proceedings must include assignments of error in accordance with Rule 10); N.C. R. App. P. 9(a)(2)(h) (providing that the record in appeals from superior court review of administrative boards and agencies must include assignments of error in accordance with Rule 10); and N.C. R. App. P. 9(a)(3)(j) (providing that the record in criminal actions must include assignments of error in accordance with Rule 10).

In my opinion, the cost of effectively denying our citizens *access to justice* in our appellate courts outweighs the benefits of strictly enforcing the technical requirements for assignments of error.

While North Carolina Appellate Rules 9(a)(1)(k), (a)(2)(h), and (a)(3)(j) require parties to include assignments of error in the record on appeal as discussed *supra*, Rule 10(c)(1) outlines the technical requirements for parties' assignments of error. Rule 10(c)(1) provides:

> (1) Form; Record references.
>
> A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

N.C. R. App. P. 10(c)(1). This Court has stated that "[o]ne purpose of [Rule 10] is to 'identify for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position.' " *State v. Baggett*, 133 N.C. App. 47, 48, 514 S.E.2d 536, 537 (1999) (quoting *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988)). "In addition, Rule 10 allows our appellate courts to 'fairly and expeditiously' review the assignments of error without making a 'voyage of discovery' through the record in order to deter-

mine the legal questions involved." *Rogers v. Colpitts*, 129 N.C. App. 421, 422, 499 S.E.2d 789, 790 (1998) (quoting *Kimmel*, 92 N.C. App. at 335, 374 S.E.2d at 437).

The laudable purposes of Rule 10(c)(1), which are to provide the appellee notice of the issues before the court and to allow the court to expeditiously determine the legal questions on appeal, can be achieved through other means, such as by reviewing the parties' briefs and the record on appeal, as illustrated in the case *sub judice*. Indeed, the strict enforcement of the requirements of Rule 10, often does no more than bar litigants such as Mr. Broderick from their pursuit of justice.

Our Supreme Court's abolishment of Rules 9(a)(1)(k), (a)(2)(h), and (a)(3)(j) would be consistent with the Federal Rules of Appellate Procedure, the Local Rules of Appellate Procedure for the United States Court of Appeals for the Fourth Circuit, and the appellate rules of other state courts, which do not require parties to file assignments of error on appeal. *See* Fed. R. App. P. 3(a) advisory committee's note (1967 Amendments) (stating "[t]he petition for allowance . . ., citations, assignments of error, summons and severance—all specifically abolished by earlier modern rules—are assumed to be sufficiently obsolete as no longer to require pointed abolition[.]"); *see also* A.R.A.P. R. 20 (Alabama Appellate Rules providing that assignments of error are no longer required); Burns Ind. AP. 5 (providing that assignments of error are not required in administrative agency appeals in Indiana); Fla. R. App. P. 9.040 (stating "[A]ssignments of error are neither required nor permitted" in Florida appellate courts); *Murcherson v. The State*, 112 Ga. App. 299, 145 S.E.2d 58 (1965) (noting that the Appellate Practice Act of 1965 abolishes assignments of error in Georgia); *Camputaro v. Stuart Hardwood Corp.*, 180 Conn. 545, 429 A.2d 796 (1980) (stating that "[a]lthough this issue was not initially assigned as error, it is properly before us under [Connecticut] Practice Book, 1978, § 3060W, which abolishes the necessity of filing assignments of error."); *Trust Co. of Chicago v. Iroquois Auto Insur. Underwriters, Inc.*, 285 Ill. App. 317, 2 N.E.2d 338 (1936) (stating "[t]he former practice of formal assignment of error attached to the record accomplished nothing in the aid of the court, and this was the reason for its abolition[.]"); Frederick Bernays Wiener, *The Supreme Court's New Rules*, 68 Harv. L. Rev. 20 (1954) (stating ". . . the petition for allowance of appeal, the order allowing appeal, the assignment of errors . . . are severally abolished[]" by the July 1, 1954 amendments to the Supreme Court's Rules). I, therefore, urge the Supreme Court

to amend our appellate rules to afford greater opportunity for access to justice and abolish assignments of error as outlined in North Carolina Rule of Appellate Procedure 9(a)(1)(k), 9(a)(2)(h), 9(a)(3)(j).

Morever, in the instant case, notwithstanding Mr. Broderick's violation of Rule 10(c)(1), the legal issues for determination on appeal are set forth in the briefs of both parties. Indeed, Ms. Broderick fully responded to the merits of Mr. Broderick's arguments in her brief and therefore had notice of the basis upon which this Court might rule. *See Viar*, 359 N.C. at 402, 610 S.E.2d 361 (stating, "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."). In responding to the merits of Mr. Broderick's arguments, Ms. Broderick did not raise any appellate rule violations in her brief or elsewhere in the record. Furthermore, a review of the transcript from the trial court proceedings reveals that Mr. Broderick made the same arguments before the trial court that he raised in his brief on appeal and properly preserved this issue for appellate review. I, therefore, would be inclined to exercise discretion under Rule 2 to suspend the North Carolina Rules of Appellate Procedure and review the merits of Mr. Broderick's appeal. *See* N.C. R. App. P. 2.

However, in *Viar*, our Supreme Court admonished this Court for applying Rule 2 to review appeals where the appellant has violated our Rules, even in instances where the party's violation does not "impede comprehension of the issues on appeal or frustrate the appellate process." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. The Court held "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Id.* at 401, 610 S.E.2d at 360. The Court further stated, "[t]he Rules of North Carolina Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Id.* at 401, 610 S.E.2d at 360 (citation omitted).

Although *Viar* mandates that we consistently apply our appellate rules, 359 N.C. at 402, 610 S.E.2d at 361, our enforcement of the appellate rules has been anything but consistent. *See Walker v. Walker*, —— N.C. App. ——, —— S.E.2d —— (COA04-1601) (6 Dec. 2005) (dismissing an appeal for appellant's failure to properly assign as error the legal issues to be briefed on appeal in violation of Rule 10(c)(1)); *Vetere v. Lepanto*, 2005 N.C. App. LEXIS 2451 (COA05-91) (15 Nov. 2005) (unpublished opinion) (dismissing an appeal for appellant's failure to

reference pages in the record under the arguments in her brief, for failure to set forth the legal basis for each assignment of error, and for failure to reference the record or the transcript in her assignments of error in violation of Rules 10(c) and 28); *Surber v. Rockingham County Bd. of Educ.*, 2005 N.C. App. LEXIS 2463 (COA05-170) (15 Nov. 2005) (unpublished opinion) (dismissing an appeal for appellant's failure to reference pages in the record or transcript in her assignments of error and for failure to reference assignments of error in her brief); *Wendt v. Thomas*, 2005 N.C. App. LEXIS 2375 (COA04-1651) (1 Nov. 2005) (unpublished opinion) (dismissing an appeal for appellant's failure to set forth the legal basis for each assignment of error, and for failure to reference the record or the transcript in her assignments of error in violation of Rules 10(c) and 28); *Mitchell v. Hicks*, 2005 N.C. App. LEXIS 1488 (COA04-1405) (2 Aug. 2005) (unpublished opinion) (dismissing an appeal for appellant's failure to state any legal basis for her assignment of error in violation of Rule 10(c)). *But see Coley v. State*, 173 N.C. App. 481, ——, 620 S.E.2d 25, 27 (2005) (noting that although the appellant violated several appellate rules, none of the violations were substantive or egregious enough to warrant dismissal of the appeal, and because the "minor rules violations" did not require the Court to create an appeal for an appellant or to examine any issues the appellant had not raised, *Viar* did not prohibit reliance on Rule 2); *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, ——, 614 S.E.2d 396, 400 (2005) (invoking Rule 2 where the defendant violated numerous appellate rules because the Court could determine the issues on appeal, the plaintiff responded to the defendant's arguments, and the plaintiff was therefore put on sufficient notice of the issues before the Court); *Cordell Earthworks, Inc. v. The Town of Chapel Hill*, 2005 N.C. App. LEXIS 1107 (COA04-189, COA04-190) (7 June 2005) (unpublished opinion) (invoking Rule 2 where appellant's assignments of error violated Rule 10, but the Court could "discern the legal issues raised by petitioner").[1]

This inconsistent application of Rule 2 to appeals where the appellant has violated our appellate rules is particularly troublesome in criminal cases. For example, in *State v. Dennison*, this Court

1. It should be noted that while an unpublished opinion of this Court does not constitute controlling legal authority under North Carolina Rule of Appellate Procedure 30(e)(3), a review of these cases is nonetheless relevant to illustrate the need for clear guidance from our Supreme Court as to when this Court should dismiss cases for violations of our appellate rules or invoke Rule 2 to review cases on their merits.

found that the trial court committed prejudicial error in admitting evidence of the defendant's prior acts at trial and awarded the defendant a new trial. *State v. Dennison*, 163 N.C. App. 375, 594 S.E.2d 82 (2004). On appeal, our Supreme Court reversed this Court's decision in a *per curiam* decision stating, "even assuming *arguendo* that the admission of this evidence was error, defendant waived his right to appellate review of this issue because he failed to object when [the witness] testified. *See* N.C. R. App. 10(b)(1)[.]" *State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 757 (2005). By declining to exercise its discretion under Rule 2 to review the merits of the *Dennison* appeal, our Supreme Court implicitly found that even where the Court of Appeals has reviewed a criminal appeal on the merits and has found prejudicial error, which entitled the defendant to a new trial, and the defendant has received a sentence of life imprisonment, such reasons are not sufficiently compelling to invoke Rule 2. *See also State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356 (2005) (declining to invoke Rule 2 where defendant failed to preserve the grounds for his appeal under Rule 10(b) for criminal convictions); *State v. McCoy*, 174 N.C. App. 636, 615 S.E.2d 319 (2005) (declining to invoke Rule 2 where defendant's writ of *certiorari* did not comply with Rule 21(c)). But *see State v. Johnston*, 173 N.C. App. 334, 339, 618 S.E.2d 807, 810 (2005) (invoking Rule 2 to "expedite the decision in the public interest" where the defendant failed to object to jury instructions at trial and did not assert plain error on appeal); *State v. Johnson*, 164 N.C. App. 1, 9, 595 S.E.2d 176, 181 (2004) (invoking Rule 2 in the "interests of justice" where the defendant failed to state the legal basis to support his assignments of error in violation of Rule 10(c)(1)).

Subsequent to our Supreme Court's decision in *Viar*, this Court has dismissed appeals for violating our appellate rules, and invoked Rule 2 to review the merits of other appeals. This has created conflict in this jurisdiction as to when this Court can, or if it can, exercise its discretion under Rule 2 to review appeals where the violations of the appellate rules are immaterial to the Court's review. Accordingly, I strongly urge our Supreme Court to provide this Court guidance on when we should invoke our discretion under Rule 2 and undertake to hear appeals that violate our appellate rules. "Just as the Rules of Appellate Procedure must be consistently applied, so too the principles in *Viar* must be consistently applied." *In re A.E.*, 171 N.C. App. 675, 680, 615 S.E.2d 53, 57 (2005) (internal citation and quotation omitted).

In sum, I urge our Supreme Court to exercise its exclusive authority to make the rules of practice and procedure for the appellate division of the courts and abolish assignments of error as required under North Carolina Rules of Appellate Procedure 9(a)(1)(k), (a)(2)(h), and (a)(3)(j). In doing so, litigants will be afforded a greater opportunity to pursue justice without having their appeals dismissed for failing to comply with the technical requirements for assignments of error under Rule 10(c)(1). However, because this Court is constrained by our Supreme Court's language in *Viar*, I must concur that this appeal must be dismissed based on Mr. Broderick's failure to comply with Rule 10(c)(1).

NANCY WARREN, PLAINTIFF v. BOBBY CAROL WARREN, DEFENDANT

No. COA04-1555

(Filed 17 January 2006)

1. Appeal and Error— motion to dismiss an appeal—made in brief—not addressed

Motions to dismiss an appeal must be raised in accordance with Rule 37 of the North Carolina Rules of Appellate Procedure, and not in a brief. The motion in this case was not addressed.

2. Divorce— equitable distribution—property deeded to couple—presumption of marital gift—not rebutted

The trial court did not err by finding that a parcel of land was marital property where the presumption of gift to the marital estate was not rebutted. Plaintiff wife's understanding of the transaction is immaterial because only the donor's intent is relevant, and defendant donor husband's testimony alone is not sufficient to rebut the presumption.

3. Divorce— equitable distribution—no in-kind distribution—remanded for findings

An equitable distribution order was remanded where the trial court did not order an in-kind distribution of certain property but did not make findings or conclusions about the presumption of an in-kind distribution and whether the presumption was rebutted. It is not enough that there may be evidence in the record sufficient to support findings which could have been

made; the trial court itself must determine the pertinent facts established by the evidence before it.

4. Divorce— equitable distribution—separate property—not subject to distribution

The trial court in an equitable distribution action erred by awarding an automobile to the parties' oldest child after finding that the automobile was the separate property of the child. The car was not subject to distribution after the court found that the car was separate property.

5. Divorce— equitable distribution—valuation of truck

The trial court's valuation of a pick-up truck in an equitable distribution action was supported by competent evidence and was not disturbed.

6. Divorce— equitable distribution—IRA—valued at date of separation—early distribution to pay bills—penalties

The trial court did not err in an equitable distribution action by valuing defendant husband's IRA at the date of separation, even though defendant subsequently incurred substantial taxes and penalties for early withdrawal to pay bills after plaintiff wife withdrew marital funds. Defendant's evidence is more properly considered as a distributional factor.

7. Divorce— equitable distribution—post-separation payments of debt—divisible property

Defendant's post-separation payments on a line of credit decreased finance charges and interest related to a marital debt, and constitutes divisible property to the extent made after the effective date of N.C.G.S. § 50-20(b)(4)(d). The trial court on remand must make findings regarding post-separation payments made after that date.

8. Divorce— equitable distribution—post-separation debt—not distributable

The trial court in an equitable distribution action did not have the authority to distribute increased debt resulting from plaintiff's post-separation draw on a line of credit. On remand, the court should take into account defendant's payment of finance charges incurred for plaintiff's separate debt.

9. Divorce— equitable distribution—unequal distribution—findings

An equitable distribution action was remanded for further findings on evidence offered by defendant in requesting an unequal distribution.

Appeal by defendant from judgment entered 22 April 2004 by Judge Marvin P. Pope, Jr. in Buncombe County District Court. Heard in the Court of Appeals 20 September 2005.

Cecilia Johnson for plaintiff-appellee.

Mary Elizabeth Arrowood for defendant-appellant.

GEER, Judge.

Defendant Bobby Carol Warren appeals from the trial court's equitable distribution judgment providing for an equal division of marital property between defendant and plaintiff Nancy Warren. On appeal, Mr. Warren primarily argues that the trial court erred by failing to make findings of fact (1) as to why there should not be an in-kind distribution of certain real property, and (2) regarding evidence he offered in support of his request for an unequal distribution. We agree and remand for further findings of fact in accordance with this opinion.

Facts

The parties were married in 1984, separated in 2001, and subsequently divorced. Three children were born during the marriage. At the time of the order currently on appeal, the oldest child, born in 1984, was emancipated, but the couple's two minor children, born in 1986 and 1991, resided with Mr. Warren.

In September 2001, Ms. Warren filed a complaint in Buncombe County District Court seeking child custody and support, equitable distribution, post-separation support and alimony, and attorneys' fees. Mr. Warren filed an answer and counterclaim in November 2001, denying the relevant allegations and seeking, among other things, a custody determination and an unequal division of the couple's marital estate in his favor.

In its order entered 22 April 2004, the trial court found that the couple had $151,980.21 in marital assets, including: a 16.86 acre parcel of real property valued at $64,000.00; four vehicles, collectively

valued at $15,040.00; bank accounts totaling $27,499.00; retirement accounts totaling $40,591.21; and $4,850.00 of miscellaneous personal property. The trial court also found that the couple's marital debt totaled $26,588.96.

To Mr. Warren, the trial court awarded the entire 16.86 acre tract, three of the vehicles, two of the bank accounts, one retirement account, and approximately half of the couple's personal property. The court valued these assets at $90,854.00. The court also allocated $21,720.96 of the marital debt to Mr. Warren. Accordingly, Mr. Warren was awarded a net share of the couple's marital estate amounting to $69,133.04. The remaining marital property, totaling $33,356.00, was awarded to Ms. Warren. The trial court allocated Ms. Warren $4,868.00 of the marital debt, resulting in her receiving a net share of the marital estate of $28,488.00.

Because the trial court found that an equal division of the property between Mr. Warren and Ms. Warren would be equitable, the court directed Mr. Warren to pay Ms. Warren "one-half of the economic difference between the marital property received by [Mr. Warren] and [Ms. Warren]" equal to $20,322.52. To effectuate payment, the court ordered Mr. Warren to obtain a commercial loan within three months and pay Ms. Warren in one lump sum or, alternatively, to pay Ms. Warren $10,000.00 within three months and then make monthly payments on the balance of $215.00 per month for five years or until the balance was paid in full. Mr. Warren has timely appealed to this Court.

Discussion

[1] Before addressing the issues raised by Mr. Warren's appeal, we first acknowledge that Ms. Warren has included a motion to dismiss this appeal in the opening pages of her appellee brief. Such motions may not be raised in a brief, but rather must be made in accordance with N.C.R. App. P. 37. *Smithers v. Tru-Pak Moving Sys., Inc.*, 121 N.C. App. 542, 545, 468 S.E.2d 410, 412 ("A motion to dismiss an appeal must be filed in accord with Appellate Rule 37, not raised for the first time in the brief . . . ."), *disc. review denied*, 343 N.C. 514, 472 S.E.2d 20 (1996). This motion is not, therefore, properly before this Court and we decline to address it. In any event, we note that the motion is based in part on Mr. Warren's failure to file the exhibits of both parties, despite the stipulation in the record on appeal that he would do so. The exhibits, however, have proven immaterial to the resolution of this appeal.

I

[2] On appeal, Mr. Warren contends that the trial court erred by concluding that the entire 16.86 acre parcel was marital property. Mr. Warren had initially inherited an interest in the parcel after the death of his father, who left a half-interest in the land to each of his sons. Ms. Warren's name was not included on the deed that resulted from this inheritance. Subsequently, Mr. Warren and his brother deeded the entire parcel to both Mr. Warren and Ms. Warren.

When previously separate real property becomes titled by the entireties, the law presumes the transfer to be a gift to the marital estate. *McLean v. McLean*, 323 N.C. 543, 551-52, 374 S.E.2d 376, 381-82 (1988). *See also* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 12.33, at 12-100 (5th ed. 2002) ("The [marital gift] presumption applies in all instances when the spouses cause title to real property, or an interest in real property, to be in the entireties. The presumption applies when one spouse conveys to the other spouse in the entireties and when, because of a purchase, third parties convey to the spouses in the entireties.").[1] This presumption may be rebutted only by clear, cogent, and convincing evidence that there was no donative intent to make a gift to the marriage on the part of the alleged donor spouse. *McLean*, 323 N.C. at 551-52, 374 S.E.2d at 381-82.

It is uncontested that (1) after Mr. Warren inherited the parcel with his brother, Mr. Warren's interest was his separate property, and (2) when the entire parcel was conveyed to Mr. Warren and Ms. Warren, title vested in both as tenants by the entirety. Further, the deed conveying the parcel to both Mr. Warren and Ms. Warren does not indicate any intention that the parcel not become marital property. Thus, the burden was on Mr. Warren to provide clear, cogent, and convincing evidence that he did not intend to make his interest in the parcel a gift to the marital estate.

In support of his argument, Mr. Warren points to Ms. Warren's testimony, in which she stated that she did not believe Mr. Warren had ever given her an interest in the land. It is, however, the donor's, not the donee's, intent that is relevant. *Id.* Ms. Warren's understanding of the transaction is, therefore, immaterial.

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1. Mr. Warren makes no argument regarding whether this presumption applies to a transfer from a third party, such as his brother, and we express no opinion on that question.

Mr. Warren also points to his own testimony that he did not instruct the attorney performing the conveyance to transfer the property by the entireties and to his offer of proof that he "had no intent to make a gift to [plaintiff] of my inheritance whatsoever."[2] Our courts have held, however, that the donor's testimony alone that he lacked the requisite intent is insufficient to rebut the marital gift presumption. *See Thompson v. Thompson*, 93 N.C. App. 229, 232, 377 S.E.2d 767, 768-69 (1989) (defendant's testimony alone "certainly" did not rise to the level of clear, cogent, and convincing evidence). *See also* 3 Reynolds, *supra*, § 12.33, at 12-102 ("Often the only evidence of a lack of donative intent is the donor's testimony. The appellate cases of North Carolina have uniformly held that such evidence alone will not satisfy the burden of rebutting the presumption by clear, cogent, and convincing evidence."). Accordingly, because the only relevant evidence Mr. Warren offered to rebut the presumption was his own testimony, the trial court did not err in finding that the entire parcel was marital property.

[3] Mr. Warren argues alternatively that, even assuming the 16.86 acre parcel was marital property, the trial court erred by failing either (1) to order an in-kind distribution of the property or (2) to make findings of fact justifying a distributive award rather than an in-kind distribution. In North Carolina, "it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable." N.C. Gen. Stat. § 50-20(e) (2003). This presumption "may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind." *Id.* This Court has recently held that "in equitable distribution cases, if the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004).

In this case, although the trial court did not order an in-kind distribution of the parcel, it made no findings of fact or conclusions of law regarding the presumption and whether it was rebutted. Plaintiff responds that the record contains evidence sufficient to support a finding that the presumption of an in-kind distribution had been rebutted. "It is not enough that there may be evidence in the

2. Although Mr. Warren argues in his brief that the trial court improperly excluded his testimony regarding his intent, Mr. Warren did not assign that ruling as error and we, therefore, will not review it. N.C.R. App. P. 10(a).

record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it . . . ." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). We must, therefore, "reverse the trial court on this assignment of error, and remand this matter for additional findings of fact on whether the presumption of an in-kind distribution has been rebutted . . . ." *Urciolo*, 166 N.C. App. at 507, 601 S.E.2d at 908.

II

[4] Mr. Warren next contends that the trial court erred in finding that a 1991 Ford Tempo was the property of the oldest child. The trial court made the following finding of fact with respect to the Ford Tempo: "That the 1991 Ford Tempo automobile is the separate property of the oldest child and is not subject to equitable distribution between [Ms. Warren] and [Mr. Warren]." In the decretal portion of the order, the court provided, based on this finding, that "the 1991 Ford Tempo automobile shall be the sole property of the oldest child." Although Mr. Warren agrees with the trial court's finding that the Tempo was separate property, he objects to the trial court's award of the car to the oldest child. Ms. Warren agrees that this portion of the order is in error.

Trial courts may distribute only marital and divisible property. N.C. Gen. Stat. § 50-20(a) ("Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section."). A trial court has no authority to distribute separate property: "Following classification, property classified as marital is distributed by the trial court, while separate property remains unaffected." *McLean*, 323 N.C. at 545, 374 S.E.2d at 378. Once the trial court found that the Tempo was separate property, that property was not subject to distribution, and the trial court erred in specifying that the car was the property of the couple's oldest child. We, therefore, reverse that portion of the trial court's order.

III

[5] Mr. Warren also disputes the trial court's valuation of two marital assets that the court awarded to him: a Ford Ranger pickup truck and an IRA. In equitable distribution proceedings, marital property must be valued "as of the date of the separation of the parties." N.C. Gen. Stat. § 50-21(b) (2003).

At trial, Mr. Warren offered evidence that the pickup truck was only worth $2,000.00 on the date of separation. In contrast, Ms. Warren offered evidence that the value of the pickup truck on the date of separation was $4,860.00. The trial court ultimately found that the pickup truck had a value on the date of separation of $4,860.00. Despite Mr. Warren's arguments to the contrary, this finding is supported by competent evidence and we may not disturb it on appeal. *Urciolo*, 166 N.C. App. at 506, 601 S.E.2d at 907.

[6] The trial court valued Mr. Warren's IRA at $12,821.00. Although Mr. Warren concedes that $12,821.00 accurately states the value of the IRA as of the date of separation, he nonetheless argues that he was entitled to have the IRA valued at $6,000.00 because he was forced to cash in the IRA early to pay bills when Ms. Warren withdrew $26,000.00 of marital funds after the date of separation to purchase and furnish a mobile home for herself. Mr. Warren argues that, as a result of the taxes and penalties he incurred, he netted only $6,000.00 from the IRA. Since the trial court was required by statute to find the value of the IRA as of the date of separation, the court did not err by doing so. Mr. Warren's evidence is more properly considered as a distributional factor under N.C. Gen. Stat. § 50-20(c).

IV

[7] Mr. Warren next argues that the trial court erred by making insufficient findings of fact regarding (1) post-separation payments he made with respect to marital debt and (2) increased payments resulting from financial misconduct by Ms. Warren. On the date of separation, the parties had an equity line of credit with a balance of $17,738.72. Mr. Warren argues that he paid $4,320.27 in finance charges or interest on this line of credit with post-separation funds. Further, after separation, Ms. Warren borrowed an additional amount of $7,500.00 on this line of credit. Although, pursuant to a court order, Ms. Warren repaid the $7,500.00 approximately four months later, it is undisputed that Ms. Warren's actions resulted in Mr. Warren being required to make increased monthly payments on the line of credit over the four-month period.

Mr. Warren argues that his post-separation payments on the line of credit constituted "divisible property" under N.C. Gen. Stat. § 50-20(b)(4)(d). Although this Court rejected such an argument in *Hay v. Hay*, 148 N.C. App. 649, 655, 559 S.E.2d 268, 273 (2002), in connection with post-separation mortgage payments, that opinion predated a 2002 amendment to N.C. Gen. Stat. § 50-20(b)(4)(d). At the

time of *Hay*, the statute defined divisible property as including only " '[i]ncreases in marital debt and financing charges and interest related to marital debt.' " *Hay*, 148 N.C. App. at 655, 559 S.E.2d at 273 (quoting N.C. Gen. Stat. § 50-20(b)(4)(d) (1999)). The Court reasoned that the subsection did not apply because "[d]efendant's mortgage payments have not increased the marital debt, financing charges, or interest on the marital debt." *Id.*

The statute, as amended in 2002, 2002 N.C. Sess. Laws ch. 159, sec. 33.5, now provides that divisible property includes "[i]ncreases *and decreases* in marital debt and financing charges and interest related to marital debt." N.C. Gen. Stat. § 50-20(b)(4)(d) (emphasis added). As a leading commentator has explained,

> With the 2002 amendment to the statute, the subsection authorizes the court to classify postseparation payments of marital debt as divisible property. Whether these payments reduce the principal of the debt, the finance charges related to the debt, or interest related to the debt, the court should consider the postseparation payments as divisible property. If the postseparation reduction of the marital debt increases the net value of the marital property, the court may classify the increase as divisible property.

3 Reynolds, *supra*, § 12.52, at 5 (Cum. Supp. 2004) (also noting that the amendment appeared to respond to *Hay*). This amendment became effective 11 October 2002. 2002 N.C. Sess. Laws ch. 159, sec. 92.

Since Mr. Warren's payments decreased financing charges and interest related to marital debt, those payments—to the extent made after 11 October 2002—constituted divisible property. "A trial court must value all marital and divisible property . . . in order to reasonably determine whether the distribution ordered is equitable." *Cunningham v. Cunningham*, 171 N.C. App. 550, 555-56, 615 S.E.2d 675, 680 (2005). On remand, the trial court must, therefore, make findings of fact regarding the post-separation debt payments made after 11 October 2002.

[8] The analysis differs with respect to the increased amount paid as a result of Ms. Warren's $7,500.00 post-separation draw on the line of credit. This draw and the resulting finance charges and interest were not marital debt (or divisible property) and, therefore, the trial court had no authority to distribute that debt. *Fox v. Fox*, 114 N.C. App. 125,

134, 441 S.E.2d 613, 619 (1994). The trial court should take into account on remand Mr. Warren's payment of finance charges incurred for Ms. Warren's separate debt.

V

[9] Finally, defendant argues that the trial court erred by not making findings of fact regarding the factors set forth in N.C. Gen. Stat. § 50-20(c). A trial court "must make findings of fact under section 50-20[c] regarding any of the factors for which evidence is introduced at trial." *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395, 545 S.E.2d 788, 794, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001). *See also Armstrong v. Armstrong*, 322 N.C. 396, 404, 368 S.E.2d 595, 599 (1988) ("When, however, evidence is presented from which a reasonable finder of fact could determine that an equal division would be inequitable, the trial court is required to consider the factors set forth in N.C.G.S. § 50-20(c) . . . ."). This requirement exists regardless whether the trial court ultimately decides to divide the property equally or unequally. *Id.* at 403, 368 S.E.2d at 599.

In requesting an unequal distribution, Mr. Warren offered evidence relating to various factors under N.C. Gen. Stat. § 50-20(c), including, for example, § 50-20(c)(9) and (11a), as well as evidence that Mr. Warren contends should be considered under the catch-all factor, § 50-20(c)(12) ("Any other factor which the court finds to be just and proper."). Because the trial court made no findings regarding those factors and instead concluded only that "an equal distribution of the property . . . is equitable," we must remand for further findings of fact on this issue as well.

Since we have required further findings of fact, we do not reach Mr. Warren's argument that the court erred by failing to order an unequal distribution. We have also reviewed Mr. Warren's remaining assignments of error and determined that none of them resulted in prejudicial error.

Conclusion

In sum, we affirm the trial court's categorization of the 16.86 acre parcel as marital property and its valuation of Mr. Warren's Ford Ranger pickup truck and IRA. We remand, however, for further findings of fact regarding whether there should be an in-kind distribution of the 16.86 acre parcel, Mr. Warren's post-separation debt payments, and the N.C. Gen. Stat. § 50-20(c) factors. We reverse the trial court's award of the 1991 Ford Tempo to the couple's eldest child.

Affirmed in part, reversed in part, and remanded.

Chief Judge MARTIN and Judge BRYANT concur.

EVELYN BARTON BECK, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF AVERY EDWARD BECK, PLAINTIFF v. LARRY EUGENE BECK, DEFENDANT

No. COA04-1674

(Filed 17 January 2006)

1. Estoppel— quasi-estoppel—failure to show benefit

Plaintiff grantor was not estopped under the theory of quasi-estoppel from challenging the mental capacity of her deceased co-grantor husband to execute a deed to their son, and the case is reversed and remanded for further proceedings including the presentation of defendant son's evidence, because: (1) there was no evidence that plaintiff received any actual benefit even though the trial court found that she avoided the possibility of her and her husband being ineligible for Medicaid based on owning their marital residence and other real property when the record contains no evidence that she or her husband ever applied for or actually received Medicaid or that without deeding the property to defendant son they would in fact have been ineligible for Medicaid; (2) although the trial court found that plaintiff received the ability and benefit of filing this very lawsuit as the attorney-in-fact for her husband prior to his death by relying upon the power of attorney signed by her husband on the very date she claims her husband was incapable of deeding the property, a power of attorney is for the benefit of the principal and not the agent; (3) although the trial court found that plaintiff received the benefit of being able to file a wrongful death complaint as personal representative of her husband's estate, the real party in interest is not the estate but the beneficiary of the recovery, and thus, any benefit plaintiff would receive from the wrongful death action would be by virtue of her status as her husband's lawful wife instead of the fact that she was his personal representative; and (4) although the trial court found that plaintiff received the benefit of being appointed the personal representative of her husband's estate by relying upon the new will signed by her husband, the record contains no evidence that she would not have been the

personal representative in the absence of the new will, that she received any benefits by virtue of her being named the executrix, or that there was anything other than a theoretical possibility of a dispute over the identity of the personal representative.

2. Estoppel— estoppel by deed—no evidence of consideration

Plaintiff grantor was not estopped under the theory of estoppel by deed from challenging the mental capacity of her deceased co-grantor husband to execute a deed to their son, and the case is reversed and remanded for further proceedings including the presentation of defendant son's evidence, because: (1) the record contains no evidence of any consideration being conveyed by defendant in exchange for the deed; (2) on 19 January 1998 plaintiff purported to grant precisely what she in fact owned which was her share of the property she owned with her husband in a tenancy by the entirety whereas the dispute in this case concerns the property interest her husband granted or failed to grant to their son; and (3) based on plaintiff's evidence, there was no indication that when plaintiff joined with her husband in signing the deed to defendant that she had no title, a defective title, or an estate less than that which she assumed to grant.

3. Estoppel— equitable estoppel—no showing changed position prejudicially based on representation

Plaintiff grantor was not equitably estopped from challenging the mental capacity of her deceased co-grantor husband to execute a deed to their son, and the case is reversed and remanded for further proceedings including the presentation of defendant son's evidence, because the record does not indicate that defendant in any way changed his position prejudicially as a result of any representation by plaintiff regarding her husband's competence to sign the deed.

Appeal by plaintiff from order entered 17 September 2004 by Judge Christopher M. Collier in Davidson County Superior Court. Heard in the Court of Appeals 15 June 2005.

Brinkley Walser, P.L.L.C., by Walter F. Brinkley and April D. Craft, for plaintiff-appellant.

Law Offices of J. Calvin Cunningham, by J. Calvin Cunningham and R. Flint Crump, for defendant-appellee.

GEER, Judge.

This litigation arises out of a family dispute over the ownership of land in Davidson County. Plaintiff Evelyn Barton Beck ("Mrs. Beck") and her husband, Avery Edward Beck ("Mr. Beck"), deeded land to their son, defendant Larry Eugene Beck, in January 1998. Mrs. Beck subsequently sued to invalidate the deed, claiming that Mr. Beck—now deceased—was incompetent at the time he signed the deed. At the conclusion of plaintiff's evidence, the trial court entered an order granting the son's motion to dismiss under N.C.R. Civ. P. 41(b), which this Court subsequently vacated and remanded for further findings of fact. On remand, the trial court, after making additional findings of fact, again granted the son's motion to dismiss on the grounds that plaintiff's evidence established that her claims were precluded under the theories of quasi-estoppel, estoppel by deed, and equitable estoppel. Based upon our review of the record, we have concluded that certain findings of fact are not supported by competent evidence and that the remaining findings do not support the conclusions of law and the trial court's granting of the motion to dismiss. We, therefore, reverse and remand for further proceedings, including the presentation of defendant's evidence.

Facts

A full statement of the facts in this case is set forth in this Court's earlier opinion, *Beck v. Beck*, 163 N.C. App. 311, 593 S.E.2d 445 (2004) ("*Beck I*"). We summarize here only the facts needed for an understanding of this opinion. On 19 January 1998, Mr. and Mrs. Beck executed a number of documents, including (1) a power of attorney and health care power of attorney by which Mr. Beck appointed Mrs. Beck as his attorney in fact and (2) a deed conveying two tracts of land owned by Mr. and Mrs. Beck to their son, Larry Beck. On the same date, Mr. Beck also executed a will naming Mrs. Beck as his executor and sole devisee.

On 19 February 2000, Mrs. Beck, using her power of attorney, filed this lawsuit against Larry Beck on her own behalf and Mr. Beck's behalf. Mrs. Beck claimed that the deed to Larry Beck was invalid because Mr. Beck lacked the capacity to execute a deed on the date it was signed, 19 January 1998. Defendant answered the complaint on 8 May 2000.

On 22 September 2000, Mr. Beck died. Soon thereafter, the parties entered into a stipulation that "[r]ather than subject the estate to the expense which would be involved in determining the validity of

[Mr. Beck's] 1998 will, the parties have agreed to stipulate that, if Evelyn Barton Beck qualifies as the executor of Avery Edward Beck under the 1998 will, evidence of this fact will not be admissible in the present action for the purpose of proving that Avery Edward Beck was competent on January 19, 1998." In this action, Mrs. Beck, in her capacity as executrix for the estate, was then substituted to represent her husband's estate as a party plaintiff.

The case was heard by Judge Christopher M. Collier in a bench trial beginning on 3 September 2003. At the conclusion of Mrs. Beck's evidence, defendant moved to dismiss pursuant to N.C.R. Civ. P. 41(b). Judge Collier granted the motion, concluding that Mrs. Beck was "estopped" from challenging the mental capacity of Mr. Beck as of 19 January 1998.

Upon plaintiff's appeal, this Court in *Beck I* first noted that the trial court had not specified what theory of estoppel it was relying upon in dismissing plaintiff's claim. 163 N.C. App. at 315, 593 S.E.2d at 448. The Court then identified three potential estoppel theories by which defendant might prevail: (1) quasi-estoppel, (2) estoppel by deed, and (3) equitable estoppel. *Id.* at 315-17, 593 S.E.2d at 448-49. After concluding that the trial court's findings of fact were insufficient to support a conclusion that plaintiff was estopped from contesting her husband's competence under any of the three theories, the Court vacated the trial court's order and remanded for additional findings of fact. *Id.* at 317, 593 S.E.2d at 449.

On remand, the trial court entered an "Order Supplementing Court's Order Granting Defendant's Motion to Dismiss." This order contained additional findings of fact and concluded that plaintiff was estopped from challenging the mental capacity of Mr. Beck to execute the deed under all three theories: quasi-estoppel, equitable estoppel, and estoppel by deed. Plaintiff again timely appealed to this Court.

We observe initially that this case comes to us upon the relatively unusual procedural posture of a dismissal under N.C.R. Civ. P. 41(b). That rule provides in pertinent part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to

> relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section . . . operates as an adjudication upon the merits.

"Dismissal under [Rule 41(b)] is left to the sound discretion of the trial court." *In re Oghenekevebe*, 123 N.C. App. 434, 437, 473 S.E.2d 393, 396 (1996). In a Rule 41(b) context, "the trial judge may 'decline to render any judgment until the close of all the evidence, and except in the clearest cases, he should defer judgment until the close of all the evidence.' " *Id.* (quoting *In re Becker*, 111 N.C. App. 85, 92, 431 S.E.2d 820, 825 (1993)).

On appeal of a Rule 41(b) dismissal, this Court determines whether any evidence supports the findings of the trial judge, notwithstanding the existence of evidence to the contrary. *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 218 (1983) ("[T]he judge can give judgment against plaintiff not only because his proof has failed in some essential aspect to make out a case but also on the basis of facts as he may then determine them to be from the evidence then before him."). If the findings of fact are supported by the evidence and those findings support the conclusions of law, they are binding on appeal. *Id.* at 741-42, 309 S.E.2d at 219. "The trial court's conclusions [of law], however, are completely reviewable." *Baker v. Showalter*, 151 N.C. App. 546, 549, 566 S.E.2d 172, 174 (2002). We address each of the estoppel theories relied upon by the trial court in turn.

Quasi-Estoppel

[1] "Quasi-estoppel is based on a party's acceptance of the benefits of a transaction, and provides where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it." *Parkersmith Props. v. Johnson*, 136 N.C. App. 626, 632, 525 S.E.2d 491, 495 (2000) (internal quotation marks omitted). The "essential purpose" of the quasi-estoppel theory is to prevent a party from benefitting by taking two clearly inconsistent positions. *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 88, 557 S.E.2d 176, 181 (2001), *disc. review denied*, 355 N.C. 283, 560 S.E.2d 795 (2002).

In *Beck I*, this Court instructed the trial court that, in conducting its quasi-estoppel analysis, it should "determine whether plaintiff ratified the deed and other instruments executed 19 January 1998 by accepting benefit [sic] under them, such that she may not now take an inconsistent position." 163 N.C. App. at 315, 593 S.E.2d at 448. On remand, the trial court found that Mrs. Beck received five benefits under the documents executed on 19 January 1998.

The first "benefit" found by the trial court was: "She avoided the possibility of her and her husband, Avery Edward Beck, being ineligible for Medicaid because of owning their marital residence and other real property." The record, however, contains no evidence that Mrs. Beck and/or Mr. Beck ever applied for or actually received Medicaid or that, without deeding the property to Larry Beck, Mr. and Mrs. Beck would in fact have been ineligible for Medicaid. Indeed, most of the testimony referencing Medicaid was struck on defendant's motion. Without such evidence, there can be no finding that Mrs. Beck received any actual benefit. There is only the hypothetical possibility of a benefit. This Court has previously held that an analogous absence of evidence precluded application of the theory of quasi-estoppel:

> Plaintiff claims in its brief to this Court Defendant received a "monetary and psychological benefit" from [one of the Defendants'] assignment to Plaintiff because the assignment "relieved [Defendants] of their need to find another buyer." The record, however, does not contain any evidence Defendants actually received any benefits as a result of the assignment. There is no evidence Defendants were in need of finding a buyer at the time [of] the assignment, and Defendants never accepted any funds from Plaintiff under the assignment.

Parkersmith, 136 N.C. App. at 632-33, 525 S.E.2d at 495. The evidence in this record thus does not support a finding that Mrs. Beck's challenge to the validity of the deed is "clearly inconsistent" with anything she may or may not have received with respect to Medicaid. *B & F Slosman*, 148 N.C. App. at 88, 557 S.E.2d at 181.

The trial court next found: (1) "[Mrs. Beck] received the ability and benefit of filing this very lawsuit as the Attorney-in-Fact for her husband, Avery Edward Beck, prior to his death, by relying upon the Power of Attorney signed by Avery Edward Beck on January 19, 1998"; and (2) "[Mrs. Beck] received the benefit of making health care decisions for her husband, Avery Edward Beck." It is, however, well-

settled in this State that a power of attorney is for the benefit of the principal and not the agent. *Whitford v. Gaskill*, 345 N.C. 475, 478, 480 S.E.2d 690, 692 ("[A]n attorney-in-fact is presumed to act in the best interests of the principal."), *modified on other grounds*, 345 N.C. 762, 489 S.E.2d 177 (1997); *Estate of Graham v. Morrison*, 168 N.C. App. 63, 68, 607 S.E.2d 295, 299 (2005) ("[O]ur Supreme Court has indicated that an attorney-in-fact has an obligation to act in the best interests of the principal."). The powers of attorney that Mr. Beck signed in favor of Mrs. Beck, therefore, cannot be considered a "benefit" to her for purposes of quasi-estoppel.

We next turn to the fourth "benefit" listed by the trial court: "She received the benefit of being able to file a Complaint . . . for wrongful death against Southern Assisted Living as Personal Representative of the Estate of Avery Edward Beck." While it is true that North Carolina's wrongful death statute provides that the decedent's personal representative or collector is the proper person to bring a wrongful death action, N.C. Gen. Stat. § 28A-18-2(a) (2003), it is also well-settled that, in a wrongful death action, "the real party in interest is not the estate but the beneficiary of the recovery." *Evans v. Diaz*, 333 N.C. 774, 776, 430 S.E.2d 244, 245 (1993). The beneficiaries as defined by the Wrongful Death Act are the persons who would take from decedent under the Intestate Succession Act. *Locust v. Pitt County Mem'l Hosp., Inc.*, 358 N.C. 113, 117, 591 S.E.2d 543, 545 (2004). *See also* N.C. Gen. Stat. § 28A-18-2(a) (providing that any wrongful death recovery "shall be disposed of as provided in the Intestate Succession Act"). Any benefit that Mrs. Beck would receive from the wrongful death action would, therefore, be by virtue of her status as Mr. Beck's lawful wife and not because she was his personal representative. "One cannot be estopped by accepting that which he would be legally entitled to receive in any event." *In re Will of Peacock*, 18 N.C. App. 554, 556, 197 S.E.2d 254, 255 (1973).

Fifth, the trial court found: "[Mrs. Beck] received the benefit of being appointed the Personal Representative of her husband, Avery Edward Beck's Estate by relying upon the Will signed by her husband, Mr. Beck . . . . If she were unable to rely upon this Will to be appointed Personal Representative, she could possibly have been subject to a prolonged dispute in an action before the Davidson County Clerk of Court regarding who would be appointed Personal Representative of the Estate." The record, however, contains no evidence that she would not have been the personal representative in the absence of the new will, of any benefits—as opposed to responsibilities—that

she received by virtue of being named the executrix, or that there was anything other than a theoretical possibility of a dispute over the identity of the personal representative. Like the first "benefit," avoiding the possibility of Medicaid ineligibility, we cannot conclude that a mere theoretical possibility of avoiding litigation—which might or might not be costly and time-consuming—is a benefit such that Mrs. Beck "may not now take an inconsistent position." *Beck I*, 163 N.C. App. at 315, 593 S.E.2d at 448.

In sum, the trial court's first and fifth "benefits" are not supported by competent evidence, while the second, third, and fourth "benefits" do not constitute sufficient benefits to support a conclusion that Mrs. Beck is estopped from challenging the deed to Larry Beck under a quasi-estoppel theory.

Estoppel by Deed

[2] The seminal estoppel by deed case in North Carolina is *Baker v. Austin*, 174 N.C. 433, 93 S.E. 949 (1917). That opinion states:

> Where a deed is sufficient in form to convey the grantor's whole interest, an interest afterwards acquired passes by way of estoppel to the grantee. . . . If a grantor having no title, a defective title, or an estate less than that which he assumed to grant, conveys with warranty or covenants of like import, and subsequently acquires the title or estate which he purported to convey, or perfects his title, such after-acquired or perfected title will inure to the grantee or to his benefit by way of estoppel.

Id. at 434-35, 93 S.E. at 950 (internal quotation marks omitted). In 1963, the Supreme Court also held, at least with respect to a deed from a mother to a child, that estoppel by deed is inapplicable when the underlying deed was not conveyed in exchange for valuable consideration. *Cruthis v. Steele*, 259 N.C. 701, 704, 131 S.E.2d 344, 347 (1963).

In this case, the record contains no evidence of any consideration being conveyed by defendant in exchange for the deed. Further, on 19 January 1998, Mrs. Beck purported to grant precisely what she in fact owned: her share of the property she owned with her husband in a tenancy by the entirety. That estate is precisely what she did convey. The dispute in this case concerns the property interest Mr. Beck granted (or failed to grant) to Larry Beck and not the property interest that Mrs. Beck granted. At least from plaintiff's evidence, which is

the only evidence before us, there is no indication that when Mrs. Beck joined with her husband in signing the deed to Larry Beck that she had (1) no title, (2) a defective title, or (3) an estate less than that which she assumed to grant. Therefore, estoppel by deed is inapplicable, at least on the current record.

Equitable Estoppel

[3] Although this Court in *Beck I* did not analyze the theory of equitable estoppel as it related to the facts of this case, the trial court concluded as an alternative basis for its ruling that equitable estoppel barred Mrs. Beck from contesting the issue of Mr. Beck's competence. *Parkersmith* describes the elements of equitable estoppel as follows:

> A party invoking the doctrine of equitable estoppel has the burden of proving the following elements:
>
> (1) The conduct to be estopped must amount to false representation or concealment of material fact or at least which is reasonably calculated to convey the impression that the facts are other than and inconsistent with those which the party afterwards attempted to assert;
>
> (2) Intention or expectation on the party being estopped that such conduct shall be acted upon by the other party or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon[;]
>
> (3) Knowledge, actual or constructive, of the real facts by the party being estopped;
>
> (4) Lack of knowledge of the truth as to the facts in question by the party claiming estoppel;
>
> (5) *Reliance on the part of the party claiming estoppel upon the conduct of the party being sought to be estopped*;
>
> (6) *Action based thereon of such a character as to change his position prejudicially.*

Parkersmith, 136 N.C. App. at 633, 525 S.E.2d at 495-96 (emphasis added) (internal quotation marks omitted).

The trial court found that defendant relied upon the representation that Mr. Beck was competent and that the deed was valid by

occupying, maintaining, and improving the property and by making property tax and insurance payments on that property. The evidence to date, however, indicates that defendant has occupied the property since 1985 rent-free under an agreement with Mr. Beck that defendant would pay the insurance and property taxes and maintain and restore the house. The record does not yet indicate that defendant in any way changed his position prejudicially as a result of any representation by Mrs. Beck regarding Mr. Beck's competence to sign the deed.

There being inadequate support in the record as it stands for the trial court's conclusion that the doctrines of quasi-estoppel, estoppel by deed, or equitable estoppel operate to bar Mrs. Beck's challenge to the deed to Larry Beck, we reverse the trial court's order dismissing this action under Rule 41 and remand for further proceedings.

Reversed and remanded.

Judges CALABRIA and ELMORE concur.

MARK J. ARMSTRONG, EMPLOYEE, PLAINTIFF v. W.R. GRACE & CO., EMPLOYER, CONTINENTAL CASUALTY COMPANY, CARRIER, DEFENDANTS

No. COA04-581

(Filed 17 January 2006)

1. Workers' Compensation— most advanced specialty doctrine—not recognized

There was ample support in the record in a workers' compensation case for the Industrial Commission's findings and conclusions that plaintiff's job was not the cause or an exacerbating condition of his underlying rheumatoid arthritis. The "most advanced speciality doctrine," advocated by plaintiff, was not recognized.

2. Workers' Compensation— appellate role—whether findings supported by record

The role of the Court of Appeals in a workers' compensation case is to determine whether the Industrial Commission's

findings are supported by the record. If so, as here, the decision is affirmed.

Judge WYNN concurring.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Full Commission entered 5 December 2003 by Commissioner Laura Kranifeld Mavretic. Heard in the Court of Appeals 19 April 2005.

Ben E. Roney, Jr., for plaintiff-appellant.

Young, Moore and Henderson, P.A., by J. Aldean Webster, III, for defendant-appellees.

JACKSON, Judge.

On 9 April 2002, Deputy Commissioner Amy L. Pfeiffer heard Mark J. Armstrong's ("plaintiff") workers' compensation claim filed against W.R. Grace & Co. ("defendant-employer") and Continental Casualty Company ("defendant-carrier"), collectively defendants. On 8 May 2003, the Deputy Commissioner issued an Opinion and Award in favor of defendants. On 14 October 2003, the full Commission heard plaintiff's appeal. On 5 December 2003, an Opinion and Award in favor of defendants was filed by Commissioner Laura K. Mavretic, with Commissioner Bernadine S. Ballance concurring and Commissioner Thomas J. Bolch dissenting. It is from the full Commission's Opinion and Award that plaintiff appeals.

The full Commission's findings of fact tended to show that in 1975, defendant-employer hired plaintiff as a general helper. Plaintiff also worked as a maintenance helper, a machine operator, and a tooling assembler. Plaintiff worked for defendant-employer until he took a leave of absence due to pain and loss of range of motion in his elbows. As a machine operator for approximately thirteen years, plaintiff was required to use his upper extremities frequently and repetitively and with load-bearing force. Plaintiff prepared raw product, finished the product, and cleaned and adjusted the machines. Plaintiff's job duties required lifting, transporting, handling, reaching, and making load bearing movements. Plaintiff began to experience left elbow problems while working in May 1989. Shortly thereafter, plaintiff experienced pain in his right elbow while working. Plaintiff continued to work for defendant but did not seek medical treatment until 26 January 1990, when he was seen by Dr.

E. O. Marsigli ("Dr. Marsigli"), an orthopaedist. Plaintiff reported to Dr. Marsigli that he had been unable to fully extend his upper left extremity since May 1989.

On or about 23 December 1991, Dr. Marsigli diagnosed plaintiff with post traumatic arthritis of the left elbow. On 19 February 1996, however, Dr. Marsigli stated by letter that he could not determine the cause of plaintiff's bilateral elbow condition, and that "job related traumatic arthrosis of the elbow has not been described in the literature to his knowledge." On 8 July 1992, Dr. Helen E. Harmon ("Dr. Harmon"), a rheumatologist, diagnosed plaintiff with questionable rheumatoid arthritis. Dr. Harmon did not comment as to whether plaintiff's work situation caused or exacerbated his bilateral elbow symptoms.

On 21 July 1992, plaintiff transferred from the position of operator to tooling assembler, which required the use of both upper extremities to change inserts, change cavities, change needles and clean needles.

Plaintiff sought additional treatment from Dr. Ralph W. Coonrad ("Dr. Coonrad"), an orthopaedic surgeon, in October 1992. On 22 October 1992, plaintiff ceased employment with defendant. On 23 November 1992, Dr. Coonrad performed a left elbow replacement on plaintiff due to plaintiff's left elbow symptoms. After the surgery, Dr. Coonrad diagnosed plaintiff with arthrosis of both elbows due to rheumatoid arthritis.

A second physician, Dr. William Byrd ("Dr. Byrd"), diagnosed plaintiff with severe bilateral synovitis and pain of plaintiff's elbows with uncertain etiology on 3 August 1993. Dr. Byrd could not exclude rheumatoid arthritis as an underlying diagnosis. On 28 September 1993, Dr. Coonrad performed a total right elbow replacement.

Plaintiff received additional medical treatment later in 1993. On 21 December 1993, rheumatologist Dr. David S. Caldwell ("Dr. Caldwell"), determined that plaintiff might have an atypical presentation of rheumatoid arthritis. Dr. Caldwell further stated that plaintiff's job might have had something to do with plaintiff's bilateral elbow problems.

On 12 July 1994, plaintiff filed a Form 18 with the Industrial Commission. In the Form 18, plaintiff claimed that repetitive load bearing movements with his upper extremities caused traumatic arthritis. Plaintiff's bilateral elbow problems had begun five years

prior to the filing of the Form 18 with the Industrial Commission; he was diagnosed with traumatic arthritis two and one half years prior to filing his Form 18 with the Industrial Commission; and he was diagnosed with rheumatoid arthritis twenty months prior to filing the Form 18.

Dr. Coonrad informed plaintiff on 3 May 1996, that it was unlikely that plaintiff's job caused his rapidly progressive and severe arthrosis of each elbow, and although it might have been an aggravating condition, Dr. Coonrad could not determine a percentage or degree of aggravation. Dr. Caldwell confirmed plaintiff's diagnosis of atypical presentation of rheumatoid arthritis when x-rays revealed that plaintiff was experiencing erosive changes in his feet in January 2001.

In October 2000, plaintiff filed a Form 33 requesting a hearing on this matter. There is no evidence in the record to show that other employees suffered from hand and arm injuries in the course of their employment. The Deputy Commissioner found that there has been no person other than plaintiff who has ever developed complete bilateral elbow joint destruction while performing an operator job with defendant-employer.

In Dr. Caldwell's deposition, he stated that (1) because of plaintiff's pre-existing rheumatoid disease, plaintiff had an increased risk of developing an exacerbation of his underlying rheumatoid arthritis compared to the general public not so employed; (2) plaintiff's job at defendant-employer for a person without rheumatoid arthritis posed no increased risk of the type of elbow problems plaintiff experienced; (3) plaintiff's job contributed to the advanced arthritis and the destruction of his bilateral elbow joints; and (4) plaintiff's elbow aggravation and the underlying disease process resulted in plaintiff's incapacity for continued work after 22 October 1992.

Another orthopaedic surgeon specializing in upper extremities, Dr. George S. Edwards ("Dr. Edwards"), testified that plaintiff's job subjected plaintiff's elbows to microtrauma due to its repetitive nature and that the job could have placed plaintiff at an increased risk of injuring his arms compared to the general public. However, Dr. Edwards testified that the job and plaintiff's performance did not have an effect on the cartilage destruction within plaintiff's elbows and the job did not cause or accelerate any permanent deterioration of his elbow joints.

In addition, Dr. Douglas H. Adams ("Dr. Adams") testified that although plaintiff's job required him to use his upper extremities

repetitively, Dr. Adams knew of no studies showing an association between work and the degree of force on the joint and the progression of rheumatoid arthritis and the destruction of joints.

On appeal, plaintiff-appellant argues that the Commission committed reversible error in finding for defendant-appellees, and presents eleven Assignments of Error citing various challenges to the full Commission's disposition of this case. In their response, defendants raise eight cross-assignments of error.

The standard of review in an appeal from the full Commission is limited to determining "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Our review " 'goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). The full Commission's findings of fact are conclusive on appeal when supported by competent evidence, even if there is evidence to support a contrary finding, *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citation omitted).

[1] Of the eleven Assignments of Error submitted by plaintiff, only one challenges the Commission's Findings of Fact. In this assignment, plaintiff challenges the validity of Finding of Fact Number 16, the Commission's crediting of an orthopaedist's testimony over the testimony of a rheumatologist, premised upon this Court's applying a "most advanced specialty" doctrine that we have never before adopted or recognized. Plaintiff cites as authority a federal court case and argues that the court, or in this case the Commission, should credit the testimony of the most advanced specialist who treated a particular patient. *See Cosgrove v. Provident Life and Accident Insurance Co.*, 317 F. Supp. 2d 616 (E.D.N.C. 2004). This Court is unable to ascertain the existence of such a doctrine, nor has this Court ever recognized such a doctrine, and we decline to do so at this time. In the particular case upon which the plaintiff relies, the judge, acting as factfinder, merely credits the testimony he finds most compelling and credible. In that case, the credible diagnosis happened to originate from the specialist who treated the patient, as opposed to the primary care physician. *Id.* at 625.

Under our Workers' Compensation Act, the Commission is the factfinding body. *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962). The Commission is the sole judge of the credibility of witnesses and the ultimate factfinder whether it is conducting a hearing or reviewing a cold record. *Adams*, 349 N.C. at 680-81, 509 S.E.2d at 413. On appeal, this Court does not " 'weigh the evidence and decide the issue on the basis of its weight . . . [t]he court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Deese*, 352 N.C. at 115, 530 S.E.2d at 552 (citations omitted).

The full Commission reviewed depositions from three qualified physicians, and reviewed notes from another physician who was not present. It is clear that the Commission recognized the competing opinions of two of these physicians, Drs. Caldwell and Edwards, as to whether plaintiff's underlying disease was either caused or exacerbated by his job. Dr. Caldwell testified that plaintiff's job was an underlying aggravator, while Dr. Edwards testified that plaintiff's job "did not have an effect on the underlying cartilage destruction within plaintiff's elbow joints." The Commission acknowledged that Dr. Adams, a physician who did not treat plaintiff but reviewed his medical history and notes, also stated that he knew of no studies "showing an association between work and the degree of force on a joint and . . . the destruction of joints." Of the three physicians who testified, and the fourth whose notes were provided, the Commission concluded that only Dr. Caldwell opined that plaintiff's job aggravated his underlying arthritis. For that reason, and others within the exclusive purview of the Commission, the Commission concluded that plaintiff's job was not the cause or an exacerbating condition of his underlying rheumatoid arthritis. We find ample support in the record to affirm the Commission's findings of fact, and further find that those facts support the corresponding conclusions of law.

[2] The remaining Assignments of Error, if undertaken, would require this Court to weigh evidence, assess the credibility of witnesses, and substitute our judgment for that of the Commission's. As noted *supra*, that is neither our role nor our right. The role of this Court is to determine whether the Commission's findings of fact are supported by the record, and if so, its decision is to be affirmed. If there is competent evidence to support the Commission's findings, our inquiry ends. In the case at bar, we find that there is competent evidence to support the Commission's findings and we therefore affirm its findings of fact, and affirm its ruling in favor of defendants.

Since we find for the defendants on the merits of the case, there is no need to reach their cross-assignments of error.

Affirmed.

Judge WYNN concurs in a separate opinion.

Judge Bryant concurs.

WYNN, Judge, concurring.

I agree with the result in the majority opinion but write separately to further consider Plaintiff's argument regarding the "most advanced specialty" doctrine, which has not been adopted by any court in North Carolina.

It is well established under our case law that findings of fact of the Industrial Commission are upheld on appeal if those findings are supported by "any competent evidence[.]" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). It is important to note that Plaintiff does not argue that the opinions of doctors with specialties other than rheumatology would be incompetent evidence under the facts of this case. Instead, Plaintiff argues that the full Commission should have afforded the greatest credibility or highest quality of competence to the doctor/expert who has the "most advanced specialty" in the field of medicine the disease or injury concerns.

Plaintiff cites to *Cosgrove v. Provident Life & Accident Ins. Co.*, 317 F. Supp. 2d 616 (E.D.N.C. 2004), to support his theory of the "most advanced specialty" doctrine. In *Cosgrove*, the defendant insurance company denied the plaintiff's claim for long term disability after discounting the opinion of the plaintiff's treating physician, a specialist in the field of her disease, and instead relied upon the opinion of another doctor, not in the same specialty, who never treated the plaintiff but simply reviewed her medical records. *Id.* at 625. The court never announced a doctrine of needing to give greater weight to the doctor with the "most advanced specialty" but simply held that "there was a lack of substantial, objective evidence to discount the reliability and weight of Plaintiff's uncontradicted evidence of symptoms[.]" *Id.*

Here, Plaintiff was first treated by an orthopedist, Dr. Coonrad, who performed surgery on his elbow. Later he was treated by a

rheumatologist Dr. Caldwell. Both doctors, and several others, testified. Plaintiff argues that the full Commission should have given greater weight to Dr. Caldwell's testimony or that Dr. Caldwell's testimony should be more competent than Dr. Coonrad's testimony, because Dr. Caldwell, a rheumatologist, has the most specific specialty regarding Plaintiff's eventual diagnosis of rheumatoid arthritis.

The full Commission determines credibility of witnesses, not this Court. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413-14 (1998). Therefore, it is the full Commission's decision whether to afford a higher degree of credibility to the doctor or expert with the "most advanced specialty." On appeal, this Court is limited to determining "whether *any competent evidence* supports the Commission's findings of fact[.]" *Deese*, 352 N.C. at 116, 530 S.E.2d at 553 (emphasis added). Therefore, even if this Court gave greater deference to the doctor with the "most advanced specialty," Dr. Caldwell, the full Commission still relied on testimony of doctors competent to testify, meeting the "any competent evidence" standard. *See id.*

VAN REYPEN ASSOCIATES, INC. D/B/A THE GIN MILL, PLAINTIFF V. GERALD EUGENE TEETER, AND GORDEN LEWIS D/B/A GORDEN'S EXCAVATING SERVICE, DEFENDANTS

No. COA05-515

(Filed 17 January 2006)

1. Negligence— summary judgment—affidavit of named party—facts not peculiarly within knowledge

The trial court did not err in a negligence case by granting summary judgment in favor of defendants on the basis of the affidavit of defendant individual, because: (1) even though defendant was an interested person as a named party to the action, the affidavit was not inherently suspect and the facts contained in the affidavit were not peculiarly within his knowledge; (2) nothing was presented in opposition to the motion which called into question defendant's credibility or the facts as they were presented in his affidavit; and (3) a mere failure to include the affidavits of persons with knowledge as to facts of contention does not make the facts included in a party's affidavit peculiarly within his knowledge.

2. Motor Vehicles— summary judgment—no sworn statements—affidavit giving expert opinion—speed of vehicle at time of accident

The trial court did not err in a negligence case by concluding that there was no genuine issue of fact raised by the pleadings, discovery, and a professional engineer's affidavit, because: (1) the pleadings and discovery contained no sworn statements, but merely predicted statements of third parties which cannot be relied upon in ruling on a motion for summary judgment; and (2) the engineer's affidavit giving an expert opinion as to the speed of the vehicle at the time of the accident was inadmissible under the current law of this state since one who did not see the vehicle in motion will not be permitted to give an opinion as to its speed.

Appeal by plaintiff from order entered 29 April 2004 by Judge David S. Cayer in Mecklenburg County Superior Court and order entered 4 August 2004 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 November 2005.

James McElroy & Diehl, P.A., by Charles M. Viser and Preston O. Odom III, for plaintiff appellant.

Stiles Byrum & Horne, L.L.P., by D. Lane Matthews, for defendant appellees.

McCULLOUGH, Judge.

Plaintiffs (Van Reypen Associates, Inc.) appeal from an order granting Mr. Teeter, Gorden Lewis and Gorden's Excavating Service (defendants) motion for summary judgment, dismissing Van Reypen Associates' complaint with prejudice and denying Van Reypen Associates' motion to reconsider. Van Reypen Associates further appeal from an order denying their motions to set aside summary judgment pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. We affirm.

FACTS

Van Reypen Associates filed an action in superior court alleging negligence against defendants, which resulted in damage to Van Reypen Associates' property. Defendants filed a motion for summary judgment on 8 April 2004 stating that they were not negligent and that their actions were not the proximate cause of any damages suffered by Van Reypen Associates and attached the affidavit of Mr. Teeter. In

opposition to the motion, Van Reypen Associates submitted the affidavit of David Brown (Mr. Brown) and their answers and objections to the first set of interrogatories and requests for production.

The facts which are undisputed in this case are the following: On 16 January 2002 defendant Mr. Teeter was driving a large dump truck owned by defendant Gorden's Excavating on South Tryon Street in Charlotte, North Carolina. At the intersection of South Tryon and Bland Streets, the truck driven by Mr. Teeter collided with a 1995 Nissan which was owned and operated by Laurie Fisher. As a result of the collision, the dump truck struck The Gin Mill, a business owned by Van Reypen Associates at the corner of South Tryon and Bland Streets, and both the truck and the Nissan struck a BMW owned by Van Reypen Associates parked outside of the Gin Mill.

Based on these events, Van Reypen Associates filed suit against Mr. Teeter, Gorden Lewis and Gorden's Excavating Service to recover damages resulting from the alleged negligence causing the collision. Van Reypen Associates alleged the following negligent actions:

(a) he operated the dump truck while transporting a load of material weighing in excess of the limit at which commercial vehicles are authorized to operate on the public thoroughfares of the State of North Carolina;

(b) he failed to keep a reasonably careful and proper lookout in his direction of travel and failed to see that the Nissan was approaching on the roadway in front of him;

(c) he failed to take into account the traffic conditions on South Tryon Street and failed to operate the dump truck in a manner consistent with those traffic conditions;

(d) he failed to operate his vehicle at a speed which was reasonable for the then existing traffic conditions;

(e) he failed to decrease his speed as necessary to avoid colliding with a vehicle on or entering the roadway;

(f) he failed to yield the right-of-way despite the fact that he approached an intersection at a clearly posted "stop light" emitting a steady red light for traffic in his direction of travel;

(g) he entered into the intersection of South Tryon Street and Bland Street without first ascertaining that this movement of his vehicle could be accomplished safely; and

(h) he operated the dump truck in a careless and reckless manner without due regard of the rights and safety of other drivers on and off the roadway, including Plaintiff.

Defendants denied that Mr. Teeter negligently operated the dump truck and alleged the doctrines of sudden emergency, unavoidable accident, and intervening insulating negligence as defenses.

In support of the motion for summary judgment, the affidavit of Mr. Teeter stated that: (1) the speed limit on the road which he was operating the dump truck was 35 miles per hour; (2) he was stopped at the intersection stop light, and when it turned green, he proceeded toward the intersection traveling 25-30 miles per hour; (3) the traffic was not heavy, the signal remained green as he approached the intersection and he was looking in his direction and not distracted at the time; (4) as he entered the intersection, another vehicle entered the intersection quickly, giving him no time to react, so he immediately hit his brakes, jerking his steering wheel to the left almost simultaneously, and the collision between the two cars occurred; (5) the weight of the load in his truck was not over any weight restrictions at the time of the accident; and (6) he made every effort to avoid the accident. In opposition to the motion for summary judgment, Van Reypen Associates relied on the pleadings, discovery materials and the affidavit of Mr. Brown. Mr. Brown, a professional engineer, stated in his affidavit that, after performing forensic mapping and surveys of the damage, based on his professional experience, Mr. Teeter's speed at the time of the collision was "at least forty eight (48) miles per hour" and that the negligence of Mr. Teeter "was the direct cause of the accident." The pleadings and discovery also listed an eyewitness, Wayne Ivey (Mr. Ivey), other potential trial witnesses, photographs of the sustained damage and the police report prepared after the collision. Summary judgment was granted in favor of defendants and the trial court denied Van Reypen Associates' oral motion to reconsider the ruling on 28 April 2004.

Van Reypen Associates subsequently brought a motion to set aside the summary judgment order pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. Van Reypen Associates alleged newly discovered material evidence as grounds for the motion and attached the materials submitted to the court for the summary judgment motion, along with the affidavits of Charles Viser, attorney for Van Reypen Associates, and Mr. Ivey. The court denied the motion to set aside the order of summary judgment.

Plaintiff now appeals.

ANALYSIS

I

[1] Van Reypen Associates contend on appeal that the lower court erred in granting defendants' motion for summary judgment on the sole basis of the affidavit of Mr. Teeter. We disagree.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). A moving party "has the burden of establishing the lack of any triable issue of fact," and its supporting materials are carefully scrutinized, with all inferences resolved against it. *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976).

Standing alone, the fact that a witness has an interest in a case is insufficient to render his supporting affidavit inherently suspect for purposes of summary judgment. *See Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976). In order for the testimony of an interested witness to be inherently suspect, it must concern facts peculiarly within the knowledge of the witness. *See Carson v. Sutton*, 35 N.C. App. 720, 242 S.E.2d 535 (1978). Our Supreme Court has held that summary judgment may be granted for the movant on the basis of his own affidavits:

> (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction . . . ; and (3) when summary judgment is otherwise appropriate.

Kidd, 289 N.C. at 370, 222 S.E.2d at 410.

In the instant case, the affidavit of Mr. Teeter was filed in support of the motion for summary judgment. Even though Mr. Teeter was an interested person as a named party to the action, the affidavit was not inherently suspect and the facts contained in the affidavit were not peculiarly within his knowledge. In the pleadings, Van Reypen Associates listed Wayne Ivey as a witness to the accident, and in addition to Mr. Ivey, there was another driver involved in the collision who had knowledge of the facts that existed at the time. The pleadings did contain the proposed testimony of the eyewitness Mr. Ivey that would have contradicted the affidavit of Mr. Teeter; however,

there was no sworn statement from Mr. Ivey, and therefore the statement could not be considered. *See Venture Properties I v. Anderson*, 120 N.C. App. 852, 855, 463 S.E.2d 795, 796 (1995) (While "[c]ertain verified pleadings may be treated as affidavits for the purposes of a motion for summary judgment[,]", an unverified pleading cannot be considered.), *disc. review denied*, 342 N.C. 898, 467 S.E.2d 908 (1996). Moreover, nothing was presented in opposition to the motion which called into question the credibility of Mr. Teeter or the facts as they were presented in his affidavit. A mere failure to include the affidavits of persons with knowledge as to facts of contention does not make the facts included in a party's affidavit peculiarly within his knowledge. Therefore, this assignment of error is overruled.

II

[2] Van Reypen Associates further contend on appeal that there was a genuine issue of fact raised by the pleadings, discovery and Mr. Brown's affidavit, and therefore the motion for summary judgment should have been denied. We disagree.

"Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001). " 'It is also clear that the opposing party is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact.' " *Kidd*, 289 N.C. at 368, 222 S.E.2d at 409. More than allegations are required because anything less would " 'allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.' " *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520(2004) (citation omitted).

In the instant case, the pleadings and discovery contained no sworn statements, but merely predicted statements of third parties which cannot be relied upon in ruling on a motion for summary judgment. *See id.* at 709, 582 S.E.2d at 345 (Issues of fact cannot be created by allegations in the complaint inappropriately resting upon the personal knowledge of third parties.). Further, the affidavit of Mr.

Brown giving an expert opinion as to the speed of the vehicle at the time of the accident was inadmissible under the current law of this state. It has long been the rule in North Carolina that "one who did not see a vehicle in motion will not be permitted to give an opinion as to its speed." *Tyndall v. Hines Co.*, 226 N.C. 620, 623, 39 S.E.2d 828, 830 (1946). Our Supreme Court has held:

> As a general rule, a witness must confine his evidence to the facts. In certain cases, however, an observer may testify as to the results of his observations and give a shorthand statement in the form of an opinion as to what he saw. For example, he may observe the movement of an automobile and give an opinion as to its speed in terms of miles per hour. However, one who does not see a vehicle in motion is not permitted to give an opinion as to its speed. A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require.

Shaw v. Sylvester, 253 N.C. 176, 180, 116 S.E.2d 351, 355 (1960).

The rule prohibiting an expert from expressing an opinion on the speed of a vehicle if he or she did not actually see the vehicle was established prior to the adoption of the modern rules of evidence. Rules 702 through 705 of the North Carolina Rules of Evidence specifically anticipate testimony of the nature excluded by cases such as *Shaw*, 253 N.C. 176, 116 S.E.2d 351. North Carolina's leading commentators regarding the law of evidence have repeatedly urged North Carolina's appellate courts to eliminate the limitation on accident reconstruction expert testimony: "The original author of this text cogently argued that the rule limiting testimony in this regard should apply only to lay witnesses, and not to experts. Dean Brandis agreed. This author strongly agrees with both of his predecessors, particularly in light of the language of N.C.R. Evid. 702, which allows opinion evidence of a qualified expert that will 'assist the trier of fact to understand the evidence or to determine a fact in issue.' " 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence*, § 183, at 37 n.166 (6th ed. 2004) (citation omitted). The unanimous view of three generations of eminent commentators suggests, at the least, that the Supreme Court should now review the question and determine whether our existing case law is consistent with modern principles and technological advancements.

The use of accident reconstruction experts is commonplace and, indeed, critical in both criminal and civil cases. There is no meaningful distinction between (1) what a competent accident reconstruction expert does in determining after-the-fact how a motor vehicle accident occurred, and (2) what a forensic pathologist or crime scene investigator does in determining after-the-fact how a person was killed. Admission of the second type of testimony is, however, routine, even while our trial courts are forced to exclude accident reconstruction testimony regarding speed.

There may well come a day—if it has not occurred already—when justice cannot be served because no eyewitness is available to testify that a defendant, either in a criminal or civil case, was or was not speeding. It is time for this state to set aside a rule that no longer can be justified. Any concerns about reliability of given testimony may effectively be addressed when determining the competency of the witness and through cross-examination.

While this Court recognizes that *Shaw* is a minority view, what some may even call archaic, until the Supreme Court of North Carolina decides to abandon this rule, we are bound by it. Therefore, this assignment of error is overruled.

Accordingly, the trial court properly granted the motion for summary judgment where no admissible materials were produced to show that there was a genuine issue of material fact.

Affirmed.

Judges HUNTER and GEER concur.

BALD HEAD ISLAND, LTD., THE CUTTING EDGE MAINTENANCE, INC., PROJECT WORKS, INC., SOUTHPORT ELECTRICAL SERVICE, INC., THE CAROLINA COMPANIES, INC., RICHARD HEWETT ELECTRIC, INC., COASTAL CAROLINA LANDSCAPE, INC., AND IVAN DIAZ, PLAINTIFFS v. VILLAGE OF BALD HEAD ISLAND, DEFENDANT

No. COA04-1209

(Filed 17 January 2006)

1. Appeal and Error— appellate rules violations—notice of errata submitted prior to oral argument

Although plaintiffs violated the Rules of Appellate Procedure by failing to reference their assignments of error in their brief as required by N.C. R. App. P. 28(b)(6), the Court of Appeals exercised is discretion under N.C. R. App. P. 2 to hear the appeal despite the violations because plaintiffs submitted a notice of errata prior to oral argument which amended the headings in their brief to comply with Rule 28(b)(6).

2. Highways and Streets— permit fee—use of internal combustion engine vehicles on island roads

The trial court did not err in an action challenging the legality of defendant Village of Bald Head Island's permit fee schedule for the use of internal combustion engine (ICE) vehicles on the island by granting summary judgment in favor of defendant, because: (1) the legislature gave the Village the express power to impose fees, and thus, it is unnecessary to address whether the fees charged by the Village are more aptly considered a fee or a tax but instead it must be determined whether the Village exceeded the authority the legislature granted; (2) although plaintiff contractors object to the amount of fees collected and the ultimate use of the revenue, the General Assembly did not place a limit on the fees but stated that the amount may be based on criteria that bear upon the Village's costs associated with the operation of vehicles on its roads and that such criteria may include gross weight, length, number of axles, and motor or engine characteristics; (3) although plaintiffs contend the ICE fees assessed by the Village violate N.C.G.S. § 20-97 which limits municipal taxes on vehicles to $5.00 per year, the General Assembly has explicitly authorized the Village to exempt itself from Article 2 of Chapter 20, which includes N.C.G.S. § 20-97; (4) although plaintiff contends the ICE ordinance violates both the North Carolina and United States Constitutions, plaintiffs fail to specify which

provisions of the constitutions the ordinance allegedly violates; (5) to the extent plaintiffs may have been presenting a commerce clause argument, the Court of Appeals lacked jurisdiction to review such an argument since plaintiffs' commerce clause claim was dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(c) and plaintiffs did not appeal from that order nor assign error to the dismissal of this claim; and (6) although plaintiffs assert the ICE ordinance deprives them of due process, the ICE fee classification based on weight and width as well as duration of use is rationally related to the Village's regulation and maintenance of its roads.

Appeal by plaintiffs from order entered 12 April 2004 by Judge Jack W. Jenkins in Brunswick County Superior Court. Heard in the Court of Appeals 20 April 2005.

Fletcher, Ray & Satterfield, L.L.P., by George L. Fletcher and Kimberly L. Moore, for plaintiff-appellants.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Douglas W. Hanna, Sean E. Andrussier, and Melody C. Ray-Welborn, for defendant-appellee.

HUDSON, Judge.

In 2002, plaintiffs filed this lawsuit against the Village of Bald Head Island (the Village), challenging the legality of the Village's permit fee schedule for the use of internal combustion engine (ICE) vehicles on the island. On 12 December 2003, the court dismissed the plaintiffs' commerce clause claim pursuant to the Village's Rule 12(c) motion to dismiss. In April 2004, the court granted summary judgment to the Village on plaintiffs' remaining claims and denied plaintiffs' cross-motion for summary judgment. Plaintiffs appeal. We affirm the trial court.

Bald Head Island is a coastal island community located near Southport, North Carolina. The General Assembly has recognized the

unique nature of Bald Head Island with its combination of structures, land, and vegetation, including the oldest standing lighthouse along the coast of the State and approximately 172 acres of publicly owned prime maritime forest, that exist in a delicate ecological balance requiring careful planning, nurture, and support, as evidenced in the development plan for the island.

S.L. 1997-324. This unique environment requires a unique form of transportation and ordinary travel on the island is by electric-powered golf cart. The narrow roads on Bald Head Island, constructed to blend into the natural environment, were built to accommodate golf carts rather than motor vehicles, and do not comply with Department of Transportation specifications. The Village greatly limits the use of gasoline-powered vehicles—although its emergency vehicles are gas-powered, other gas-powered vehicles, including those used for construction and deliveries, are allowed only by permit.

In recognition of these unique circumstances, the General Assembly empowered the Village, in its Charter, to regulate motor vehicles. S.L. 1997-324. For a number of years, the Village has had an ICE ordinance, whereby it charges fees to those who operate ICE vehicles on Bald Head Island. In February 2000, the Village adopted the current ICE ordinance, which determines permit fees based on the vehicle's gross weight, width, and duration of use. Before 2000, the fees ranged only as high as $200 per year for a construction or delivery truck. Under the new ordinance, a daily permit ranges from $20 to $200, and an annual permit costs from $200 to $2,000. In 2002, plaintiffs, who are contractors subject to the permit fees, filed suit seeking declaratory judgment. Also in 2002, the General Assembly amended the Village Charter, granting the Village the express power to regulate vehicles through the assessment of fees.

[1] Before reaching the merits of plaintiffs' arguments, we must address plaintiffs' violations of the Rules of Appellate Procedure. Rule 28(b)(6) requires that the argument sections in the appellant's brief must make "reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." N.C. R. App. P. 28(b)(6) (2004). Plaintiffs failed to reference their assignments of error in their brief, although they did submit a "Notice of Errata" prior to oral argument which amended the headings in their brief to comply with Rule 28(b)(6).

It is well-established that rules violations may result in dismissal of an appeal. *See, e.g.*, *Hines v. Arnold*, 103 N.C. App. 31, 37-38, 404 S.E.2d 179, 183 (1991). Recently, in *Viar v. N.C. DOT*, our Supreme Court reiterated the importance of compliance with the Rules of Appellate Procedure and admonished this Court not to use Rule 2 to "create an appeal for an appellant." 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Rule 2 of the Rules of Appellate Procedure allows this

Court to review an appeal, despite rules violations. N.C. R. App. P. 2 (2005). This Court has previously reviewed at least one appeal pursuant to Rule 2 where the appellant "rectified his errors" in an errata sheet. *Pugh v. Pugh*, 111 N.C. App. 118, 121, 431 S.E.2d 873, 875 (1993). Here, because plaintiffs submitted their notice of errata before oral argument, and because we need not "create an appeal" for appellants, we choose to review the appeal pursuant to our discretion under Rule 2.

[2] We review a trial court's grant of summary judgment to determine whether there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 707, 582 S.E.2d 343, 345 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004), *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004). Because the facts here are not at issue, we consider only whether the court properly concluded that the Village was entitled to judgment as a matter of law. "Any error made in interpreting a statute is an error of law." *In re Appeal of North Carolina Sav. & Loan League*, 302 N.C. 458, 464, 276 S.E.2d 404, 409 (1981).

In their first argument, plaintiffs essentially argue that the Village exceeded its statutory powers in imposing fees on ICE vehicles. Plaintiffs contend that the Village transformed the fees permitted by statute into an unauthorized form of taxation. We disagree.

Plaintiffs assert that fees are connected to regulatory activity while taxes are a revenue device to raise funds for the general public benefit. They contend that because the fees collected by the Village exceed the "cost of enforcement" and subsidize the maintenance and building of roads, they are a "tax" because the money raised confers a public benefit. Plaintiffs rely on *Homebuilders Association of Charlotte, Inc. v. City of Charlotte, Inc.*, 336 N.C. 37, 442 S.E.2d 45 (1994), for the contention that fees must be roughly equal to the cost of the regulatory program. However, we conclude that *Homebuilders* is inapposite.

In *Homebuilders*, the General Assembly had authorized the City to regulate development, but had not explicitly authorized user fees, and the City imposed user fees to reimburse it for services provided in connection with development activities. *Id.* The North Carolina Supreme Court ruled that the City had the *implied power* to impose such user fees: "municipal power to regulate an activity *implies the power* to impose a fee in an amount sufficient to cover the cost of

regulation." *Id.* at 42, 442 S.E.2d at 49 (emphasis added). Although plaintiffs correctly contend that the Court in *Homebuilders* required that the fees be "reasonable," we do not believe that *Homebuilders* applies here, where the legislature gave the Village express power to impose fees. Rather, we conclude that here the issue is whether the Village has exercised that expressly granted power properly. Thus, we need not address whether the fees charged by the Village are more aptly considered a fee or a tax, but must determine whether the Village exceeded the authority the legislature granted.

In 1997, the General Assembly granted the Village, in its Charter, the authority to regulate motor vehicles as follows:

> The Village may by ordinance exempt from the provisions of Articles 3, 3A, 11, and 13 of Chapter 20 of the General Statutes, in whole or in part, the registration, licensing, regulation, inspection, or equipping of motor vehicles and may regulate the use, operation, possession, and ownership of motor vehicles within the jurisdiction of the Village of Bald Head Island. Additionally, notwithstanding the provisions of Chapter 20 of the General Statutes or any other statute, and in addition to those powers now or hereafter conferred by law, the Village shall have the authority to regulate motor vehicles and other means of transportation within the jurisdiction of the Village, including the following:
>
> (1) Regulation of the use and operation of all vehicles, as defined in G.S. 20-4.01(49).
>
> (2) Regulation of all electrically powered vehicles or vehicles powered by fossil fuel or internal combustion engines.
>
> (3) Regulation of the size, weight, lighting, safety standards, and engine or motor size or power characteristics of all vehicles or other means of transportation within the jurisdiction of the Village.

S.L. 1997-324. In 2002, the General Assembly revised the Charter, in "An Act . . . to clarify that the regulation of motor vehicles on Bald Head Island includes the ability to charge fees for their use on the island," by adding the following provisions:

> Regulation of the use and operation of all vehicles, as defined in G.S. 20-4.01(49). The Village may impose a fee on the use of vehicles within the Village's jurisdiction. The amount of the fee may

> vary based on criteria that bear upon *the Village's costs arising from the operation of that vehicle on the Village's streets, roads, and rights-of-way. Such criteria may include gross weight, length, number of axles, and motor or engine characteristics.*
>
> * * *
>
> The fees collected under Section 10.1 of this Article shall be used by the Village to finance the establishment and maintenance of the Village's streets, roads, and rights-of-way.

S.L. 2002-129 §§ 10.1 (1) & (2) (emphasis added). The General Assembly made these sections retroactive to 24 July 1997.

Plaintiffs object to the amount of fees collected and the ultimate use of the revenue. However, the General Assembly did not place a limit on the fees, but stated that the amount may be based on "criteria that bear upon the Village's costs" associated with the operation of vehicles on its roads and that such criteria "*may* include gross weight, length, number of axles, and motor or engine characteristics." (Emphasis added). In adopting the ICE ordinance, the Village made the following uncontroverted findings:

> [T]he use of the streets and roads within the Village by large, wide, and heavy vehicles cause[s]. . . significant damage to the pavement and shoulders of such streets and roads . . . . Construction delivery vehicles, construction equipment vehicles, delivery, repair and maintenance vehicles, arrival and departure transportation vehicles, public service and utility vehicles . . . are, by their nature, required to carry loads heavier than those for which battery-propelled vehicles are designed.

As the fees are based on a vehicle's weight and width, and on the duration of the permit, we conclude that they are squarely within the legislative grant of power to assess fees based on "criteria that bear upon the Village's costs." Furthermore, in the amended Charter, the General Assembly explicitly stated that the fees must be used to finance "the establishment and maintenance" of the Village's roads. Accordingly, we conclude that the Village has not exceeded its statutory authority.

Plaintiffs also argue that the ICE fees assessed by the Village violate N.C. Gen. Stat. § 20-97, which limits municipal taxes on vehicles to $5.00 per year. N.C. Gen. Stat. § 20-97(b) (2004). However, the General Assembly has explicitly authorized the Village to exempt

itself from Article 2 of Chapter 20, which includes N.C. Gen. Stat. § 20-97. S.L. 1997-324; S.L. 2002-129. Plaintiffs suggest that N.C. Gen. Stat. § 20-97 provides "a complete and integrated regulatory scheme to the exclusion of local regulation," but here, the local regulation was authorized by the State. Furthermore,

> [i]t is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application . . . . When, however, the section dealing with a specific matter is clear and understandable on its face, it requires no construction. In such case, the Court is without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain.

State ex rel. Utilities Com. v. Lumbee River Electric Membership Corp., 275 N.C. 250, 260, 166 S.E.2d 663, 670-71 (1969) (internal citations and quotation marks omitted). Thus, we conclude that this argument has no merit.

Plaintiffs also argue that the ICE ordinance "violates both the North Carolina and United States Constitutions." However, plaintiffs fail to specify which provisions of the constitutions the ordinance allegedly violates, making assertions such as, "[s]imply put, the fees are unconstitutional," and "[the] ordinance . . . is 'inconsistent' with both state and federal constitutions and 'infringes' guaranteed liberties." We cannot review such vague arguments.

> The function of all briefs required or permitted by these rules is to *define clearly the questions presented to the reviewing court* and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. *Review is limited to questions so presented* in the several briefs.

N.C. R. App. P. 28(a) (2004) (emphasis added). Here, plaintiffs' brief does not "define clearly" the question they wish for us to review, and this Court may not "create an appeal for an appellant." *Viar*, 359 N.C. at 402, 610 S.E.2 at 361. Thus, we cannot review these arguments. We also note that to the extent that plaintiffs may have been presenting a commerce clause argument, we lack jurisdiction to review such an argument, as plaintiffs' commerce clause claim was dismissed pursuant to Rule 12(c) and plaintiffs did not appeal from that order nor assign error to the dismissal of this claim. *See* N.C. R. App. P. 3(d) & 10(a) (2004).

Finally, plaintiffs assert that the ICE ordinance deprives them of due process. Here, unlike in their previous constitutional argument, plaintiffs assert a violation of a specific constitutional right, and thus we are able to review this assignment of error. We review substantive due process challenges to economic regulation under the rational basis standard, which "merely" requires that a regulation "bear some rational relationship to a conceivable legitimate interest of government." *Huntington Prop. LLC v. Currituck County*, 153 N.C. App. 218, 230, 569 S.E.2d 695, 704 (2002). We conclude that the ICE fee classification, based on weight and width, as well as duration of use, is rationally related to the Village's regulation and maintenance of its roads. Accordingly, we reject this argument.

Affirmed.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA v. ROBERT EUGENE MATTHEWS, DEFENDANT

No. COA04-1592

(Filed 17 January 2006)

1. Evidence— photograph—defendant loading gun—defendant in altercation—admissible

There was no plain error in the admission in a prosecution for armed robbery and other crimes of a photograph of defendant loading a gun and testimony about the taking of the picture because it was relevant to defendant's possession of a gun and was the means by which the victim first identified defendant. Also, testimony about defendant having been seen in an altercation established how a witness was able to identify defendant.

2. Evidence— comment about defendant—neighbor of victim—admissible

Testimony by a neighbor of an armed robbery victim that she had told defendant he could visit her son as long as he didn't take anything did not refer to prior crimes, wrongs, or acts of defendant, fell outside the scope of N.C.G.S. § 8C-1, Rule 404(b), and was not precluded on a plain error analysis.

3. Evidence— larceny prosecution—defendant arrested for failing to appear—admissible

An officer's testimony that defendant had been arrested for failing to appear was admissible in a prosecution for armed robbery and other crimes because it was offered to show how the police came to question defendant about the robbery.

4. Evidence— probative value not outweighed by prejudice—limiting instructions not requested

The trial court did not abuse its discretion in a prosecution for armed robbery and other crimes by not excluding under N.C.G.S. § 8C-1, Rule 403 a photograph of defendant loading a gun, testimony of a prior altercation involving defendant, a neighbor's comment about defendant, and defendant's arrest on another charge. The trial court limited the State's examinations about information that risked violating Rule 404(b), and defendant did not request limiting instructions.

5. Larceny— sentence for felonious larceny—no findings of breaking or entering or value of stolen goods

The trial court erred by entering judgment and sentencing defendant on felonious larceny when the jury did not find either that defendant was guilty of felonious breaking or entering or that the value of the goods taken was more than $1,000.

6. Sentencing— aggravating factors—found by judge—not alleged in indictment

The trial court erred when sentencing defendant by imposing aggravated sentences based upon factors found by the judge rather than the jury. However, the argument that aggravating factors should have been alleged in the indictment has been rejected.

Appeal by defendant from judgments entered 2 July 2004 by Judge Abraham P. Jones in Durham County Superior Court. Heard in the Court of Appeals 8 June 2005.

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

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

GEER, Judge.

In this case, although defendant Robert Eugene Matthews was convicted of felonious larceny, the jury could not reach a verdict on felonious breaking and entering. Because the jury did not make any finding that the value of goods taken during the larceny was more than $1,000.00, we are required under *State v. Keeter*, 35 N.C. App. 574, 241 S.E.2d 708 (1978), to vacate the felonious larceny judgment and remand for entry of a sentence consistent with a verdict of guilty of misdemeanor larceny. Further, since defendant was sentenced in the aggravated range based on judicially-found aggravating factors, we are also compelled to remand for a new sentencing hearing in accordance with *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

Facts

On 20 April 2003, Clintina Docher was cooking breakfast for her fiancée, Christopher Cofield, and her baby when a man knocked on the back door. Docher asked who it was, but received no response. Docher then heard a knock on the front door, and, when she asked who it was, a man responded "Rock." Cofield recognized "Rock" as someone he had seen involved in an altercation on a bus a month earlier. Cofield went to the door, and "Rock" asked if he had any cigarettes. Cofield responded that he did not, but that he would be going to the store soon.

After Cofield left, Docher heard another knock on the front door, and the person again identified himself as "Rock." When Docher tried to open the door, Rock grabbed her by the throat and pushed her back into the house. A second man, who Rock called Daniel, also entered the house. Both men were armed with guns. Daniel put his gun to the baby's head, while Rock pointed his gun at Docher's head. Rock threatened that he would kill the baby if Docher moved or if he did not find what he wanted in the house. Rock told Daniel to go upstairs and check every room.

After Daniel went upstairs, Rock put his gun up against the back of the baby's head and again threatened to kill her. When Rock turned his head away, Docher jumped over a coffee table, grabbed her baby out of her stroller, and tried to run out the door. Rock pulled Docher back inside and threatened to kill her if she tried anything again. The two men closed all of the windows and shades and tried to tie up Docher and her baby and put them in a closet.

During a search of the house, Rock and Daniel found $260.00. The men then made sandwiches, drank some orange juice, took a 40-ounce beer, and walked out the back door. Daniel immediately returned, grabbed Docher by the face, and threatened that if she told anyone what had happened, he would kill her and her family.

After the men were gone, Docher ran to a neighbor's apartment, and the neighbor called the police. When Docher later told another neighbor, China Townsend, what had happened, Townsend showed Docher a picture of defendant loading a gun. Docher identified the person in the picture as "Rock."

On 24 April 2003, defendant was arrested on a failure to appear charge and brought in for questioning. After waiving his *Miranda* rights, defendant stated that he had been at his mother's funeral on the day of the robbery. Defendant's mother was, however, still alive on the date of the robbery and, in fact, was seen in the courthouse on the first day of defendant's trial.

Defendant was indicted for (1) robbery with a dangerous weapon, (2) felony breaking and entering, (3) felony larceny, (4) assault by pointing a gun, (5) communicating threats, (6) two counts of second degree kidnapping, (7) conspiracy to commit robbery with a dangerous weapon, and (8) possession of a firearm by a felon. The trial court granted a mistrial on the felony breaking and entering charge because the jury was unable to reach a unanimous verdict. The jury found defendant guilty on each of the remaining charges.

During sentencing, the trial judge found six aggravating factors and no mitigating factors. Based on those aggravating factors, the trial judge sentenced defendant to consecutive aggravated sentences of 129 to 164 months for robbery with a dangerous weapon, 42 to 60 months for conspiracy to commit robbery with a dangerous weapon, 42 to 60 months for each second degree kidnapping conviction, 20 to 24 months for possession of a firearm by a felon, 12 to 15 months for felony larceny, 75 days for assault by pointing a gun, and 45 days for communicating threats.

I

[1] With respect to all of his convictions, defendant argues that the trial court committed plain error by failing to exclude certain evidence under Rule 404(b) of the Rules of Evidence, including: (1) the photograph of defendant loading a gun shown by Townsend to Docher; (2) testimony by Townsend regarding statements she made

to defendant and regarding her taking of the photograph; (3) Christopher Cofield's testimony that he had witnessed defendant in an altercation on a bus in March 2003; and (4) testimony by police investigator G. K. Coats that defendant had been arrested for failing to appear. Since defendant's counsel did not object to the admission of the challenged evidence, defendant asks us to review the admission of the evidence for 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 grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial." *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996). Although the State argues that plain error review cannot be used in this instance because the admission of this evidence was in the discretion of the trial judge, this Court has previously held that the admission or exclusion of evidence under Rule 404(b) may be reviewed for plain error. *See, e.g.*, *State v. Berry*, 143 N.C. App. 187, 194-95, 546 S.E.2d 145, 151-52, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 439 (2001).

Rule 404(b) of the North Carolina Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. . . .

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). This rule is a " 'clear general rule of *inclusion* of relevant evidence,' " and evidence is excluded under this rule only when its sole probative value is to show that defendant had the propensity to commit the crime. *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852 (quoting *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990)), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436, 116 S. Ct. 530 (1995). "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." *Id.*, 457 S.E.2d at 852-53.

After reviewing the record, we hold that the disputed evidence was not precluded by Rule 404(b). The photograph showing defend-

ant loading a gun and Townsend's testimony regarding the taking of that photograph was admissible because (1) the evidence was relevant to show that defendant possessed a gun for the charge of possession of a firearm by a felon, and (2) the photograph was the means by which Docher first identified defendant as the perpetrator. *See State v. Thibodeaux*, 341 N.C. 53, 64, 459 S.E.2d 501, 509 (1995) (upholding admission of photograph of the defendant carrying gun that was murder weapon); *State v. Hanton*, 140 N.C. App. 679, 688, 540 S.E.2d 376, 382 (2000) ("His photograph [from a police file] was used to prove identity, which is permissible under Rule 404(b)."); *State v. Johnson*, 78 N.C. App. 68, 71, 337 S.E.2d 81, 83-84 (1985) (upholding admission of photographs of defendant standing next to marijuana plants as evidence of where defendant lived). Similarly, Cofield's testimony that he had seen defendant in an altercation establishes how Cofield was able to identify defendant.

[2] Defendant also challenges testimony by Townsend that she told defendant that he could visit her son at her house so long as he did not take anything. This testimony does not, however, refer to prior crimes, wrongs, or acts of defendant and, therefore, falls outside of the scope of Rule 404(b). *Thibodeaux*, 341 N.C. at 63, 459 S.E.2d at 508 (holding that trial court did not err in admitting testimony that defendant had indicated he might solve his financial difficulties by robbing a bank when "[t]he testimony at issue did not relate to any prior crime, wrong or act of the defendant").

[3] Finally, the officer's testimony regarding defendant's failure to appear was offered to show how the police came to question defendant about this crime. As such, it is admissible. *See State v. McCree*, 160 N.C. App. 19, 27-28, 584 S.E.2d 348, 354 (testimony by officer that the defendant was stopped while driving a car that had been reported stolen did not violate Rule 404(b) because it was offered to explain the defendant's presence in a photographic lineup), *appeal dismissed and disc. review denied*, 357 N.C. 661, 590 S.E.2d 855 (2003); *State v. Riley*, 137 N.C. App. 403, 409, 528 S.E.2d 590, 594 (allowing evidence of officer's interrogation of defendant in connection with another offense in part to justify officer's initial contact with defendant), *appeal dismissed*, *disc. review denied*, *and cert. denied*, 352 N.C. 596, 545 S.E.2d 217-18 (2000), *cert. denied*, 531 U.S. 1082, 148 L. Ed. 2d 681, 121 S. Ct. 785 (2001).

[4] Defendant also argues that the evidence, even if admissible, should have been excluded under Rule 403. Defendant contends that

the evidence's probative value was limited because it was cumulative, while its prejudicial effect was substantial. We note that the trial court acted affirmatively to limit the State's examinations with respect to information that risked violating Rule 404(b). Based on our review of the record, we cannot agree with defendant that the trial court abused its discretion under Rule 403. Nor are we able to conclude, as required for plain error, that the admission of the evidence tilted the scales sufficiently to cause defendant to be convicted. *See State v. Childress*, 321 N.C. 226, 234, 362 S.E.2d 263, 268 (1987) ("in order to invoke the plain error rule this Court must determine that the alleged error 'tilted the scales' and caused the jury to reach its verdict"). To the extent defendant contends he was prejudiced by the lack of limiting instructions, his failure to request such instructions precludes review of that issue on appeal. *State v. Stager*, 329 N.C. 278, 310, 406 S.E.2d 876, 894 (1991). Accordingly, this assignment of error is overruled.

II

[5] Defendant also argues that the trial court erred by entering judgment and sentencing him on felony larceny when the jury did not find either that defendant was guilty of felonious breaking and entering or that the value of the goods taken was more than $1,000.00. Although the State argues that defendant has waived this argument by failing to object at trial, a defendant need not object to a sentencing error at trial in order to preserve the issue for appellate review. *State v. Hargett*, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003) ("Our Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure.").

Under N.C. Gen. Stat. § 14-72 (2003), defendant's larceny could be considered a felony, rather than a misdemeanor, only if the value of the property he took was more than $1,000.00 or if he committed the larceny in the course of a felonious breaking and entering. In this case, the jury made no finding regarding the value of the stolen property and the jury failed to convict defendant of felonious breaking and entering.

This Court addressed this precise situation in *Keeter* and wrote:

> Our Courts have repeatedly held that where a defendant is tried for breaking or entering and felonious larceny and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, it is improper for the trial judge

> to accept the verdict of guilty of felonious larceny unless the jury has been instructed as to its duty to fix the value of the property stolen; the jury having to find that the value of the property taken exceeds $200.00 [now $1,000.00] for the larceny to be felonious. . . .
>
> We are presented with the question of whether the rule . . . should be extended to the case at bar. That is, whether a case in which the jury is unable to reach a verdict on a charge of felonious breaking or entering precludes the acceptance of a guilty verdict of felonious larceny. We hold that [the rule] does apply. . . . [I]f the jury does not find the defendant guilty of felonious breaking or entering, it cannot find him guilty of felonious larceny based on the charge of felonious breaking or entering.

Keeter, 35 N.C. App. at 575, 241 S.E.2d at 709. Under *Keeter*, the trial court in this case erred in sentencing defendant for felonious larceny. The judgment of felonious larceny must be vacated and the case must be "remanded for entering a sentence consistent with a verdict of guilty of misdemeanor larceny." *Id.*

III

[6] Finally, defendant argues that the trial court erred, under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), in imposing aggravated sentences because (1) no aggravating factors were pled in the indictments, and (2) the trial judge himself, not the jury, found the factors in aggravation. We agree that this case must be remanded for resentencing.

Our Supreme Court addressed the impact of *Blakely* in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 437, 615 S.E.2d at 265 (citing *Blakely*, 542 U.S. at 303-04, 159 L. Ed. 2d at 413-14, 124 S. Ct. at 2537; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455, 120 S. Ct. 2348, 2362 (2000)). The failure to do so constitutes structural error and is reversible *per se*. *Id.* at 449, 615 S.E.2d at 272.

Because the trial court in this case based defendant's sentences on aggravating factors that it, rather than a jury, had found, we must vacate the sentence and remand for resentencing in accordance with

Blakely and *Allen*. With respect, however, to defendant's argument that the aggravating factors should have been alleged in the indictment, the Supreme Court rejected that argument in *Allen*. *Id.* at 438, 615 S.E.2d at 265.

Vacated and remanded in part, no error in part, and remanded for re-sentencing on all convictions.

Judges CALABRIA and ELMORE concur.

STEVE McINTYRE, PLAINTIFF v. VICKI McINTYRE, DEFENDANT

No. COA05-344

(Filed 17 January 2006)

Appeal and Error— appealability—interlocutory order—failure to show substantial right

Although both parties appeal various trial court rulings which resolve the issue of equitable distribution, the merits of the parties' contentions cannot be reached because the parties appealed an interlocutory order when the related issue of alimony remained. Although the parties maintain they will avoid retrial of the issue of alimony in the event the Court of Appeals reverses and/or vacates the equitable distribution orders, avoidance of a rehearing or trial is not a substantial right entitling a party to an immediate appeal.

Appeal by plaintiff from order entered 27 June 2000 by Judge Victoria L. Roemer in Forsyth County District Court. Appeal by plaintiff and defendant from order entered 31 July 2001 and judgment entered 3 December 2004 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 15 November 2005.

Michelle D. Reingold for plaintiff.

Bell, Davis & Pitt, P.A., by Robin J. Stinson, and Gatto Law Offices, by Joseph J. Gatto, for defendant.

JOHN, Judge.

Steve McIntyre ("plaintiff") appeals the trial court's 27 June 2000 order denying his motion for partial summary judgment on the equitable distribution claim of Vicki McIntyre ("defendant"). Plaintiff and defendant appeal the trial court's 31 July 2001 order ("the Order") allowing the equitable distribution trial to proceed, as well as the court's 3 December 2004 judgment ("the Judgment") awarding the parties certain separate and marital property. For the reasons discussed herein, we are compelled to dismiss the appeal.

Pertinent factual and procedural background information includes the following: Plaintiff and defendant married 17 July 1986 in Lexington, North Carolina. Following a 22 December 1999 separation, they were divorced 28 January 2002. Plaintiff initiated the instant action by filing a 24 August 1999 complaint seeking divorce from bed and board and division of the parties' separate and marital property. Defendant responded with a 25 October 1999 answer and counterclaim, requesting, *inter alia*, equitable distribution of the parties' property as well as provision of post-separation support and permanent alimony commensurate with defendant's needs. In his reply filed 4 November 1999, plaintiff countered that an attached document entitled "Prenuptial Agreement" ("the Agreement") barred defendant's "martial rights in the real estate and personal property of [] plaintiff and particularly with regard to claims for alimony and equitable distribution . . . ."

The Agreement, signed by both parties and dated 17 July 1986, provides as follows:

> THAT WHEREAS, said parties have agreed to be married, each to the other; and WHEREAS said parties each own property; and WHEREAS said parties, deeming the same to be just and fair to the other party, have mutually agreed as herein set out:
>
> NOW, THEREFORE, in consideration of said contemplated marriage and of the covenants hereby entered into, the parties mutually agree as follows:
>
> FIRST: STEVE A. McINTYRE hereby releases, renounces and forever quitclaims to VICKIE [sic] GAIL TRUELL all right, title, interest, claim and demand whatsoever including all marital rights in the real estate and personal property of VICKIE [sic] GAIL TRUELL and agrees that VICKIE [sic] GAIL TRUELL may at

> all times hereafter purchase, acquire, own[,] hold, possess, encumber, dispose of and convey any and all kinds and classes of property, both real and personal, as though still unmarried and without the consent, joinder or interference of the party of STEVE A. McINTYRE.
>
> SECOND: VICKIE [sic] GAIL TRUELL hereby releases, renounces and forever quitclaims to STEVE A. McINTYRE all right, title, interest, claim and demand whatsoever including all marital rights in the real estate and personal property of STEVE A. McINTYRE and agrees that STEVE A. McINTYRE may at all times hereafter purchase, acquire, own, hold, possess, encumber, dispose of and convey any and all kinds of classes of property, both real and personal, as though still unmarried and without the consent, joinder or interference of VICKIE [sic] GAIL TRUELL.

Citing the Agreement, plaintiff moved for partial summary judgment, contending no genuine issue of material fact remained regarding defendant's claim for equitable distribution. In an order entered 27 June 2000, Judge Victoria L. Roemer denied plaintiff's motion. On 24 April 2001, Judge Laurie L. Hutchens allowed defendant's motion to amend her answer and counterclaim to allege duress and undue influence, fraud and misrepresentation, unconscionability and inadequate disclosure, and unenforceability in relation to the Agreement.

Judge Chester C. Davis conducted a hearing on 6 July 2001, following which he entered the Order. Judge Davis found as fact therein that the Agreement did not prohibit defendant's claims to marital property, and further that because

> the terms of the Agreement distinguish the property that the parties owned at the time of their marriage rather than property acquired after their marriage . . . the [Agreement] simply provided that [plaintiff] and [defendant] were "free traders."

Based in part upon the foregoing findings, Judge Davis concluded as a matter of law that defendant was not "influenced, coerced or under duress" when she signed the Agreement and that the document did not "determine the property interest of the parties as to property acquired following their marriage on July 17, 1986." Ultimately, Judge Davis ruled defendant's equitable distribution claim was not barred by the Agreement and could proceed to a trial on the merits "as to all property acquired following the parties' marriage . . . without preju-

dice to either party's right to argue classification and distribution issues pursuant to N.C.G.S. § 50-20 . . . ."

The case proceeded to trial in April 2004. Following 20 April, 17 May, 18 May, and 21 June 2004 hearings, Judge Davis determined an equal distribution of the parties' property was "both just and fair." On 3 December 2004, Judge Davis entered the Judgment, finding as fact he

> ha[d] previously ruled . . . that the real estate and personal property stated in the document referred to as the "Prenuptial Agreement" applied to the property in existence as of the date of the parties[']marriage, and therefore Equitable Distribution could continue with respect to property acquired after the parties' marriage.

After classifying and valuing the parties' assets, Judge Davis awarded certain property to each party and ordered defendant to pay plaintiff $25,478.16 within thirty days.

Plaintiff appeals Judge Roemer's 27 June 2000 order, and both parties appeal the Order and the Judgment of Judge Davis.

Plaintiff contends the trial court erred by: (i) determining the Agreement was a "free trader" agreement which did not bar defendant's claim for equitable distribution; and (ii) considering a Douglas Form book in its determination. Defendant contends the trial court erred by: (i) declining to set aside the Agreement entirely due to duress and undue influence on the part of plaintiff; (ii) failing to consider the effects of appreciation and improvements to the parties' property during marriage; and (iii) distributing the parties' property equally. However, we are unable to reach the merits of the parties' contentions because the appeal is interlocutory.

In the case *sub judice*, the parties appeal various trial court rulings which resolve the issue of equitable distribution but leave open the related issue of alimony. Judicial orders are "either 'interlocutory or the final determination of all rights of the parties.' " *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (quoting N.C. Gen. Stat. § 1A-1, Rule 54(a)).

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but

> leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. Durham, 231 N.C. 354, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted).

While a final judgment is always appealable, an interlocutory order may be appealed immediately only if (i) the trial court certifies the case for immediate appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b), or (ii) the order "affects a substantial right of the appellant that would be lost without immediate review." *Embler*, 143 N.C. App. at 165, 545 S.E.2d at 261. "This rule is grounded in sound policy considerations[,]" *id.*, including the prevention of "fragmentary and premature appeals that unnecessarily delay the administration of justice" and the assurance that "the trial divisions fully and finally dispose of the case before an appeal can be heard," *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (citations omitted).

Both plaintiff and defendant concede the "outstanding alimony claim . . . remains to be heard in this case[,]" and thus do not contest the interlocutory nature of their appeal. Without question, moreover, neither the Order nor the Judgment contains certification by the trial court for immediate appeal pursuant to N.C.G.S. § 1A-1, Rule 54. Nonetheless, the parties in effect lay claim to the "substantial right" exception by maintaining appeal has been taken herein "in the interest of judicial economy." They request

> that this Court determine whether or not the equitable distribution orders are proper prior to the alimony hearing in order for the trial court in the alimony hearing to accurately consider the parties' financial standing in the event that alimony is awarded.

The parties further assert that

> [b]y completing the equitable distribution portion of the case, the parties avoid the time and expense of trying an alimony case, only to retry the issue of alimony in the event that this Court reverses and/or vacates the equitable distribution orders.

Unfortunately for the parties, these arguments, while perhaps persuasive at first blush, have previously been resolved against them by this Court.

"Whether an interlocutory appeal affects a substantial right is determined on a case by case basis." *Embler*, 143 N.C. App. at 166, 545 S.E.2d at 262 (citation omitted). "Our courts generally have taken

a restrictive view of the substantial right exception[,]" *id.* (citation omitted), requiring the appellant to "establish that a substantial right will be affected unless he is allowed immediate appeal" and rejecting for review those "[i]nterlocutory appeals that challenge only the financial repercussions of a separation or divorce . . . ." *Id.*; *see also Stafford v. Stafford*, 133 N.C. App. 163, 164, 515 S.E.2d 43, 44 (appeal seeking immediate review of date of separation used by trial court in absolute divorce judgment held not to affect a substantial right where date relevant only to equitable distribution claim), *aff'd per curiam*, 351 N.C. 94, 520 S.E.2d 785 (1999); *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998) (order of post-separation support not immediately appealable); *Hunter v. Hunter*, 126 N.C. App. 705, 708, 486 S.E.2d 244, 245-46 (1997) (interim equitable distribution order not immediately appealable); *Dixon v. Dixon*, 62 N.C. App. 744, 745, 303 S.E.2d 606, 607 (1983) (order requiring return of property to marital home pending disposition of equitable distribution and divorce actions not immediately appealable); *Stephenson v. Stephenson*, 55 N.C. App. 250, 251, 285 S.E.2d 281, 281-82 (1981) (monetary *pendente lite* orders not immediately appealable).

In *Embler*, this Court held the trial court's equitable distribution order "that explicitly left open the related issue of alimony" was interlocutory and neither affected a substantial right nor presented the potential for inconsistent verdicts. 143 N.C. App. at 167, 545 S.E.2d at 262-63. Although the Order and the Judgment herein do not "explicitly" leave open the issue of alimony, we perceive no distinction between the circumstances of the case *sub judice* and those in *Embler*.

In seeking immediate appeal, the parties maintain they will avoid retrial of "the issue of alimony in the event that this Court reverses and/or vacates the equitable distribution orders" following a timely-filed appeal. As in *Embler*, however, there appears to be no danger of inconsistent verdicts were we to remand this case to the trial court. Further, this Court has consistently stated that " 'avoidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal.' " *Banner v. Hatcher*, 124 N.C. App. 439, 442, 477 S.E.2d 249, 251 (1996) (quoting *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)). Regarding the parties' contention that "the interest of judicial economy" compels immediate review so as to avoid any delay caused by the potential for retrial of the alimony action, we note the admonition of this Court approximately twenty-six years ago that

> the matter could have been heard on its merits and a final order entered by the District Court . . . months before the appeal reached this court for disposition. . . . The avoidance of deprivation due to delay is one of the purposes for the rule that interlocutory orders are not immediately appealable.

Stephenson, 55 N.C. App. at 251, 285 S.E.2d at 282.

In short, because the parties have failed to distinguish *Embler* or to meet their burden of identifying a substantial right which would be affected were we to decline review of the instant appeal, *see Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) ("moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party"), the appeal must be dismissed as interlocutory. Whatever might be the personal inclination of one or more members of this panel, we are bound by *Embler* and the other authorities cited herein. *See 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."). The recourse of the parties and others similarly situated is to our Supreme Court or to the General Assembly.

Appeal Dismissed.

Judges WYNN and STEELMAN concur.

ANITA THOMPSON, EMPLOYEE, PLAINTIFF v. FEDERAL EXPRESS GROUND, EMPLOYER, CRAWFORD & COMPANY, CARRIER, DEFENDANTS

No. COA05-34

(Filed 17 January 2006)

1. Workers' Compensation— unauthorized medical treatment—approval not timely sought

The Industrial Commission's findings that a workers' compensation plaintiff had not sought timely approval of treatment by an osteopath was binding where plaintiff did not assign error to

those findings. Defendants were not required to pay for treatments from the osteopath beyond those approved by her treating physician.

2. Workers' Compensation— unauthorized medical expenses—retroactively sanctioned by treating physician—further treatment not covered

Expenses for osteopathic treatment for a workers' compensation plaintiff beyond that approved by the treating physician were not subject to Rule 407(4) of the Workers' Compensation Rules, and defendants did not have to pay for those treatments. The treating physician retroactively sanctioned the initial treatment but did not refer plaintiff to the osteopath. He did not recommend further treatment.

3. Workers' Compensation— attorney fees not awarded—no abuse of discretion

The Industrial Commission did not abuse its discretion in a workers' compensation case by not awarding attorney fees as a sanction for unreasonable defense.

Appeal by plaintiff from opinion and award entered 1 September 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 December 2005.

Browne, Flebotte, Wilson, Horn & Webb, PLLC, by Martin J. Horn, for plaintiff-appellant.

McAngus Goudelock & Courie, PLLC, by Louis A. Waple and Joseph N. Hamrick, for defendants-appellees.

STEELMAN, Judge.

Plaintiff, Anita Thompson, appeals an opinion and award concluding that defendant-carrier, Crawford and Company, was not required to pay for certain medical treatments plaintiff obtained from an unauthorized physician. For the reasons discussed herein, we affirm the determination of the Industrial Commission.

At the time of plaintiff's hearing before the Industrial Commission, she was fifty-eight years old. She had a BA in business administration and an MA in education. Plaintiff was hired by defendant-employer, Federal Express Ground, as a manager in training. Upon successful completion of her training, plaintiff would have been a

terminal manager. Shortly after she was hired, plaintiff suffered a compensable injury by accident on 16 December 2000 while removing luggage from her car. At the time of her injury, plaintiff's average weekly wage was $1,076.00. This entitled her to compensation at the rate of $558.00, which she continues to receive for temporary total disability.

Following the plaintiff's injury, she initially went to Hillandale Medical Center for treatment, but was later referred to Triangle Orthopedic Associates and saw Dr. Raphael Orenstein, who became her treating physician. Dr. Orenstein's notes reflect plaintiff complained of pain in her neck and lower back. He recommended conservative treatment, including therapy, medication, and chiropractic care. Plaintiff was permitted to return to work with modified duty restrictions. She was not to lift anything greater than ten pounds or do any repetitive bending or twisting. Upon her return to Dr. Orenstein, plaintiff reported her pain was worse and involved her entire body. Plaintiff also reported pain when driving and requested a restriction of no driving. Dr. Orenstein continued plaintiff on modified work restrictions. Despite an MRI scan, the doctor was unable to determine the source of plaintiff's pain. When plaintiff did not respond to the treatment, Dr. Orenstein recommended she attend an interdisciplinary pain program geared toward changing a patient's attitude toward pain. In response to this recommendation, plaintiff underwent a psychological evaluation by Dr. Scott Sanitate on 11 April 2001. Dr. Sanitate found no physical cause for plaintiff's pain and determined her symptoms were not consistent with the described injury. He opined that plaintiff's pain was psychological. He concluded plaintiff had reached maximum medical improvement, was able to return to work, and her condition did not warrant an impairment rating. The only treatment Dr. Sanitate recommended was a limited course of chiropractic treatment. Based on Dr. Sanitate's report, defendants did not authorize plaintiff to participate in the interdisciplinary pain program.

At this time, plaintiff requested a referral for a second opinion with an osteopath. Dr. Orenstein felt this was unnecessary. He felt that since plaintiff had not experienced any relief from chiropractic treatment, it was unlikely she would experience any additional relief from an osteopath. Despite Dr. Orenstein's refusal to refer plaintiff, she found an osteopath via the Internet, and commencing 24 April 2001, received treatment from Dr. Thomas Motyka, an osteopathic consultant at UNC hospitals. Although Dr. Orenstein disagreed with

Dr. Motyka's diagnosis of fibromyalgia, he later stated that in his opinion Dr. Motyka's treatment from 24 April 2001 through 26 June 2001 was not necessarily inconsistent with the type of chiropractic treatment he recommended and was reasonable and necessary. However, as of 26 June 2001, Dr. Orenstein did not recommended any further chiropractic or osteopathic treatment. Although plaintiff received treatment from Dr. Motyka starting 24 April 2001, she did not request approval from the Industrial Commission until she filed a motion on 15 May 2002.

Defendants refused to pay for Dr. Motyka's treatment. Plaintiff filed a Form 33 asserting she was not receiving disability benefits. The Full Commission (Commission) filed an Opinion and Award on 1 September 2004 awarding plaintiff temporary total disability at the weekly rate of $588.00 and instructing defendants to pay for all medical expenses plaintiff had incurred or would incur as a result of her compensable injury, including expenses associated with Dr. Motyka's treatment for the limited period from 24 April 2001 through 26 June 2001. The Commission further ordered that neither Dr. Motyka nor Dr. Orenstein were approved as plaintiff's treating physicians. Finally, the Commission determined that defendants' defense against plaintiff's medical claims was reasonable and not based on stubborn, unfounded litigiousness. As a result, it held plaintiff was not entitled to attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1. Plaintiff appeals.

Our review of an award by the Industrial Commission is limited to: (1) whether there was competent evidence before the Commission to support its findings; and (2) whether such findings support its legal conclusions. *Lewis v. Orkland Corp.*, 147 N.C. App. 742, 744, 556 S.E.2d 685, 687 (2001). Findings of fact from an opinion and award of the Commission, if supported, are deemed conclusive, even if there is evidence that would support findings to the contrary. *Id.* On appeal, this Court does not have the authority to weigh the evidence or make determinations of credibility, rather our duty goes no further than to determine whether the record contains any evidence tending to support the Commission's findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citations omitted).

[1] In plaintiff's first argument, she contends the Commission erred in concluding that defendants were not responsible for expenses incurred for her treatment by Dr. Motyka because defendant-carrier had no right to direct any medical care she obtained before the date

it accepted the claim pursuant to N.C. Gen. Stat. § 97-25, nor was she required to seek approval from the Commission to change Dr. Motyka as her treating physician. We disagree.

Generally, an employer has the right to direct the medical treatment for a compensable work injury. *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 623-24, 540 S.E.2d 785, 788 (2000). Even so, an employer's right to direct medical treatment, which necessarily includes the right to select the treating physician, only arises once the employer accepts the claim as compensable. *Id.* at 624, 540 S.E.2d at 788. Although defendant-carrier paid plaintiff's medical bills, this did not constitute an acceptance of liability. *Biddix v. Rex Mills*, 237 N.C. 660, 664, 75 S.E.2d 777, 780-81 (1953). Since defendants did nothing to accept the claim, other than to pay plaintiff's bills, the date liability is deemed to have been accepted is 8 August 2001, the date defendants filed the Form 60. The Commission ordered defendants to pay plaintiff's medical bills, including those to Dr. Motyka from 24 April 2001 through 26 June 2001. Thus, the only medical expenses that are at issue are those arising from Dr. Motyka's care from 27 June 2001 until 8 August 2001, when defendants officially admitted liability by filing a Form 60. After that date, defendants would be entitled to direct plaintiff's medical treatment.

Defendants would ordinarily be required to pay for the treatment plaintiff received from Dr. Motyka during this period. However, N.C. Gen. Stat. § 97-25 imposes upon an employee who chooses his or her own physician the requirement that they obtain the approval of the Commission within a reasonable time after associating with the physician. This statute provides that "an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, *subject to the approval of the Industrial Commission*." N.C. Gen. Stat. § 97-25 (2005) (emphasis added). This approval is required for each physician an employee chooses. *Lucas v. Thomas Built Buses, Inc.*, 88 N.C. App. 587, 590, 364 S.E.2d 147, 150 (1988). "Moreover, the claimant must obtain the Industrial Commission approval for the selected physician within a reasonable time after procuring the services of the physician." *Forrest v. Pitt County Bd. of Education*, 100 N.C. App. 119, 126, 394 S.E.2d 659, 663 (1990). It is for the Commission to determine whether approval was sought within a reasonable time after treatments with the physician began and to make the appropriate findings in support of its determination. *Scurlock v. Durham County Gen. Hosp.*, 136 N.C. App. 144, 152, 523 S.E.2d 439, 444 (1999). Absent the Commission's approval,

the employer is not required to pay for those medical services. *See Forrest*, 100 N.C. App. at 126, 394 S.E.2d at 663.

In the instant case, the Commission specifically found:

> 11. Though [plaintiff] received unauthorized treatment from Dr. Motyka beginning on April 24, 2001, plaintiff did not request Industrial Commission approval of the treatment until a Motion was filed May 15, 2002, almost one year later. Plaintiff, who was represented by counsel, had ample opportunity to request approval earlier as numerous forms and Motions were filed during this time and the circumstances involved did not constitute [an] emergency situation, especially in light of the treatment being provided.

The Commission went on to find that plaintiff's motion to approve Dr. Motyka was "not timely filed." Plaintiff did not assign as error these findings in the record on appeal. As a result, these findings are presumed to be supported by competent evidence and are binding on appeal. *Konrady v. U.S. Airways, Inc.*, 165 N.C. App. 620, 628, 599 S.E.2d 593, 598 (2004). Since plaintiff failed to obtain the Commission's approval of Dr. Motyka within a reasonable time, defendants were not required to pay for her treatments with Dr. Motyka from 27 June 2001 until 8 August 2001.

[2] In the alternative, plaintiff argues that pursuant to Rule 407(4) of the Workers' Compensation Rules of the North Carolina Industrial Commission, the Commission should have required defendants to pay all of her medical expenses associated with Dr. Motyka's treatment because Dr. Orenstein, her authorized treating physician, referred her to Dr. Motyka.

Rule 407(4) provides:

> The responsible employer or carrier/administrator shall pay the statements of medical compensation providers to whom the employee *has been referred* by the authorized treating physician, unless said physician has been requested to obtain authorization for referrals or tests; . . .

Workers' Compensation Rules of the North Carolina Industrial Commission, Rule 407(4) (2005) (emphasis added). The Commission found that "[plaintiff] located an osteopath via the Internet and on April 24, 2001 received treatment *on her own* from Dr. Thomas

Motyka, an osteopathic consultant at UNC Hospitals . . . ." (emphasis added). Dr. Orenstein did not refer plaintiff to Dr. Motyka; he retroactively sanctioned the treatment provided from 24 April through 26 June 2001. However, he did not recommend further treatment after that time. For this reason, the expenses for medical treatment provided by Dr. Motyka after 26 June 2001 are not subject to Rule 407(4). This argument is without merit.

[3] In plaintiff's second argument, she contends the trial court erred in declining to award attorney's fees as a sanction against defendants for unreasonable defense of her claim. We disagree.

Pursuant to N.C. Gen. Stat. § 97-88.1, the Commission may award attorney's fees if it determines that a hearing has been unreasonably brought or defended. The decision whether to award or deny attorney's fees rests within the sound discretion of the Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason. *Bryson v. Phil Cline Trucking*, 150 N.C. App. 653, 656, 564 S.E.2d 585, 587 (2002). Our review of the record fails to disclose an abuse of discretion by the Commission. This argument is without merit.

The remainder of plaintiff's assignments of error are either not argued in her brief or no authority is cited in support thereof. As such, they are deemed abandoned. N.C. R. App. P. 28(b)(6).

AFFIRMED.

Judges WYNN and LEWIS concur.

MAPCO, INC., PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA05-266

(Filed 17 January 2006)

Contracts— change—proposal specifications as estimates—no breach of good faith or implied warranty

A summary judgment for defendant was affirmed in a breach of contract action which arose when defendant reduced the distance a road was to be resurfaced, milled, and repainted under

this contract because of overlap with another contract. This change undermined defendant's reliance on specifications in the bid proposal, particularly the amount of reclaimed asphalt pavement the project would generate, and reduced its profit. However, the contract stated that the amount of milling and resurfacing were subject to change as the project progressed, and contract provisions concerning changes were not applicable. Claims of breach of good faith and breach of defendant's implied warranty that plans and specifications were accurate were not argued or supported in the brief, or were without merit.

Appeal by plaintiff from an order entered 19 November 2004 by Judge John R. Jolly, Jr. in Wake County Superior Court. Heard in the Court of Appeals 20 October 2005.

Bugg & Wolf, P.A., by John E. Bugg and William J. Wolf, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Fred Lamar and Assistant Attorney General Steven Armstrong for defendant-appellee.

ELMORE, Judge.

This case arises from the North Carolina Department of Transportation's (DOT) decision to reduce the amount of necessary construction under a contract it had with MAPCO, Inc. (MAPCO). On 1 December 2000 the DOT awarded a construction contract to MAPCO for the milling, resurfacing, and placement of markings on two sections of Highway 421 in Guilford County. The project was centered in Division 7 of the DOT and under that division's authority. At a pre-construction meeting between the parties, MAPCO was informed that the DOT was going to reduce the scope of the contract due to the fact that a small portion of MAPCO's project was going to overlap with one of the DOT's larger projects—a project managed at the state level. In order to prevent the overlap, MAPCO's 11.45 mile project was reduced by 6,900 linear feet, or 1.3 miles. MAPCO, however, had placed its bid according to the specifications in the bid proposal, in particular relying on the amount of reclaimed asphalt pavement (RAP) the project was going to generate. Because of the cost savings the proposed RAP would generate on the project and profit made through the sale of the excess, MAPCO lowered its bid or otherwise credited the DOT. The DOT's alterations in the project

were such that MAPCO would now not realize the gain it bargained for from the $2,956,775.73 contract.

MAPCO pursued its administrative and statutory remedies against the DOT without relief. Thereafter it filed suit against the DOT on 22 May 2003 alleging breach of contract. MAPCO claimed, in part, that:

> 14. At the time the project was bid, Mapco relied to its detriment on the detailed plans and specifications for the work. Further, at the time the Department awarded the project to Mapco, the Department was fully aware that a portion of work was going to be deleted from the project but did not inform Mapco of this until after Mapco had allowed the Department more than $100,000.00 credit for the material to be recycled from the milling work as part of its bid for the work. Mapco's bid ultimately became part of the contract between Mapco and the Department.
>
> . . .
>
> 17. The Department breached its obligations to Mapco by failing to adjust the contract amount to return the value of the credit Mapco allowed the Department in its bid for the value of the milling materials.

The DOT denied MAPCO's allegations and also filed for summary judgment. MAPCO, agreeing that there was no genuine issue of material fact, also filed for summary judgment. The trial court ordered summary judgment in favor of the DOT. MAPCO appeals.

Our review of an order for summary judgment is well understood, *see Lee v. R. & K. Marine, Inc.*, 165 N.C. App. 525, 526-27, 598 S.E.2d 683, 684 (2004), and while both parties agree there is no genuine issue of material fact, each contends they were entitled to summary judgment as a matter of law. Even while viewing the facts in the light most favorable to MAPCO, however, we agree with the trial court that the DOT was entitled to summary judgment in its favor.

Included in the contract between the parties is the 1995 edition of the North Carolina Standard Specifications for Roads and Structures (SSRS). Application of these specifications along with other provisions within the parties' contract determine who shall recover. *See Teer Comp. v. Highway Commission*, 265 N.C. 1, 13, 143 S.E.2d 247, 256 (1965).

> It is noted that the statutory procedure is available when the contractor has completed his contract with the Highway Commission and fails to receive 'such settlement as he claims to be entitled to *under his contract*.' . . . The procedure is to resolve any controversy as to what (additional) amount, if any, the contractor is entitled to recover under its terms.

Id. (emphasis in original); *see also Thompson-Arthur Paving Co. v. N.C. Dept. of Transportation*, 97 N.C. App. 92, 94, 387 S.E.2d 72, 73 (1990) (statutory recovery is limited to terms of contract and this is the exclusive remedy); *Teer Co. v. Highway Comm.*, 4 N.C. App. 126, 142, 166 S.E.2d 705, 716 (1969) ("In the absence of an executed supplemental agreement, the parties are bound by the terms of the Contract, and recovery, if any will be controlled by its provisions."). Further, "[w]here the provisions of a contract are plainly set out, the court is not free to disregard them and a party may not contend for a different interpretation on the ground that it does not truly express the intent of the parties." *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 284, 296 S.E.2d 512, 514-15 (1982); *Teer*, 4 N.C. App. at 143, 166 S.E.2d at 716 (quoting 2 Strong's North Carolina Index 2d, *Contracts* § 12).

The parties' contract states that the amount of milling and resurfacing are subject to change as the project progresses; in other words, the figures provided by the DOT and used by MAPCO in bidding on the project are estimates only.

> The quantities shown in the itemized proposal for the project are considered to be approximate only and are given as the basis for comparison of bids. The Department of Transportation may increase or decrease the quantity of any item or portion of the work as may be deemed necessary or expedient.
>
> An increase or decrease in the quantity of any item will not be regarded as sufficient ground for an increase or decrease in the unit prices, nor in the time allowed for the completion of the work, except as provided for the contract.

Despite this language, MAPCO contends that several of the contract's provisions allow it to recover the lost offset against the DOT.

First, MAPCO argues that the exclusion of 6,900 linear feet from the project was an elimination of a contract line item. Section 104-6 of the SSRS states the DOT "may eliminate any item from the contract, and such action will in no way invalidate the contract."

However, if the contractor has incurred expenses related to the eliminated item, the contractor is entitled to a reimbursement of costs. But this provision is not applicable to the parties' dispute here. The DOT did not eliminate any contract line item; rather, the DOT reduced the quantity of several line items of work by shortening the distance of the overall project. For instance, the DOT did not eliminate MAPCO's need to place a yellow line marking on the highway, a line item in the contract; it did, however, reduce the length that marking would need to be.

Second, MAPCO contends the DOT altered the tolerance (depth) of the milling, and under section 612-4 of the SSRS it is entitled to additional money. Section 612-4, entitled "Tolerance," addresses the depth a contractor shall mill the existing pavement before resurfacing it.

> Removal of the existing pavement shall be to the depth required by the plans or project special provisions. The Engineer may vary the depth of milling by not more than one inch. In the event the directed depth of milling per cut is altered by the Engineer more than one inch, either the Department of the Contractor may request an adjustment in unit price under the provisions of Article 104-3.

MAPCO contends that since the depth of milling in the section removed from the contract was altered from three inches to zero, it is entitled to the offset. We cannot agree with the applicability of this provision either. The plain language of the section applies to alterations or variations in the *depth* of milling pavement lengths that exist under the contract, not in offering an offset when the contractor's *distance* of pavement to mill is reduced by direction of the DOT. In fact, according to the record, the tolerance of the milling in the contract did not vary, instead 36,800 square yards of three inch deep milling was removed from the contract, along with every other aspect of work to be done to those 36,800 yards.

Third, MAPCO contends the DOT altered the construction plans and materially changed the character and cost of the work it was supposed to perform. Section 104-3 of the SSRS addresses these concerns. This section generally states that if the DOT alters the contract plans it shall not constitute a breach and the contractor agrees to perform the work as altered for the original bid price. But there is a notable conditional exception to this agreement: if the altered plans or details 1) materially change the character of the work and 2) ma-

terially change the cost of performing the work, then an adjustment in price is warranted. "An adjustment in the affected contract unit or lump sum prices due to alterations in the plans or details of construction that materially change the character of the work and the cost of performing the work will be made by the Engineer only as provided in this article." According to this provision, absent a *material* change in character and cost, there is no agreement to adjust the price.

MAPCO would have this Court ostensibly ignore the word "material," and instead read the contract to authorize an adjustment in price any time there is an alteration in the plans. Yet to do so would reverse the clear intent of this extensive provision and place it in conflict with others throughout the contract. *See Reaves v. Hayes*, 174 N.C. App. 341, 345, 620 S.E.2d 726, 729 (2005) (contract terms are to be harmoniously construed and each word given effect) (quoting *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000)). Most importantly, MAPCO does not argue that the deletion of 6,900 linear feet from the contract increased its cost or materially changed the character of the work it performed. Rather, MAPCO contends that "[s]ince [its] bid price included a credit for the value of the RAP that [it] was to receive under the express terms and conditions of the parties Contract, the Department owed [it] the value of those materials when the Department changed its plans and took back much of the RAP [it] had been promised."

But as stated earlier, the quantities in the contract were estimates, and presumptively, if there was 1) a material change in the plans or details, or 2) if a major contract item's quantity is altered greater than fifteen percent, the SSRS, and thus the parties' contract, allows for flexible adjustments. Outside these provisions, there is nothing in this contract or the record before us that protects MAPCO's interest in the amount of RAP it would be able to take away from the project had the estimates been actually realized. Indeed, section 612-1 of the SSRS states: "milled material shall become the property of the Contractor." But there is nothing to suggest, as the DOT points out, that this provision entitles MAPCO to anything other than the material actually milled.

Fourth, MAPCO argues that when the DOT reduced the necessary distance of the resurfacing project it breached the implied duty of good faith. MAPCO acknowledges that the bid proposal contains estimated quantities, but suggests that "absent an error by the

Department in calculating the 'estimated quantities,' it is virtually impossible to have any significant variations in those quantities on a resurfacing project without an alteration to the plans." MAPCO goes on to claim that the Department did just that, alter the plans. However, alteration of construction plans is a conceivable event and one that was specifically dealt with throughout the contract. Although perhaps hinting that the DOT acted in bad faith by allowing the estimates to be included in the proposal while knowing them to be false, this claim is not supported or argued in the brief.

Last, MAPCO argues that the DOT breached its implied warranty as to the accuracy of the plans and specifications for the project. We find this argument lacks sufficient merit. Thus, having resolved that the trial court did not err in finding summary judgment in favor of the DOT, we affirm its order.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

STATE OF NORTH CAROLINA v. KENNETH DALE HYDEN, DEFENDANT

No. COA04-1162

(Filed 17 January 2006)

1. Criminal Law— order establishing conviction of crimes— guilty plea

Defendant's contention that there was no order of the court establishing his convictions of the crimes of involuntary manslaughter, reckless driving, driving while license revoked, fictitious tag, unsafe movement, hit and run with property damage, and hit and run with personal property case is without merit. Although defendant challenges his guilty plea by contending the trial court examined him on his transcript of plea but then went directly to a summary of the factual basis of the plea without accepting the plea or ordering it to be recorded, the transcript of plea was signed by defendant, both counsel, and the court, and the record contains the judgment and commitment also signed by the court.

2. Sentencing— prior record level—driving while impaired convictions

The trial court did not err by counting all five of defendant's prior driving while impaired convictions when determining his prior record level under N.C.G.S. § 15A-1340.14 for purposes of sentencing even though defendant contends that three of the driving while impaired convictions were also elements of the two habitual impaired driving convictions, because: (1) although prior convictions of driving while impaired are elements of the offense of habitual impaired driving, the statute does not impose punishment for these previous crimes but instead imposes an enhanced punishment for the latest offense; (2) on each occasion that defendant was sentenced as a felon, it was based on the new instance of DWI being considered a more serious violation in light of defendant's recidivist record; (3) defendant was convicted of five separate instances of DWI, some deemed by the General Assembly to be misdemeanors and some deemed to be felonies; and (4) to hold otherwise renders habitual driving while impaired a status rather than an offense which is contrary to N.C.G.S. § 20-138.5 and prior decisions of the Court of Appeals.

3. Sentencing—aggravated range—failure to submit aggravating factors to jury—*Blakely* error

The trial court erred by sentencing defendant in the aggravated range without submitting the aggravating factors found by the court to the jury. Contrary to the State's contention, there was no indication in the record that defendant stipulated or otherwise admitted the existence of the aggravating factors.

Appeal by defendant from judgment entered 15 December 2003 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 11 May 2005.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for defendant-appellant.

GEER, Judge.

Defendant Kenneth Dale Hyden appeals from his guilty plea to involuntary manslaughter, reckless driving, driving while license revoked, fictitious tag, unsafe movement, hit and run with property

damage, and hit and run with personal injury. On appeal, defendant primarily contends that the trial court incorrectly calculated his prior record level and that he was sentenced in the aggravated range in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004) and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). With respect to his prior record level, defendant argues that the trial judge should not have counted three prior misdemeanor driving while impaired convictions when those convictions formed the basis for his two convictions of habitual impaired driving, which were also included in the prior record level calculation. Defendant had five prior convictions based on his driving while impaired, three categorized as misdemeanors and two as felonies. We hold that the trial court properly counted all five convictions when determining his prior record level for purposes of sentencing him on the charge of involuntary manslaughter and the six other related charges. We agree, however, that he is entitled to a new sentencing hearing under *Blakely* and *Allen*.

The evidence tended to show that, on 6 July 2003, as defendant drove along Leicester Highway in Asheville, he passed other vehicles that had stopped for a traffic light and struck a car driven by Carol Morrow, who was turning onto the highway. Ms. Morrow died as a result of the accident and her two minor grandchildren, passengers in the car, were injured. Defendant left the scene, but turned himself into the police approximately 18 hours later and gave a statement acknowledging substance abuse before the collision.

On 1 December 2003, defendant was indicted for felony hit and run, failure to stop with personal injury, failure to stop causing property damage, driving while license revoked, reckless driving to endanger, involuntary manslaughter, fictitious tag, unsafe movement, and hit and run. On 15 December 2003, defendant entered into a plea agreement with the State and pled guilty to driving while license revoked, reckless driving, involuntary manslaughter, fictitious tag, unsafe movement, hit and run with property damage, and hit and run with personal injury. The parties stipulated that all of the charges would be consolidated into a single Class F felony for judgment. After finding that defendant had 14 points, resulting in a prior record level IV, the court found several aggravating factors and sentenced defendant to 31 to 38 months in prison.

Discussion

[1] Defendant first challenges his guilty plea, contending that the trial court examined him on his transcript of plea, but then went

directly to a summary of the factual basis of the plea without accepting the plea or ordering it to be recorded. Nevertheless, the transcript of plea was signed by defendant, both counsel, and the court, and the record contains the judgment and commitment also signed by the court. Defendant's contention that there was no order of the court establishing his conviction of the crimes is without merit.

[2] Defendant next contends that the trial court incorrectly calculated his prior record level under N.C. Gen. Stat. § 15A-1340.14 (2003). In arriving at the figure of 14 points, the trial judge counted two prior convictions for habitual impaired driving (Class F felonies carrying four points each), three prior driving while impaired convictions (misdemeanors resulting in one point each), and three prior non-traffic misdemeanors (carrying one point each). Defendant argues that the trial judge should not have counted the three driving while impaired convictions because those convictions were also elements of the habitual impaired driving convictions. We disagree.

N.C. Gen. Stat. § 15A-1340.14(b)(3) requires a trial court, in calculating a defendant's prior record level, to assign four points for each prior Class E, F, or G felony conviction. Defendant was twice convicted for habitual impaired driving under N.C. Gen. Stat. § 20-138.5(a) (2003), which provides: "A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense." The offense of habitual impaired driving is a Class F felony. N.C. Gen. Stat. § 20-138.5(b).

Under the plain language of the statute, in order to be convicted of habitual impaired driving, there must have been at least four instances of driving while impaired ("DWI"): the current offense being tried together with three prior convictions for DWI. As this Court has previously held, "[p]rior convictions of driving while impaired are the elements of the offense of habitual impaired driving, but the statute 'does not impose punishment for [these] previous crimes, [it] imposes an enhanced punishment' *for the latest offense.*" *State v. Vardiman*, 146 N.C. App. 381, 385, 552 S.E.2d 697, 700 (2001) (emphasis added) (quoting *State v. Smith*, 139 N.C. App. 209, 214, 533 S.E.2d 518, 521, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000)), *appeal dismissed*, 355 N.C. 222, 559 S.E.2d 794, *cert. denied*, 537 U.S. 833, 154 L. Ed. 2d 51, 123 S. Ct. 142 (2002). In rejecting a double jeopardy claim, the *Vardiman* panel wrote:

> It follows in the case at bar, then, that the habitual driving while impaired statute does not violate the prohibition on double jeopardy, because it enhances punishment for present conduct rather than repunishing for past conduct. We hold that the habitual impaired driving statute does not punish prior convictions a second time, *but rather punishes the most recent conviction more severely* because of the prior convictions.

Id. at 386, 552 S.E.2d at 701 (emphasis added).

In light of *Vardiman*, we reject defendant's claim that the trial judge's calculation of his prior record level represents a double-counting of convictions. Defendant's prior record included five instances of DWI, three of which were punished as misdemeanors and two of which were punished as felonies. On each occasion that defendant was sentenced as a felon, it was because that new instance of DWI was considered a more serious violation in light of his recidivist record. As *Vardiman* establishes, the felony status is not the result of further punishing of prior instances of DWI. Because each of these felony convictions involve separate offenses of DWI that have simply been punished more severely, there is no basis for declining to include these convictions in calculating defendant's prior record level. *See also State v. Baldwin*, 117 N.C. App. 713, 716, 453 S.E.2d 193, 194 ("Habitual impaired driving is a substantive felony offense. Therefore, a conviction for that offense may serve as the basis for enhancement to habitual felon status." (internal citation omitted)), *cert. denied*, 341 N.C. 653, 462 S.E.2d 518 (1995).

We do not believe that *State v. Gentry*, 135 N.C. App. 107, 519 S.E.2d 68 (1999), relied upon by defendant, mandates a different result. In *Gentry*, this Court concluded that the General Assembly "did not intend that the convictions which elevate a misdemeanor driving while impaired conviction to the status of the felony of habitual driving while impaired, would then again be used to increase the sentencing level of the defendant." *Id.* at 111, 519 S.E.2d at 70-71. *Gentry* did present an instance of double-counting. The defendant's sentence for his current DWI was first enhanced from a misdemeanor to a felony as a result of three prior DWI convictions and then was enhanced a second time by those same prior convictions when they were counted as part of his prior record level.

Here, by contrast, defendant was convicted of five separate instances of DWI, some deemed by the General Assembly to be misdemeanors and some deemed to be felonies. The question presented

in this case is not whether these convictions may elevate a sentencing status and simultaneously also increase the sentencing level. It is whether each of defendant's prior convictions should count towards his prior record level when sentencing defendant for involuntary manslaughter and six other charges. The trial judge did not err in counting all five DWI convictions in calculating defendant's prior record level. To hold otherwise renders habitual impaired driving a status rather than an offense, contrary to N.C. Gen. Stat. § 20-138.5 and this Court's prior decisions.

[3] Even though the trial court properly calculated the prior record level, resentencing is necessary under *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). The trial court, in sentencing defendant, found one statutory aggravating factor and two non-statutory aggravating factors over defendant's objection. Contrary to the State's contention, there is no indication in the record that defendant stipulated to or otherwise admitted the existence of the aggravating factors. Accordingly, defendant's sentence violates *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004). In *Allen*, our Supreme Court held that this error is "structural and, therefore, reversible *per se*." 359 N.C. at 449, 615 S.E.2d at 272.

Affirmed in part; and remanded for a new sentencing hearing in part.

Judges HUNTER and HUDSON concur.

ALFRED R. FERREYRA, EMPLOYEE, PLAINTIFF v. CUMBERLAND COUNTY, EMPLOYER, SELF-INSURED, KEY RISK MANAGEMENT SERVICES, INC., SERVICING AGENT, DEFENDANTS

No. COA05-401

(Filed 17 January 2006)

1. Workers' Compensation—injury by accident—giving CPR—exhaustion and aneurysm rupture

There was evidence supporting the Industrial Commission's finding in a workers' compensation case that a deputy sheriff suffered an aneurysm rupture after giving CPR and that this was a compensable injury by accident. Although there was

testimony that deputies rarely perform CPR, it is the extent and nature of the exertion that determines whether the resulting injury was an injury by accident, and plaintiff did not need to show that the overexertion occurred while he was engaged in some unusual activity.

2. Workers' Compensation—aneurysm rupture after giving CPR—causal relationship—medical testimony not speculative

Medical testimony that the stress and excitement of performing CPR caused a deputy sheriff's aneurysm to rupture was unequivocal and not speculative and supported the Industrial Commission's findings that the aneurysm rupture was causally related to the deputy's employment. The Court of Appeals does not weigh the credibility or relative strength of evidence.

Appeal by defendants from opinion and award entered 13 January 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 November 2005.

MacRae, Perry, & MacRae, L.L.P., by Daniel T. Perry, III, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, by Dayle A. Flammia and Courtney L. Coates for defendant-appellants.

HUDSON, Judge.

Plaintiff Alfred R. Ferreyra, an employee of defendant Cumberland County ("the county"), claimed an injury by accident after he suffered a burst aneurysm at work on 26 February 2002. Following a hearing on 28 May 2003, Deputy Commissioner George T. Glenn, II, issued an opinion and award on 30 January 2004, concluding that plaintiff had sustained a compensable injury by accident at work and awarding benefits. Defendant appealed, and on 13 January 2005, the Full Commission issued an opinion and award affirming the Deputy Commissioner's opinion and award with minor modifications. Defendants appeal. As discussed below, we affirm.

At the relevant time, plaintiff was employed as a deputy sheriff. On 26 February 2002, plaintiff was on routine patrol with a trainee, when a young woman sought help for her mother ("the victim"). The victim had stopped breathing while in her daughter's car. Plaintiff was certified in cardiopulmonary resuscitation ("CPR") and as a First Responder, but had never had occasion to use CPR during his eight

years as a deputy sheriff. Plaintiff performed chest compressions on the victim in the front seat of the car, while the trainee began rescue breathing. After performing twenty-one sets of five chest compressions, plaintiff felt a sharp pain in his head, and another deputy took over performing the CPR. Plaintiff was unable to complete his shift due to his severe headache and went home. After over-the-counter medications and rest did not alleviate his pain, plaintiff went to the hospital where he was diagnosed as suffering from a brain aneurysm. Dr. Bruce P. Jaufmann treated plaintiff and performed surgery on him on 1 March 2002.

Dr. Jaufmann testified that:

> It is my opinion that most likely the stress and excitement while performing CPR in attempting to save the individual's life resulted in an increase in blood pressure, which caused the aneurysm to rupture at that time . . . .

We begin by noting the well-established standard of review for worker's compensation cases from the Industrial Commission. This Court does not assess credibility or re-weigh evidence; it only determines whether the record contains any evidence to support the challenged findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *rehearing denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). We are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). In addition, findings of fact not challenged on appeal are binding on this Court. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

We note that defendants assign error to the commission's findings of fact 6, 7, 8, 13, 14, and 15, but fail to argue them in their brief to this Court. Accordingly, these findings are conclusive on appeal.

[1] Defendants first argue that the Commission erred in concluding that plaintiff sustained an injury by accident. We disagree.

The Workers Compensation Act provides benefits "only [when an] injury by accident aris[es] out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (2003). An accident is "an unlooked for and untoward event which is not expected or designed by the per-

son who suffers the injury." *Adams v. Burlington Industries Inc.*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983) (citations omitted). "An accident therefore involves 'the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.' " *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 124 (2000) (quoting *Adams*, 61 N.C. App. at 260, 300 S.E.2d at 456).

Defendants contend that this case is controlled by the holding in *Neely v. City of Statesville*, in which a firefighter's heart attack during a fire was found to be a non-compensable injury. 212 N.C. 365, 366, 193 S.E. 664, 665 (1937). The Supreme Court held that

> [t]he work in which the deceased was engaged was the usual work incident to his employment. The surrounding conditions might be expected at a fire. The falling in of the roof is a natural result of fire burning there. Heat and smoke are expected. Physical exertion is required in handling the hose and fire-fighting equipment. The firemen, of necessity, act hurriedly. We find no evidence of an accident.

Id. at 366-67, 193 S.E. at 665. Likewise, defendants here contend that plaintiff's injury occurred during usual work incident to his employment and is thus non-compensable. We believe that the case here is more analogous to *King v. Forsyth County*, 45 N.C. App. 467, 263 S.E.2d 283, *disc. review denied*, 3000 N.C. 374, 267 S.E.2d 676 (1980). In *King*, a deputy sheriff suffered a heart attack just after chasing a fleeing suspect. *Id.* at 468, 263 S.E.2d at 283. In reversing the commission's denial of compensation, this Court held that it:

> was not necessary for the plaintiff to show that the overexertion which was the cause of his injury occurred while he was engaged in some unusual activity. It was the extent and nature of the exertion that classifies the resulting injury to the plaintiff's heart as an injury by accident within the meaning of G.S. 97-2(6).

Id. at 471, 263 S.E.2d at 285. The *King* opinion also cites *Gabriel v. Town of Newton*, 227 N.C. 314, 42 S.E.2d 96 (1947), in which "our Supreme Court clearly recognized that damage to heart tissue clearly precipitated or caused by 'overexertion' constitutes an injury by accident." *King*, 45 N.C. App. at 468, 263 S.E.2d at 284. In *Gabriel*, a policeman suffered a heart attack after struggling with a man who was violently resisting arrest; the heart attack was held

to be a compensable injury by accident. *Gabriel*, 227 N.C. at 318, 42 S.E. 2d at 98-99.

Here, the commission found that plaintiff suffered an aneurysm following exhaustion from administering CPR in the course of his work, and that the physical exertion and stress of administering CPR caused the aneurysm to burst. Further the commission found:

> Plaintiff, Officer Mead and Wanda Smith the dispatcher testified CPR is seldom done by deputy sheriffs. Although they are trained in CPR, deputies are rarely first responders to medical emergencies. This was the first time plaintiff had done CPR in his 8½ years on the force and dispatcher Smith had not had any officer on the Sheriff's department doing CPR in her eight years as a dispatcher with the Department.

This finding which is well-supported by the evidence, supports the commission's conclusion that plaintiff, like the plaintiff in *Gabriel*, suffered a compensable injury by accident. These findings, which are conclusive on appeal, support the conclusion that plaintiff suffered a compensable injury by accident on 26 February 2002. Because plaintiff did not need to show that the overexertion which was the cause of his injury occurred while he was engaged in some unusual activity, the commission's findings are sufficient to support its conclusion. We overrule this assignment of error.

[2] Defendants next argue that the commission erred in concluding that plaintiff's employment was causally related to his aneurysm. We disagree.

Defendants contend that the evidence before the commission did not support the commission's finding that plaintiff suffered a ruptured aneurysm as a result of his work doing CPR on 26 February 2002. However, the record indicates that Dr. Jaufmann stated by letter that:

> Alfred Ferreyra suffered a subarachnoid hemmorage due to an anterior communicating artery aneurysm while giving CPR . . . . It is my opinion that most likely the stress and excitement while performing CPR in attempting to save the individual's life resulted in an increase in blood pressure which caused the aneurysm to rupture at that time.

This evidence supports the commission's finding that plaintiff's administration of CPR while working caused the aneurysm

which in turn supports the conclusion that plaintiff suffered a compensable injury.

Defendants assert that this testimony was incompetent and should not have been relied upon because it was based on speculation and conjecture. *See Dean v. Carolina Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 94 (1975). Defendants contend that testimony from another medical expert should have been given greater weight than Dr. Jaufmann's. We conclude that Dr. Jaufmann's testimony was unequivocal and not speculative. This Court does not weigh the credibility or relative strength of evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Because the evidence supports the commission's findings of fact, which in turn support its conclusions of law, we overrule this assignment of error.

Affirmed.

Judges TYSON and LEVINSON concur.

STATE OF NORTH CAROLINA v. DONALD WAYNE McGEE, DEFENDANT

No. COA04-1338

(Filed 17 January 2006)

1. Sentencing—habitual felon—indictment–order of convictions—waiver of argument by guilty plea

An habitual felon indictment was facially valid and defendant's guilty plea waived his right to challenge the correctness of the information in the indictment. His guilty plea also waived his argument concerning a prior prayer for judgment continued and impermissible overlapping convictions under N.C.G.S. § 14-7.1. Even so, "conviction" refers to the factfinder's guilty verdict; defendant was "convicted" when he received the prayer for judgment continued.

2. Appeal and Error—preservation of issues—Eighth Amendment issue–not raised at trial—not heard on appeal

The question of whether an habitual offender sentence violated the Eighth Amendment was not raised at trial and thus was not preserved for appeal.

STATE v. McGEE

[175 N.C. App. 586 (2006)]

Appeal by defendant from judgment entered 28 April 2004 by Judge Edwin G. Wilson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 18 May 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Brian Michael Aus for defendant-appellant.

GEER, Judge.

After being convicted by a jury of felonious possession of cocaine and driving while his license was revoked, defendant Donald Wayne McGee pled guilty to being a habitual felon. On appeal, he does not challenge his convictions on the substantive charges, but rather contends that he was improperly sentenced as a habitual felon. Although he argues that the information regarding his felony convictions contained in the habitual felon indictment was incorrect, he waived his right to seek review on that basis by pleading guilty. Defendant also argues that the indictment was invalid for not alleging three discrete, non-overlapping felonies as required by N.C. Gen. Stat. § 14-7.1 (2003). We find that the three felonies listed in the indictment do comply with the requirements of § 14-7.1.

On 6 January 2003, defendant was arrested by the Forsyth County Sheriff's Department for driving without a license. During a search of defendant incident to his arrest, police found a clear, plastic bag containing 0.3 grams of cocaine. Defendant was indicted for felonious possession of cocaine, driving while license revoked, and having attained the status of habitual felon.

On 27 April 2004, a jury convicted defendant of both substantive charges, and the following day, defendant pled guilty to being a habitual felon. Pursuant to the plea agreement, defendant received a mitigated range sentence of 105 to 135 months imprisonment.

[1] Defendant first challenges the habitual felon indictment on the ground that it incorrectly identified the court and the case file number for one of the predicate felonies. By knowingly and voluntarily pleading guilty, an accused waives all defenses other than the sufficiency of the indictment. *State v. Hughes*, 136 N.C. App. 92, 97, 524 S.E.2d 63, 66 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000). Nevertheless, when an indictment is alleged to be facially invalid, thereby depriving the trial court of jurisdiction, the indict-

ment may be challenged at any time. *State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003). "Our Supreme Court has stated that an indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense." *Id.*

N.C. Gen. Stat. § 14-7.3 (2003) specifies what a habitual felon indictment must allege:

> An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

In this case, defendant does not dispute that the indictment included each of the elements specified in the statute. The indictment is, therefore, facially valid.

Defendant argues, however, that the information in the indictment regarding one of his felony convictions is incorrect. In other words, defendant is arguing that there was a variance between the indictment and the proof offered in support of this indictment. As this Court held in *State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195, *cert. denied*, 341 N.C. 653, 462 S.E.2d 518 (1995), when considering the defendant's contention that a habitual felon indictment contained incorrect information regarding one of his felony convictions, "[t]he issue of variance between the indictment and proof is properly raised by a motion to dismiss." When a defendant fails to raise the issue at trial, he waives his right to appeal that issue. *Id.* (declining to address the issue because defendant moved to dismiss on double jeopardy rather than variance grounds).

By pleading guilty, defendant thus waived his right to challenge the indictment on the ground that the information in the indictment was incorrect. *See State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 437 (2000) ("A defendant waives an attack on an indictment when the validity of the indictment is not challenged in the trial court."), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797, 121 S. Ct. 890 (2001). We also note that defendant's counsel stipulated to the convictions set out in the indictment, resulting in no fatal variance. *Baldwin*, 117 N.C. App. at 716, 453 S.E.2d at 194 ("[N]o fatal variance was shown between the

indictment and proof at trial since defendant's counsel stipulated to the previous convictions as set out in the indictment.").

Defendant next argues that his habitual felon indictment is invalid under N.C. Gen. Stat. § 14-7.1, which defines who qualifies as a habitual felon:

> Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon. . . . The commission of a second felony shall not fall within the purview of this Article *unless it is committed after the conviction of or plea of guilty to the first felony*. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony.

(Emphasis added.)

In the State's superceding habitual felon indictment, the State alleged that defendant was convicted of possession of stolen goods on 15 April 1998, speeding to elude arrest on 28 January 2000, and maintaining a vehicle for keeping and selling controlled substances on 29 August 2001. Defendant argues with respect to the first felony that a jury convicted him *in absentia* and that a prayer for judgment was continued until defendant was apprehended in October 1998 when he was arrested for the second felony. Defendant was sentenced for the possession of stolen goods conviction on 4 November 1998. Defendant argues that he was not convicted for purposes of N.C. Gen. Stat. § 14-7.1 until he was sentenced in November 1998 and, therefore, he committed the second felony before he was "convicted" of the first felony.

Since this argument does not challenge the sufficiency of the indictment on its face, defendant's guilty plea has waived this argument as well. Even if this issue were properly before us, the plain language of the statute refers to "conviction" and not entry of judgment or sentencing. " 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.' " *State v. Cheek*, 339 N.C. 725, 728, 453 S.E.2d 862, 864 (1995) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)).

Black's Law Dictionary 358 (8th ed. 2004) defines "conviction" as "1. The act or process of judicially finding someone guilty of a

crime; the state of having been proved guilty. . . . 2. The judgment (as by jury verdict) that a person is guilty of a crime." Thus, under the traditional definition, "conviction" refers to the jury's or factfinder's guilty verdict. This definition is also consistent with how we have defined "conviction" for purposes of sentencing. Thus, in *State v. Canellas*, 164 N.C. App. 775, 778, 596 S.E.2d 889, 891 (2004), we held that when a defendant pled guilty, but—as here—judgment was continued, defendant was "convicted" as of the date of his guilty plea. *See also State v. Hatcher*, 136 N.C. App. 524, 527, 524 S.E.2d 815, 817 (2000) (interpreting N.C. Gen. Stat. § 15A-1331(b) (1997) "to mean that formal entry of judgment is not required in order to have a conviction"). We, therefore, hold that defendant was "convicted" for purposes of N.C. Gen. Stat. § 14-7.1 of possession of stolen goods on 15 April 1998 and there was, therefore, no impermissible overlap of felonies.

[2] Finally, defendant argues that his sentence violates the Eighth Amendment. Defendant did not, however, raise this issue before the trial court. "It is well settled that this Court will not review constitutional questions that were not raised or passed upon in the trial court." *State v. Carpenter*, 155 N.C. App. 35, 41, 573 S.E.2d 668, 673 (2002) (internal quotation marks omitted). Accordingly, defendant's third assignment of error was not properly preserved for appeal.

No error.

Judges HUNTER and HUDSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 JANUARY 2006

BAME v. PRIORITY TR. SERVS. OF N.C. No. 05-322	Rowan (04CVS1873)	Affirmed
BOONE v. CHRISTIAN CHAPEL UNITED CHURCH OF CHRIST No. 04-900	Wake (03CVS11344) (03CVS11966)	Vacated
C&S REALTY CORP. v. BLOWE No. 05-461	Dare (02CVD253)	Affirmed
CANTY v. HAYES MEM'L UNITED HOLY CHURCH, INC. No. 05-236	Guilford (04CVS9633)	Appeal dismissed
CHILDERS v. ASHE MEM'L HOS., INC. No. 04-1117	Ashe (3CVS486)	This appeal is dismissed
IN RE A.G. No. 04-1536	Lee (03J23) (03J24)	Affirmed
IN RE B.J. No. 04-1730	Rutherford (03J106)	Vacated in part
IN RE C.G.F. No. 05-21	Wilkes (98J25)	Reversed and remanded
IN RE C.S. No. 05-389	Cabarrus (03J166)	Affirmed
IN RE D.K. No. 04-1583	New Hanover (02J403)	Dismissed as to respondent mother. Affirmed as to respondent father.
IN RE J.S.B. No. 05-467	Alamance (01J94)	Reversed and remanded
IN RE K.E. No. 05-196	New Hanover (00J181)	Affirmed
IN RE P.L.M.E. No. 05-125	Gaston (01J346)	Affirmed
IN RE S.M.S. & E.M.S. No. 05-137	Rutherford (02J89) (02J90)	Affirmed
IN RE S.R.L. No. 04-1707	New Hanover (03J387)	Affirmed

IN RE R.S.C. No. 05-418	Alamance (03J254)	Affirmed
IN RE W.A.W. No. 05-329	Buncombe (02J34)	Vacated
JG WINSTON-SALEM, LLC v. CENTRAL CAROLINA SURGICAL EYE ASSOCS., P.A. No. 04-1673	Guilford (03CVS720)	Affirmed
KING v. NORFOLK S. CORP. No. 05-394	Mecklenburg (04CVS8392)	Affirmed
ORANGE CTY. EX REL. DASHMAN v. DUBEAU No. 04-1722	Orange (03CVD26)	Reversed and remanded
PHELPS v. KORBACH No. 05-593	Dare (02CVS293)	Affirmed
PLATINUM CONSTR. CORP. v. STANLEY No. 05-151	Forsyth (03CVS3848)	Dismissed
STATE v. ADAMS No. 05-662	Iredell (01CRS8493) (01CRS53076) (01CRS53079)	No error
STATE v. ALLEN No. 05-497	Durham (04CRS16524) (04CRS51138)	Affirmed
STATE v. BELL No. 05-315	Buncombe (03CRS18152) (03CRS19070) (03CRS19184) (03CRS65049) (04CRS4051)	Affirmed
STATE v. BENNETT No. 04-1686	Anson (03CRS2797) (03CRS50709) (03CRS50753)	No error
STATE v. BETHEA No. 05-688	Cumberland (02CRS59193)	No error
STATE v. BOLTON No. 05-312	Alamance (03CRS53676)	Affirmed
STATE v. BRAYBOY No. 05-437	Robeson (03CRS50400)	No error
STATE v. BRIM No. 05-348	Forsyth (03CRS59488)	No error

STATE v. BROWN No. 05-217	Stokes (03CRS1379) (03CRS50234) (03CRS50276)	Remanded for resentencing
STATE v. BROWN No. 05-702	Burke (02CRS6654) (03CRS5002)	No error
STATE v. BURKS No. 05-138	Randolph (03CRS51659) (03CRS51660) (03CRS51661) (03CRS51662) (03CRS51663) (03CRS51664)	No error
STATE v. CUTHRELL No. 05-314	Forsyth (02CRS14578) (02CRS19311) (02CRS60951) (02CRS60952) (02CRS60953) (02CRS60954) (02CRS32460) (02CRS32461) (02CRS32462) (02CRS32463) (02CRS32464) (02CRS32465) (02CRS33502) (02CRS14578)	Affirmed
STATE v. DAVIS No. 05-442	Rowan (03CRS58491)	No error
STATE v. DULA No. 05-433	Caldwell (01CRS8660)	Reversed and remanded
STATE v. DUNSTON No. 05-391	Wake (03CRS76832) (03CRS76833) (03CRS76834)	No error in part; vacate the conspiracy to deliver cocaine conviction and remand
STATE v. EDWARDS No. 04-1312	Guilford (03CRS23051) (04CRS96857)	No error
STATE v. EDWARDS No. 05-245	Nash (04CRS50615)	No error
STATE v. GILBERT No. 05-133	Davidson (03CRS60938) (03CRS60939)	No error

STATE v. HARTGROVE No. 05-66	Catawba (03CRS9933) (03CRS9934)	No error
STATE v. HENDRICKS No. 04-1539	Hertford (03CRS51061)	No error
STATE v. HOWARD No. 05-310	Pitt (03CRS64331)	No error
STATE v. HOWELL No. 05-162	Iredell (97CRS7004)	No error in trial; remanded for resentencing
STATE v. JOLLY No. 04-1311	Gaston (03CRS9358) (03CRS53590)	No error
STATE v. LLOYD No. 05-213	Wake (04CR56403) (04CR53540) (04CR53541)	Affirmed
STATE v. MATHURIN No. 05-350	Forsyth (03CRS59477)	Remanded for resentencing
STATE v. McCARTER No. 05-633	Beaufort (02CRS538) (02CRS3610)	No error
STATE v. MILLER No. 05-280	Buncombe (03CRS64206) (03CRS64209) (03CRS64211) (03CRS64586) (03CRS64587) (04CRS4056) (04CRS7099) (04CRS7101) (04CRS7102) (04CRS7103) (04CRS7104) (04CRS7105) (04CRS7106) (04CRS52136)	Dismissed
STATE v. MILLER No. 05-330	Watauga (03CRS50100)	No error
STATE v. MIRAFUENTES No. 05-45	Rowan (03CRS53537) (03CRS53538) (03CRS53539) (03CRS53540)	Dismissed

	(03CRS53541) (03CRS54640) (03CRS54641)	
STATE v. MOSES No. 05-434	Anson (03CRS52235)	No error
STATE v. PARDUE No. 05-49	Wilkes (04CRS50465) (04CRS1771) (04CRS1772)	No error
STATE v. POLLEY No. 05-557	New Hanover (03CRS52703)	No error
STATE v. POWELL No. 05-485	Caldwell (02CRS9379)	No error
STATE v. RICHARDSON No. 05-513	Durham (04CRS15863) (04CRS15864) (04CRS50391) (04CRS50392)	Reversed and remanded
STATE v. ROUTH No. 05-381	Randolph (02CRS57384) (02CRS52423) (03CRS58380)	Affirmed
STATE v. SCHWARZER No. 04-1663	Pender (01CRS4712)	No error
STATE v. SIMON No. 05-309	Forsyth (02CRS59428) (04CRS10278)	No error at trial; remanded for resentencing
STATE v. SMITHEY No. 05-263	Person (03CRS3104) (03CRS3105) (03CRS53592)	No error
STATE v. SPAIN No. 05-533	Columbus (03CRS53352)	No error
STATE v. TAYLOR No. 05-425	Forsyth (02CRS58142) (03CRS5262)	No error
STATE v. TEETER No. 05-264	Anson (03CRS50555) (03CRS3067)	Affirmed and remanded for correction of the sentencing worksheet
STATE v. TIPTON No. 05-441	Mitchell (04CRS50230)	No error

STATE v. TORRES No. 04-1578	Buncombe (03CRS62239) (03CRS62240) (03CRS62241) (03CRS62242)	No error in defendant's trial; vacated and remanded for resentencing
STATE v. WILLIAMS No. 05-375	Wilson (03CRS8258)	Dismissed
STATE v. WILLIS No. 05-569	Haywood (98CRS2255) (98CRS2674) (98CRS2675)	No error
STAVISSKY v. COMARK, INC. No. 05-176	Ind. Comm. (I.C. #184548)	Affirmed
WEAVER-SOBEL v. SOBEL No. 04-474	Mecklenburg (00CVD1702)	Reversed and remanded
WILCOX v. BANKERS INS. CO. No. 05-436	Mecklenburg (03CVS10578)	Reversed and remanded
WILLIAMS v. COLONY TIRE CORP. No. 04-1614	Ind. Comm. (I.C. #041688)	Affirmed

STATE OF NORTH CAROLINA v. ERIC MARSHALL HAMMETT

No. COA05-377

(Filed 7 February 2006)

Evidence— expert testimony—victim sexually abused—plain error

The trial court committed plain error in a multiple statutory sexual offense and multiple taking indecent liberties case by admitting expert testimony that based on the victim's statements alone the expert would have diagnosed the victim as having been sexually abused, and defendant is entitled to a new trial, because: (1) the Court of Appeals has repeatedly held that the admission of expert testimony that a child victim has suffered sexual abuse absent physical findings is error; (2) the injuries could have been caused by someone other than defendant; (3) in this evidentiary context where the physical findings revealed a tenuous connection to defendant, and defendant and the victim gave conflicting accounts of factual matters central to the criminal charges, the credibility of the witnesses was particularly important; (4) although a victim's testimony standing alone is generally sufficient to survive a motion for directed verdict, in the instant case where plain error analysis is concerned, the concern is whether there was overwhelming evidence of defendant's guilt independent of the improper testimony instead of whether there was substantial evidence in the record to allow the offenses to be submitted to the jury in the absence of the improper opinion testimony; (5) there is a likelihood that the outcome of the verdicts would have been different in the absence of the expert's impermissible expert opinion since the case rested largely on the credibility of witnesses; and (6) the expert's inadmissible testimony, considered in context and in full, could also have been associated by the jury with the conduct underlying the indecent liberties charges.

Judge TYSON dissenting.

Appeal by defendant from judgment entered 11 February 2004 by Judge Steve A. Balog in Cabarrus County Superior Court. Heard in the Court of Appeals 17 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Kelly L. Sandling, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant.

LEVINSON, Judge.

Eric Marshall Hammett (defendant) appeals from a judgment entered 11 February 2004 consistent with jury verdicts finding him guilty of three counts of statutory sexual offense and seven counts of taking indecent liberties with a child. Because the admission of expert testimony in this case resulted in plain error, we must grant a new trial on all counts.

The State's evidence presented at trial tended to show the following:

Defendant's daughter C.H. was born 10 August 1989. C.H. alleged that defendant committed various acts of sexual abuse against her in the spring of 2003. C.H. came to live with defendant during her seventh grade year, in December 2001. Prior to that time, C.H. lived with her mother and her mother's boyfriend, D.C. C.H. testified she did not like it when she had to go live with her father: "I loved my mom too much. I don't like getting away from her."

C.H. testified that D.C. engaged in various sexual acts with her from when she was five years of age until she was approximately ten and one half years of age. C.H. testified D.C. would lick her private area, and have her masturbate him. C.H. testified that D.C. never penetrated her vagina in any way.

C.H. testified defendant committed various sexual acts on her while she lived with him in Cabarrus County between January and April 2003. C.H. stated that defendant watched pornographic videos in front of her and masturbated during the videos; that, at defendant's request, C.H. straddled defendant's lower waist while defendant lay in bed; that defendant measured her chest and "private area" with a measuring tape three or four times; that one time defendant asked her to "kiss me like you love me" and as he kissed her, he tried to put his tongue in her mouth; that defendant reached under her shirt and rubbed lotion on her breasts; that in the spring of 2003 defendant took two showers with C.H. and put his fingers inside her vagina both times; that, at defendant's request, C.H. washed defendant's genitals with her bare hands while taking a shower with him; and that, while C.H. was lying on a bed after taking a shower, defendant opened her

legs, shaved the hair around her vaginal area, and put his tongue into her vagina. C.H. testified she related these events to a friend at school (hereafter "the friend"), and was removed from defendant's home that same day.

The friend testified that C.H. had confided in her the sexual abuse C.H. was experiencing at home. The friend called her mother. The friend's mother then called the appropriate authorities.

Dr. Rosalina Conroy, a pediatrician, testified that she examined C.H. on 28 April 2003 to evaluate her for possible sexual abuse. Dr. Conroy performed a genital examination which included photographing C.H.'s genital area. Dr. Conroy testified that the photographs revealed a "notch" in C.H.'s hymen and a defect in the posterior fourchette, an area at the bottom of the hymenal ring towards the anus. Dr. Conroy stated the types of injuries she observed were made from "penetrating vaginal trauma with a hard object." During her second day of testimony, Dr. Conroy testified that C.H.'s statements, regarding having been abused by defendant, were consistent with those made by children who were telling the truth and that, even in the absence of physical findings, Dr. Conroy's diagnosis of sexual abuse would remain the same. This testimony is set forth in more detail below.

Concord Police Department Detective Larissa Cook testified that defendant agreed to speak to her regarding the allegations of sexual abuse. On 8 May 2003, defendant told Detective Cook that C.H. had a hygiene problem and that he had showered with her naked and had used a wash cloth to wash C.H. "from head to toe."

Defendant testified. He admitted showering with C.H. on two occasions and washing her "private areas." Defendant denied all the other material allegations C.H. made against him. He denied having fondled C.H.'s breasts, trying to French kiss her, having her straddle him on a bed, measuring her, touching her private parts, and watching pornographic movies with her.

The jury returned verdicts of guilty on all counts. The trial court consolidated all offenses for judgment and sentenced defendant to an active prison term of 288-355 months imprisonment. From this judgment, defendant appeals.

Defendant contends the trial court erred by admitting Dr. Conroy's expert opinion that, based on C.H.'s statements alone, Dr.

Conroy would have diagnosed her as having been sexually abused. Because defendant did not object to Dr. Conroy's testimony at trial, we review for plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) ("[P]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.") (internal quotation marks and citation omitted).

" 'Our appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence.' " *State v. Figured*, 116 N.C. App. 1, 7, 446 S.E.2d 838, 842 (1994) (quoting *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (citations omitted)). Furthermore, our Supreme Court's mandate in *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002), regarding the admissibility of expert testimony in child victim sexual abuse cases, is clear: "In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *Id.* at 266-67, 559 S.E.2d at 789 (citations omitted).

This Court has repeatedly found that the admission of expert testimony that a child victim has suffered sexual abuse, absent physical findings, is error. *See State v. Delsanto*, 172 N.C. App. 42, 55-56, 615 S.E.2d 870, 873 (2005) (absent physical indications of abuse, it was error to admit expert testimony that the victim " 'suffered from the sexual abuse that she disclosed to [the doctor] and [victim's] family' "); *State v. Ewell*, 168 N.C. App. 98, 105-06, 606 S.E.2d 914, 919, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 326 (2005) (error for the trial court to allow expert testimony that it was " 'probable that [the child] was a victim of sexual abuse' " when the testimony was "not based on any physical evidence or behaviors consistent with sexual abuse"); *State v. Couser*, 163 N.C. App. 727, 729-31, 594 S.E.2d 420, 423 (2004) (error to admit expert testimony that the child was "probably sexually abused" where the physical evidence was insufficient to support diagnosis of sexual abuse); *State v. Bush*, 164 N.C. App. 254, 259, 595 S.E.2d 715, 718 (2004) (error to admit doctor's testimony that " '[the victim] was sexually abused by [defendant]' " absent physical evidence of abuse); *State v. Grover*, 142 N.C. App. 411, 418-19, 543 S.E.2d 179, 183 (2001) (error to admit expert testimony that the child had been sexually abused where the expert opinion was based solely on the child's statements); *State v. Trent*, 320 N.C. 610, 614, 359

S.E.2d 463, 465-66 (1987) (physical evidence that hymen was not intact, where "the condition of the hymen alone would not support a diagnosis of sexual abuse," was insufficient to support a diagnosis of sexual abuse of child victim).

Our analysis of the instant case is governed by this Court's three recent holdings in *Delsanto*, *Ewell*, and *Bush* noted above.

In *Delsanto*, a medical examination of the child victim revealed no physical evidence of sexual abuse and the State's expert medical witness, Dr. Kathleen Russo, testified as follows:

> My diagnosis was that [the child victim] had suffered from the sexual abuse that she disclosed to me and her family. . . . So based on what she told me, the consistency of what she told me, what she told the parents, what she told law enforcement was just all very striking, and that I felt like she was—that she did experience that abuse.

Delsanto, 172 N.C. App. at 47, 615 S.E.2d at 873-74. As this Court noted, "Dr. Russo conclusively stated that defendant sexually assaulted [the victim] when she testified that she diagnosed [the victim] as having been sexually abused by defendant[.]" *Id.* at 47, 615 S.E.2d at 873. Dr. Russo's testimony "amounted to an impermissible opinion of [the victim's] credibility." *Id.* at 47, 615 S.E.2d at 874.

In *Ewell*, the doctor testified that, "based upon the physical exam '[t]here's no way . . . I could prove or disprove that she's had sexual intercourse or been sexually active.' " *Ewell*, 168 N.C. App. at 104, 606 S.E.2d at 919. In formulating her diagnosis, "[the doctor] acknowledged that 'I'm relying on the history [the child gave] being true[.]' " *Id.* at 105, 606 S.E.2d at 919. This Court held the admission of the doctor's testimony regarding her diagnosis of sexual abuse was error. *Id.*

In *Bush*, the State's expert was again Dr. Russo. Dr. Russo testified:

> I was impressed by [the victim's] sensory recollection . . . and the fact that she could tell me how she felt, how she was feeling that evening, what she felt, and what she did when she realized what was happening, what Mr. Bush's response was when she realized he was waking up, where they were, where the other people in the family were at the time, all of that other sensory recollection was very telling and adds to the *credibility* of her story.

Bush, 164 N.C. App. at 259, 595 S.E.2d at 718. In *Bush*, this Court reasoned, "[t]he practical effect of Dr. Russo's testimony was to give [the victim's] story a stamp of credibility by an expert in pediatric gynecology[.]" *Id.* at 259, 595 S.E.2d at 719.

In the instant case, Dr. Conroy gave two opinions regarding whether the victim had been sexually abused. On the first day of her testimony, Dr. Conroy gave an opinion that C.H. was sexually abused. This opinion was based upon some physical findings discussed in greater detail, *infra*, and has not been challenged on appeal. On the second day of her testimony, Dr. Conroy testified that, even absent physical findings, her diagnosis of sexual abuse would have been the same:

> What we really based the bulk of our conclusion on is the child's history. And we also—we look for different things in the history. We look especially for consistency because when kids are not telling the truth, they don't have details to it, they don't have consistency to it. . . . And in this case, in [C.H.'s] case, her story was extremely consistent and she gave details, the details—especially the detail that she gave about the pain and how sharp it was, that it went to her back. That's not the kind of history that we get if something has not really happened. So that's what we based our conclusion [on]. And even if there were absolutely no physical findings, my conclusion would still be the same, based on her history that her consistent history [and] plenty of details in that history is that she has been sexually abused.

On appeal, defendant objects to the statements Dr. Conroy made during her second day of testimony, particularly the underlined portion above. Our review of the transcript reveals that factfinders could reasonably infer that Dr. Conroy's testimony on the second day, noted immediately above, concerned the allegations for which defendant stood accused and not the abuse suffered by C.H. in earlier years. We conclude this testimony is functionally indistinguishable from that held to be error in *Delsanto*, *Ewell*, and *Bush*. Dr. Conroy provided an expert opinion of sexual abuse premised on an absence of physical findings, and essentially vouched for the credibility of C.H. Therefore, the admission of this testimony was error.

We next review the admission of Dr. Conroy's testimony under the plain error doctrine to determine whether defendant must be afforded a new trial. Plain error is error "so fundamental as to amount

to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (citations omitted). "Our Supreme Court has extended plain error review to issues concerning admissibility of evidence." *Ewell*, 168 N.C. App. at 102, 606 S.E.2d at 917 (citing *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983)). "We examine the entire record to decide whether the error 'had a probable impact on the jury's finding of guilt.' " *Id.* (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 379). "For a jury trial to be fair it is fundamental that the credibility of witnesses must be determined by them, unaided by anyone, including the judge." *State v. Holloway*, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73-74 (1986). "[A]n expert's opinion to the effect that a witness is credible, believable, or truthful . . . is plain error when the State's case depends largely on the prosecuting witness's credibility." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citations omitted).

The State argues that even if the admission of Dr. Conroy's second day of testimony was error, the error did not amount to plain error because of the overwhelming evidence of defendant's guilt. *See Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (despite the error in the admission of the expert opinion regarding a diagnosis of sexual abuse absent physical evidence of such abuse, no plain error where there was other overwhelming evidence of defendant's guilt).

We next determine whether there was overwhelming evidence of defendant's guilt independent of Dr. Conroy's impermissible expert opinion to support the convictions. This is a critical inquiry because, as our case law informs, there is no plain error where the error did not have a probable impact on the outcome of the trial.

Here, the State's case was almost entirely based on C.H.'s out-of-court statements and in-court testimony; Dr. Conroy's testimony concerning the physical findings and expert opinion of sexual abuse that was elicited on the first day of her testimony; and the testimony of the friend and Detective Cook which largely corroborated C.H.'s allegations. Defendant denied all the material allegations, though he acknowledged taking showers with C.H. on two occasions for purposes unrelated to sexual gratification or arousal. From her examination of C.H., Dr. Conroy noted some physical evidence consistent with C.H.'s statements of having been sexually abused by defendant. Dr. Conroy's pertinent testimony, during her first day of testimony, follows:

Q: Doctor Conroy, the nurse testified that C.H. told her about another incident involving another person that involved a licking and her touching that other person. In your opinion, are those incidents, could they cause the injuries that you just talked about?

A: No, they cannot. The types of injuries that I saw were made from penetrating vaginal trauma with a hard object.

Q: Hard object, would that be consistent with a finger?

A: No. Well, the hymenal ring could be, but the posterior fourchette it would have to be a larger object.

Q: Now, what about more than one finger?

A: Again, the hymenal ring could—it could definitely be explained by that. The posterior fourchette, given how—given the depth of that scar, it's possible.

Q: But with the oral act?

A: No, absolutely not.

. . . .

Q: And after discussing her history and examining her, did you reach a medical conclusion in this case?

A: Yes, I did.

Q: And what was that conclusion?

A: I concluded that she had been repeatedly sexually abused.

On cross-examination, Dr. Conroy testified as follows:

Q: A person on one occasion inserting their tongue into this female's vagina, in your professional opinion is that sufficient to cause this trauma that you see?

A: Absolutely not.

Q: A person on one occasion inserting his tongue into this person's vagina and on another occasion inserting a finger or fingers into this person's vagina—nothing else, just those two incidents—is that sufficient to cause this trauma that you saw here?

A: No, this is repeated.

Q: My next question, a person's tongue on one incident being inserted into this person's vagina together with a second separate incident where finger or fingers is inserted into this person's vagina combined with a second incident, meaning three incidents—tongue, finger or fingers, third incident being finger or fingers inserted in this person's vagina, nothing else just those three incidents, is that sufficient to cause this trauma that you're talking about?

A: No.

On re-direct examination, Dr. Conroy testified:

Q: [I]s it possible that inserting fingers and licking—is it not possible, depending on the size of the fingers and how those fingers were used that they could have caused some of the injury that you saw?

A: Yes, and they would have caused pain which would explain the notch at the six o'clock position in the hymen.

On recross-examination, Dr. Conroy testified:

Q: That is scarring consistent with many times over time?

. . . .

A: It's many times, right, over time, but I can't say over how long.

Dr. Conroy's testimony on the first day regarding whether the acts alleged against defendant could have caused the injuries she observed was contradictory. At first, Dr. Conroy testified that the digital penetration defendant was accused of could have caused the injuries she noted. Later, Dr. Conroy testified that the acts the defendant was accused of could not have caused the physical findings she observed. Upon further questioning, Dr. Conroy stated that defendant's alleged acts could *have* caused "some of the injury" she had observed. Dr. Conroy's opinion linking defendant to the crimes charged was equivocal at best. Furthermore, the one assertion Dr. Conroy consistently made was that the physical trauma she had observed had been caused by "repeated" penetration "many times . . . over time." Where the sexual assaults defendant was accused of consisted of cunnilingus and two instances of digital vaginal penetration, the testimony linking the physical findings to the accusations involving defendant was, in short, not strong evidence of defendant's guilt. Stated alternatively, the injuries could easily have been caused by someone other than defendant.

In this evidentiary context, where the physical findings revealed a tenuous connection to defendant, and C.H. and defendant gave conflicting accounts of factual matters central to the criminal charges, the credibility of the witnesses was particularly important. Without Dr. Conroy's inadmissible testimony, the jury would have been essentially left with C.H.'s accusations, defendant's denial, and Dr. Conroy's expert opinion that sexual abuse occurred—an opinion that did little to connect C.H.'s physical injuries to the conduct for which defendant stood accused. Under these circumstances, the jury's factual evaluation of whether defendant caused the injuries is of obvious importance. With Dr. Conroy's inadmissible testimony, the jury could more freely discount the uncertain cause or origin of C.H.'s injuries and rely heavily, instead, on an opinion that C.H. was sexually abused from a witness accepted by the court as an expert in pediatric medicine—essentially an opinion that C.H. was sexually abused by defendant because C.H. was believable.

The dissent correctly observes that a victim's testimony, standing alone, is generally sufficient evidence to survive a motion for directed verdict. Here, however, in evaluating whether plain error occurred, we are concerned with whether there was overwhelming evidence of defendant's guilt independent of the improper testimony, not whether, in the absence of the improper opinion testimony, there was substantial evidence in the record to allow the offenses to be submitted to the jury. There is a likelihood that the outcome of the verdicts would have been different in the absence of Dr. Conroy's impermissible expert opinion because the case rested largely on the credibility of witnesses. Accord *Hannon*, *supra*. Moreover, we respectfully disagree with the dissent insofar as it appears to conclude that the inadmissible opinion by Dr. Conroy that C.H. was "sexually abused" was necessarily limited to whether defendant penetrated C.H. We conclude, instead, that Dr. Conroy's inadmissible testimony, considered in context and in full, could have been associated by the jury with the conduct underlying the indecent liberties charges, too. Thus, the likely prejudice to the outcome of the indecent liberties verdicts is as real as that linked to the statutory sexual offenses.

This case rested largely on the credibility of the witnesses because the evidence shows that the objective physical findings could have easily not been caused by defendant. That C.H. was likely "repeatedly sexually abused" by someone was not seriously challenged at trial. Instead, it was whether the defendant abused C.H., and whether the alleged actions on his part could even cause C.H.'s

injuries. The transcript reveals that counsel for both the State and defendant recognized the importance of the factual question of the origin of the injuries, and thoroughly questioned Dr. Conroy concerning the same. "That [the] grossly improper testimony [of Dr. Conroy] unfairly affected defendant's trial seems obvious to us." *Holloway*, 82 N.C. App. at 587, 347 S.E.2d at 73.

We conclude that, in the absence of the inadmissible testimony, there is a reasonable probability the jury would have reached different results. Regrettably, our careful review of the record reveals the outcome of the trial was not reliable, and we therefore cannot sustain defendant's 24 year prison term.

New trial.

Judge HUDSON concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion grants defendant a new trial on all convictions and asserts the trial court committed plain error in allowing the admission of Dr. Conroy's testimony. The trial court's admission of Dr. Conroy's testimony did not constitute plain error and was not so prejudicial to award defendant a new trial. I respectfully dissent.

I. Dr. Conroy's Expert Testimony

The majority's opinion holds this case is governed by this Court's prior precedents in *State v. Delsanto*, 172 N.C. App. 42, 615 S.E.2d 870 (2005), *State v. Ewell*, 168 N.C. App. 98, 606 S.E.2d 914 (2005), and *State v. Bush*, 164 N.C. App. 254, 595 S.E.2d 715 (2004). Their opinion misapplies and unduly enlarges and extends the holdings in *Delsanto*, *Ewell*, and *Bush* to award defendant a new trial on the facts before us.

In *Delsanto*, a medical examination of the child victim revealed no physical signs of sexual abuse. *Delsanto* at 55, 615 S.E.2d at 872. Nonetheless, the medical expert testified that she diagnosed the child as having been sexually abused by the defendant. *Id.* at 55-56, 615 S.E.2d at 872. Similarly, in *Ewell* the medical expert testified she diagnosed the victim as sexually abused even though she could not prove or disprove, by the results of the physical examination, whether the

victim had engaged in sexual intercourse or had previously been sexually active. *Ewell*, 168 N.C. App. at 104, 606 S.E.2d at 919. The medical expert in *Bush* also testified that the child was sexually abused even though no physical evidence of sexual abuse was present. *Bush*, 164 N.C. App. at 258, 595 S.E.2d at 718. In each of these cases we found the trial court's admission of the expert's testimony and opinion that the victim was sexually abused to be plain error and awarded a new trial. These cases are easily distinguishable from the facts of this case.

Here, substantial physical evidence of sexual abuse of the victim was presented. Dr. Conroy performed a physical examination of C.H. which included the use of a special camera to magnify abnormalities in C.H.'s genital area. Dr. Conroy testified that the photographs taken during C.H.'s examination revealed a "notch" at the six o'clock position of her hymen. The physical examination also revealed a scar on the posterior fourchette, that was "irregular." Dr. Conroy testified that the types of injuries revealed from the genital examination "were made from penetrating vaginal trauma with a hard object." C.H. was thirteen years old at the time of these assaults and testified that she had not engaged in any penetrating vaginal contact before these assaults occurred.

II. Expert Medical Testimony of Sexual Abuse

The rule regarding the admissibility of expert medical testimony in child sexual abuse cases is well-established. In *State v. Stancil*, our Supreme Court stated, "In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has in fact occurred because, *absent physical evidence supporting a diagnosis of sexual abuse*, such testimony is an impermissible opinion regarding the victim's credibility." 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (citation omitted) (emphasis supplied).

> An expert medical witness may render an opinion pursuant to Rule 702 that sexual abuse has in fact occurred if the State establishes a proper foundation, i.e. physical evidence consistent with sexual abuse. . . . However, *in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility.*

Ewell, 168 N.C. App. at 103, 606 S.E.2d at 918 (quoting *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598) (emphasis in original). *See*

also State v. Couser, 163 N.C. App. 727, 729-31, 594 S.E.2d 420, 423 (2004) (error to admit expert testimony that the child was "probably sexually abused" where the physical evidence was insufficient to support a diagnosis of sexual abuse); *State v. Grover*, 142 N.C. App. 411, 418-19, 543 S.E.2d 179, 183-84 (2001) (Expert opinion testimony that the child had been sexually abused based solely on the child's statements lacks a proper foundation where no physical evidence of abuse is shown), *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001). "[W]hile it is impermissible for an expert, in the absence of physical evidence, to testify that a child has been sexually abused, it is permissible for an expert to testify that a child exhibits characteristics [consistent with] abused children." *Grover*, 142 N.C. App. at 419, 543 S.E.2d at 184 (citation and internal quotation marks omitted). Based upon the physical evidence presented, Dr. Conroy was permitted to state her opinion that C.H. had been sexually abused. *Ewell*, 168 N.C. App. at 103, 606 S.E.2d at 918. Substantial "physical evidence to support a diagnosis of sexual abuse" was presented to provide a foundation to admit Dr. Conroy's opinion to which defendant failed to object. *Id.* Defendant's convictions should be sustained.

III. Plain Error Rule

To award a new trial for plain error, the trial court's error must be "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (citations omitted), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). In the absence of Dr. Conroy's opinion testimony, it is not probable that the jury would have reached a different verdict. Other substantial evidence of defendant's guilt was presented in addition to Dr. Conroy's testimony. Defendant admitted at trial to taking showers with C.H. and washing her private areas on both occasions. Defendant stated he directed C.H. to get in the shower the second time because "she stunk," and defendant proceeded to get into the shower with her. The second shower incident occurred just two days after the first. Defendant's reason for entering nude into the shower with C.H. was that "she had bad personal hygiene." At trial, defendant denied instructing C.H. to wash him. The State impeached defendant's testimony with his prior statement in which he admitted to having C.H. "wash his arms and legs." *State v. Aguallo*, 322 N.C. 818, 824, 370 S.E.2d 676, 679 (1989) ("Prior statements by a defendant are a proper subject of inquiry by cross-examination."); N.C. Gen. Stat. § 8C-1, Rule 607 (2005). Defendant then stated he instructed

C.H. to wash "the upper part of his chest." When asked to explain to the jury how C.H.'s washing him helped her personal hygiene, defendant admitted, "I have no explanation of that."

C.H.'s classmate at school, E.O., also corroborated C.H.'s accounts. C.H. told E.O. of the assaults and abuses the day after the second shower incident occurred. E.O. testified C.H. told her at school about the shower incidents and that defendant had made C.H. kiss him. C.H. also told E.O. that defendant tried to "French Kiss" her. E.O. testified that C.H. "was very uncomfortable and that she was sad and depressed, and it was hard for her to talk about it."

Sherry Cook ("Cook"), a registered nurse at the Children's Advocacy Center at NorthEast Medical Center, also corroborated C.H.'s testimony. Cook testified she interviewed C.H. on 28 April 2003. C.H. told Cook that defendant (1) masturbated on the bed in C.H.'s presence while watching a pornographic video; (2) penetrated her vagina with his fingers in the shower; (3) instructed C.H. to wash his penis in the shower and "hold it like a hose"; (4) shaved her "bikini area" with a razor; (5) inserted his tongue into her vagina "for a few seconds"; (6) attempted to put his tongue into her mouth; and (7) had C.H. straddle him on the bed and "move up and down." This testimony was admitted without defendant's objection and was not contradicted.

IV. Indecent Liberties with a Child Convictions

Presuming the majority's award of a new trial for defendant is legally sound on the statutory sexual offense convictions, awarding defendant a new trial for his convictions of indecent liberties with a child based on plain error in the admission of Dr. Conroy's expert opinion testimony is unwarranted.

The jury found defendant to be guilty of seven counts of taking indecent liberties with a child by: (1) having C.H. wash his private parts; (2) fondling C.H.'s breasts; (3) actually or attempting to "French Kiss" C.H.; (4) having C.H. straddle defendant on the bed and "bounce up and down" on him; (5) touching C.H.'s private parts while "measuring" her; (6) touching C.H.'s private parts while "measuring" her on a separate occasion; and, (7) masturbating in C.H.'s presence while watching a pornographic movie.

N.C. Gen. Stat. § 14-202.1(a) (2005) states:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

Here, defendant was 31 years old and C.H. was 13 years old when the incidents occurred.

Actual touching or any physical contact with the minor child is not necessary for defendant to be found guilty under this statute. *State v. Hicks*, 79 N.C. App. 599, 603, 339 S.E.2d 806, 809 (1986). *See also State v. Turman*, 52 N.C. App. 376, 278 S.E.2d 574 (1981) (conviction upheld where defendant masturbated in the presence of the child); *State v. Kistle*, 59 N.C. App. 724, 297 S.E.2d 626 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E.2d 694 (1983) (conviction upheld where defendant photographed the nude child in a sexually suggestive position). "The uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 if the testimony establishes all of the elements of the offense." *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993) (citing *State v. Vehaun*, 34 N.C. App. 700, 705, 239 S.E.2d 705, 709 (1977), *cert. denied*, 294 N.C. 445, 241 S.E.2d 846 (1978)).

Physical evidence of sexual abuse or any physical contact with the victim is wholly unnecessary to sustain a conviction for taking indecent liberties with a child. *Id.* The testimony of Dr. Conroy was not required to sustain defendant's convictions pursuant to N.C. Gen. Stat. § 14-202.1(a).

C.H.'s testimony, standing alone, was sufficient to support the convictions on the taking indecent liberties with a child charges. Her testimony was also corroborated by two other witnesses other than Dr. Conroy, and defendant admitted to acts and activities with C.H. sufficient to sustain his indecent liberties convictions. Defendant should not be granted a new trial on any of the taking indecent liberties with a child convictions even if the admission of Dr. Conroy's opinion testimony was plain error.

V. Credibility and Weight of the Evidence

The majority's opinion erroneously determines the credibility of the witnesses and the weight to be afforded their testimonies to award a new trial. This role is reserved to the jury, and not to an appellate court. The majority's opinion states: (1) "the testimony linking the physical findings to the accusations involving defendant was, in short, not strong evidence of defendant's guilt"; (2) "the injuries could have easily have been caused by someone other than defendant"; (3) "[Dr. Conroy's opinion] did little to connect C.H.'s physical injuries to the conduct for which defendant stood accused"; (4) "the evidence shows that the objective physical findings could have easily not been caused by defendant". These issues are all questions of fact that were properly determined by the jury. It is not the province of this Court to substitute its judgment for the verdict of the triers of fact. *Mattox v. Huneycutt*, 3 N.C. App. 63, 65, 164 S.E.2d 28, 29 (1968) ("This Court will not substitute its judgment for that of the triers of the facts.").

VI. Conclusion

Substantial evidence was presented that C.H.'s genital organs exhibited physical signs of sexual abuse. In accord with well-established precedents, it was not error, and certainly not plain error, for the trial court to admit Dr. Conroy's opinion that C.H. had been sexually abused after the State laid a proper foundation for her testimony.

Even if Dr. Conroy's testimony rose to plain error on the statutory sexual offenses, defendant's convictions for taking indecent liberties with a child do not require any element of physical abuse or contact, and should be sustained on C.H.'s testimony and defendant's admissions alone. *Ewell*, 168 N.C. App. at 103, 606 S.E.2d at 918. I vote to hold that no error, plain or otherwise, occurred during defendant's trial. I respectfully dissent.

STATE OF NORTH CAROLINA v. LATWANG JANELL REID, DEFENDANT

No. COA04-1362

(Filed 7 February 2006)

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

The use of a short-form indictment to charge attempted first-degree murder is authorized in North Carolina, and the defendant in this case was properly charged.

2. Homicide— attempted first-degree murder—intent to kill—evidence sufficient

The evidence that a defendant charged with attempted first-degree murder specifically intended the victim's death was circumstantial but sufficient where the victim was unarmed when he was grabbed and pulled from his front door by defendant and two accomplices, all of whom were armed; the victim tried to run and did not see who shot him; and the two accomplices were in a bedroom when the victim was shot.

3. Burglary and Unlawful Breaking or Entering— evidence of breaking—sufficient

There was sufficient evidence of a breaking in a burglary prosecution where the victim testified that he opened his front door, was forcibly grabbed and dragged outside, and one or two of the assailants then rushed past him into his home.

4. Conspiracy— one conspiracy to commit multiple crimes—finding of agreement to commit each crime—not required

The jury was not required to find that a defendant who was charged with one conspiracy to commit multiple crimes had agreed to commit every unlawful act alleged.

5. Conspiracy— burglary and robbery—evidence sufficient

There was sufficient evidence of conspiracy to commit burglary and robbery where the victim was dragged out of his home by three men armed with firearms, one of whom the victim identified as defendant; at least two of the assailants entered the victim's home to steal drugs and money; and they left the victim lying on the ground shot in the back.

6. Assault— instruction on lesser included offense not given—no error

The trial court did not err by not giving an instruction on the lesser included offense of assault with a deadly weapon inflicting serious injury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury. Defendant chose to base his defense on the theory that he did not commit the crimes, never attacked the evidence of intent to kill, and presented no evidence which would have supported the submission of the lesser included offense.

7. Evidence— other crimes or bad acts—identification

The trial court did not erroneously admit evidence of other crimes when an assault and burglary victim was asked how he knew defendant and replied that they had "hustled together," which he explained meant that they had sold drugs together. The testimony was properly admitted for identification and not to prove the character of defendant.

8. Evidence— other crimes or bad acts—defendant as fugitive in this crime—captured with weapons

Evidence that defendant was a fugitive and had guns in his possession when he was arrested was properly admitted where there were no warrants out for defendant other than for this offense and there had been testimony that firearms were used in this offense.

9. Evidence— whether defendant had reason to lie—admissibility

There was no error in a prosecution arising from a robbery where the victim was asked by the State, "Do you have any reason to lie on him [defendant]?" This goes to whether the witness has any reason to lie, not whether he is currently lying.

10. Evidence— impeaching witness—prior inconsistent statement

There was no plain error in a prosecution for robbery and other offenses in the State's introduction of extrinsic evidence to impeach a defense witness who denied making a prior inconsistent statement. Whether the prior statement was made is a collateral matter and the testimony should not have been allowed; however, defendant did not meet his burden of showing that the jury would probably have reached a different result if the testimony had been excluded.

11. Criminal Law— flight—evidence of premeditation and deliberation—no plain error

There was no plain error in a prosecution for attempted first-degree murder and other offenses where the court instructed the jury on flight but did not specifically instruct the jury that flight has no bearing on premeditation and deliberation. Defendant's objection at trial concerned defendant's flight during his arrest, not at the scene, and his argument concerning premeditation is reviewed under plain error analysis. There is no plain error because the question of whether the jury considered defendant's flight as evidence of premeditation and deliberation was speculative.

12. Constitutional Law— double jeopardy—assault and attempted murder

Convictions for attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury based on the same act are not a violation of double jeopardy. Each offense requires proof of at least one element that the other does not.

Appeal by defendant from judgments dated 6 May 2004 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 8 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

Linda B. Weisel for defendant.

BRYANT, Judge.

On 20 October 2003, Latwang Janell Reid (defendant) was indicted for attempted first degree murder; assault with a deadly weapon with intent to kill inflicting serious injury; attempted armed robbery; and first degree burglary. Defendant was also indicted for conspiracy to commit: first degree murder; assault with a deadly weapon with intent to kill inflicting serious injury; robbery with a dangerous weapon; and first degree burglary. Defendant was tried before a jury at the 3 May 2004 criminal session of the Cumberland County Superior Court, the Honorable Jack A. Thompson presiding. On 6 May 2004, the jury returned guilty verdicts for attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted armed robbery, first degree bur-

glary, conspiracy to commit robbery with a firearm and conspiracy to commit first degree burglary. Defendant appeals his convictions.

Facts

On the evening of 13 October 2002, Michael David Fields was playing video games with his friend, Michael Isreal, in his room at his home in Hope Mills, North Carolina. Fields lived in the house with his mother, Sarah McGougan, who was also home at the time. Earlier in the afternoon, Fields had been drinking beer and smoking marijuana. He had also sold marijuana from his home three or four times earlier that day.

Responding to a knock on his front door, Fields looked out the window, saw a car which he thought he recognized as belonging to his friend, Melvin Franklin, but could not see who was at the door. When Fields opened the inside door, three armed men were standing at the doorway, the glass storm door having already been opened. Two of the men had their faces covered such that Fields did not recognize them, but he recognized the third man, whose face was not fully covered, as defendant, whom he had known for several years. The men grabbed Fields and pulled him outside, demanding money and drugs.

The two men whose faces were covered then entered the house and made their way to Fields' bedroom where Isreal was waiting for Fields to return. They demanded Isreal tell them where the money and the marijuana were. Isreal replied that he didn't know. The men then forced him onto the floor and took whatever was in his pockets. Isreal testified he was certain that neither of the men who came into the bedroom was the defendant. While the two men were in the bedroom with him, Isreal heard two gunshots.

Fields testified that he "tussled" with the men holding him on the front porch, then ran away toward his neighbor's house. Fields heard a single shot and did not remember anything more from that night. Police later discovered Fields lying face down and partially conscious next to a neighbor's bush. A bullet hole was observed in his back, and the bullet was found in the front of his shirt when he was rolled over. Fields was taken to Cape Fear Valley Medical Center, where he spent nearly a month in a coma, and over eight months in the hospital. After coming out of his coma in the hospital, Fields identified the defendant as the person he recognized from the assault.

Defendant was arrested and a shotgun and handgun were found in the room in which defendant was staying. Defendant did not testify, but did present the testimony of his cousin, Melvin Franklin, who testified that he asked Fields in the hospital if he knew who had shot him, and Fields appeared to shake his head indicating no. On cross-examination, Franklin was asked by the prosecutor whether he had talked with Sarah McGougan, Fields' mother, shortly after the shooting and told her that the defendant had shot her son. Franklin admitted talking with McGougan, but denied that he said defendant did the shooting. McGougan then testified in rebuttal that Franklin told her that defendant shot her son.

On appeal, defendant raises twelve issues discussed in turn below.

I

[1] Defendant first argues that as North Carolina does not specifically authorize the use of a short-form indictment for the crime of attempted murder and because the indictment at issue did not sufficiently allege the offense of attempted first-degree murder, his conviction for attempted murder must be vacated. "To be sufficient under our Constitution, an indictment 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)). "The elements of an attempt to commit a crime are: '(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.' " *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (quoting *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996)).

Subsequent to defendant's filing of his brief, the North Carolina Supreme Court held short-form indictments for attempted first-degree murder are constitutional and statutorily authorized. *State v. Jones*, 359 N.C. 832, 616 S.E.2d 496 (2005). See also *State v. Andrews*, 154 N.C. App. 553, 559-60, 572 S.E.2d 798, 803 (2002); *State v. Trull*, 153 N.C. App. 630, 640, 571 S.E.2d 592, 599 (2002); and *State v. Choppy*, 141 N.C. App. 32, 41, 539 S.E.2d 44, 50-51 (2000); all finding short-form indictments sufficient to charge attempted first-degree murder.

Section 15-144 of the North Carolina General Statutes provides in an indictment for murder, "it is sufficient in describing murder to

allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder [victim's name] . . . ." N.C. Gen. Stat. § 15-144 (2005). Section 15-170 further provides that "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less[er] degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less[er] degree of the same crime." N.C. Gen. Stat. § 15-170 (2005). The North Carolina Supreme Court has held that when Section 15-144 is construed alongside Section 15-170, the use of a short-form indictment to charge attempted first-degree murder is authorized. *Jones*, 359 N.C. at 838, 616 S.E.2d at 499. "[W]hen drafting such a [sic] indictment, it is sufficient for statutory purposes for the state to allege 'that the accused person feloniously, willfully, and of his malice aforethought, did [attempt to] kill and murder' the named victim." *Id.*

The indictment in the case at hand charges defendant with the offense of attempted murder using the language from Section 15-144, and states: "The jurors for the State upon their oath present that on or about the date 13th day of October, 2002, in the County named above the defendant named above unlawfully, willfully and feloniously did of malice aforethought attempt to kill and murder Michael David Fields." Defendant was properly charged in a short-form indictment with attempted first-degree murder. This assignment of error is overruled.

II

[2] Defendant next argues his conviction for attempted first-degree murder must be vacated because there is insufficient evidence of specific intent to kill, premeditation, and deliberation. Defendant contends there is no evidence he or the "two unidentified black males or other unknown persons" had a specific intent for their actions to result in Fields' death and therefore defendant's motion to dismiss the charge of attempted first degree murder was improperly denied.

In a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn from the facts and evidence presented. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is

properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and quotations omitted). "Substantial evidence is defined as relevant evidence which a reasonable mind could accept as adequate to support a conclusion." *Lee*, 348 N.C. at 488, 501 S.E.2d at 343. "The evidence need only give rise to a reasonable inference of guilt for the case to be properly submitted to the jury." *State v. Barnett*, 141 N.C. App. 378, 383, 540 S.E.2d 423, 427 (2000).

"The elements of attempted first degree murder are: '(1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing.' " *State v. Poag*, 159 N.C. App. 312, 318, 583 S.E.2d 661, 666 (2003) (quoting *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000)). Premeditation and deliberation "are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence." *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994). In the context of attempted first-degree murder, circumstances that may tend to prove premeditation and deliberation include, among others: (1) lack of provocation by the intended victim or victims; and (2) conduct and statements of the defendant both before and after the attempted killing. *State v. Myers*, 299 N.C. 671, 677-78, 263 S.E.2d 768, 773 (1980).

Evidence presented at trial established Fields was unarmed when he was grabbed and pulled from the front doorway of his home by defendant and his two accomplices, all of whom were armed. Fields was trying to run away and thus did not see the person who shot him. However, the evidence also indicated the two accomplices were in the bedroom when Fields was shot. While circumstantial, this evidence is sufficient for the jury to conclude defendant, after sufficient deliberation, intentionally shot Fields in the back as he was attempting to flee, intending to cause Fields' death. This assignment of error is overruled.

III

[3] Defendant argues his conviction for burglary must be vacated because there is insufficient evidence of a breaking. Burglary is committed when a person "breaks or enters into the dwelling house or sleeping apartment of another in the nighttime with the intent to commit a felony therein." *State v. Little*, 163 N.C. App. 235, 239, 593 S.E.2d 113, 116 (2004), *appeal docketed*, No. 183A04 (N.C. Apr. 20,

2004). "A breaking in the law of burglary constitutes any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed." *State v. Jolly*, 297 N.C. 121, 127-28, 254 S.E.2d 1, 5-6 (1979) (citation and quotations omitted) (constructive breaking occurred when defendant gained entry into victim's motel room by pushing victim into the room as the victim opened the door); *see also State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

At trial, Fields' testimony indicated he was forcibly grabbed and dragged outside by one or more individuals when he opened his front door, whereupon one or two of the assailants rushed past him and into his home. This use of force is sufficient to constitute the element of breaking necessary to support a conviction of burglary. This assignment of error is overruled.

IV

[4] Defendant next argues his conviction for conspiracy must be vacated because there was insufficient evidence of every element of the crime charged and because the evidence and jury instructions were at material variance with the allegations of the indictment. We disagree.

"Because the crime of conspiracy lies in the agreement itself, and not the commission of the substantive crime, a defendant can, under certain fact situations, be convicted of a single conspiracy when there are multiple acts or transactions." *State v. Wilson*, 106 N.C. App. 342, 345, 416 S.E.2d 603, 605 (1992) (citations omitted). "Courts have uniformly upheld multiple-object conspiracies, and they have consistently concluded that a guilty verdict must be sustained if the evidence shows that the conspiracy furthered any one of the objects alleged." *United States v. Bolden*, 325 F.3d 471, 492 (4th Cir. 2003) (citing *Griffin v. United States*, 502 U.S. 46, 56-57, 116 L. Ed. 2d 371, 381 (1991) ("When a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.") (citations and quotations omitted)).

In the instant case, defendant was indicted for conspiracy as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 13th day of October, 2002, in the County named above the defendant named above unlawfully, willfully and feloniously did agree, plan, combine, conspire and confeder-

> ate with two black males and other unknown persons to commit the felonies of First Degree Murder, . . . Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, . . . Robbery with a Dangerous Weapon, . . . and First Degree Burglary . . . against Michael David Fields and Sarah McGougan, 4600 Rita Court, Hope Mills, North Carolina.

The trial court initially instructed the jury that in order to find defendant guilty of conspiracy:

> [T]he State had to prove three things beyond a reasonable doubt. First, that the defendant and two other black males entered into an agreement. Second, that the agreement was to commit first degree murder; assault with a deadly weapon with intent to kill inflicting serious injury; robbery with a firearm and first degree burglary. And, third, that the defendant and two other black males intended that the agreement be carried out at the time it was made.

In response to questions from the jury concerning the conspiracy charge, and over defendant's objection, the trial court changed its conspiracy instruction and gave the jury an amended verdict sheet which read:

> AS TO COUNT NUMBER TWO:
>
> ___ GUILTY OF CONSPIRACY TO COMMIT THE FELONIES OF (CHECK EACH OFFENSE THAT YOU FIND THE DEFENDANT CONSPIRED TO DO)
>
> ___ FIRST DEGREE MURDER
>
> ___ ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL INFLICTING SERIOUS INJURY
>
> ___ ROBBERY WITH A FIREARM
>
> ___ FIRST DEGREE BURGLARY
>
> OR
>
> ___ NOT GUILTY

The trial court instructed the jury to simply "check the space beside the offense you find the defendant has conspired to." The jury returned the verdict sheet finding defendant guilty of conspiracy to commit the felonies of robbery with a firearm and first degree burglary.

A plain reading of the indictment indicates defendant was charged with one conspiracy that included the commission of multiple crimes. To convict defendant of conspiracy under the indictment at issue, the jury was not required to find that defendant agreed to commit every unlawful act alleged, only that defendant agreed to commit at least one of the unlawful acts. Furthermore, the change in the jury instructions did not constitute a material variance in the conspiracy charge, it merely established which unlawful acts were proven to the jury to support their verdict of guilty on the charge of conspiracy. The jury found defendant guilty of conspiracy to commit the felonies of robbery with a firearm and first-degree burglary and defendant was subsequently sentenced based upon a single conviction of conspiracy. This assignment of error is overruled.

V

[5] Defendant next argues that his conspiracy conviction must be vacated because there is insufficient evidence he entered into an agreement to commit the offenses in this case. "A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). To prove conspiracy it is unnecessary for the State to prove an express agreement. *Id.* The State must only present evidence tending to show a mutual, implied understanding. *Id.* "Direct proof of the charge is not essential, for such is rarely obtainable. It 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." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933); *see also State v. Lamb*, 342 N.C. 151, 155-56, 463 S.E.2d 189, 191 (1995) (finding sufficient evidence that a robbery was carried out pursuant to a common plan when the evidence established three men drove to the home of the victim, left their vehicle and entered the victim's home, robbed and shot him).

The evidence presented at trial tended to show that Fields was dragged out of his home by three men armed with firearms, one of which Fields identified as defendant. At least two of the assailants entered Fields' home looking to steal drugs and money. Finding no drugs or money in Fields' home, the three men left the scene, leaving Fields lying on the ground shot in the back. This evidence is sufficient to support an inference by the jury that defendant was involved with the two other assailants in a conspiracy to commit the felony of rob-

bery with a firearm and a conspiracy to commit the felony of first-degree burglary. This assignment of error is overruled.

VI

[6] Next, defendant argues he is entitled to a new trial on the assault charge because the trial court failed to submit to the jury instructions they could find defendant guilty of assault with a deadly weapon inflicting serious injury. The trial court stated it would not give any lesser included offenses concerning the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The defendant did not request an instruction on a lesser included offense.

> [W]hen there is conflicting evidence of the essential elements of the greater crime and evidence of a lesser included offense, the trial judge *must* instruct on the lesser included offense even where there is no specific request for such instruction. An error in this respect will not be cured by a verdict finding a defendant guilty of the greater crime.

State v. Rowland, 54 N.C. App. 458, 461, 283 S.E.2d 543, 545 (1981) (citations and quotations omitted). "The presence of such [conflicting] evidence is the determinative factor. . . . Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks*, 241 N.C. 156, 159-60, 84 S.E.2d 545, 547 (1954). Where "there is *no* evidence to negate [the elements of the crime charged] other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of [a lesser included offense.]" *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 771 (2002) (citations and quotations omitted).

Defendant chose to base his defense on the theory that he did not commit the crimes and never attacked the State's evidence supporting an intent to kill. Defendant presented no evidence which would have supported the submission of the lesser included offense. This assignment of error is overruled.

VII

[7] Defendant argues he is entitled to a new trial as to all charges because the trial court erroneously admitted "other crimes" evidence under Rule 404(b) that he was a local drug dealer. "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 . . . identity . . . .” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005).

At trial, when Fields was asked how he knew defendant, he responded they had “hustled together” which he explained meant they had “sold drugs together.” This line of questioning came when the prosecutor was establishing how Fields knew defendant such that Fields was able to identify defendant as one of his assailants. This testimony was properly admitted for the purpose of establishing how Fields could identify defendant and was not admitted “to prove the character of [defendant] in order to show that he acted in conformity therewith.” *Id.* This assignment of error is overruled.

VIII

[8] Defendant next argues he is entitled to a new trial because the trial court erroneously admitted “other crimes” evidence that he was a fugitive and had guns in his possession when he was arrested. Rule 404(b) of the North Carolina Rules of Evidence provides that “[e]vidence 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.” *Id.*

There is nothing in the testimony challenged by defendant that indicates there were any warrants out for defendant’s arrest for crimes other than those for which defendant was currently on trial. While a shotgun and a handgun were recovered from the room in which defendant was arrested, there had been previous testimony that a shotgun and handgun were used in the commission of the crimes at hand. There is absolutely no indication that this testimony involves other crimes which would be inadmissible under the North Carolina Rules of Evidence. *Cf. State v. Evans*, 149 N.C. App. 767, 773, 562 S.E.2d 102, 105-06 (2002) (no error under Rule 404(b) where challenged testimony did not relate to the defendant’s prior conduct). This assignment of error is overruled.

IX

[9] Defendant also argues he is entitled to a new trial as to all charges because the trial court erroneously admitted, over his objection, the testimony of Fields that he had no reason to lie about defendant. The credibility of a witness is for a jury to decide and it is improper for counsel to ask his witness, “Are you telling this jury the truth?” *State v. Skipper*, 337 N.C. 1, 39, 446 S.E.2d 252, 273 (1994). In the instant case, the prosecution, over objection by defendant, asked

Fields, "Do you have any reason to lie on him?" This question is substantially different from "are you telling this jury the truth" and goes to whether or not the witness has any reason to lie, not whether or not he is currently lying. *See State v. Corbett*, 339 N.C. 313, 333-34, 451 S.E.2d 252, 263 (1994) (no error in questioning defendant to show he had a motive to lie). The trial court did not err in overruling defendant's objection. This assignment of error is overruled.

X

[10] Defendant next claims he is entitled to a new trial as to all charges because the trial court erred in admitting State witness McGougan's evidence that defense witness Melvin Franklin called her on the phone, told her defendant "did it," and told her to call Crime Stoppers. Franklin was called as a defense witness and testified on direct about several things, but not about talking to Fields' mother, Sarah McGougan, about defendant. On cross, the Prosecutor asked Franklin whether he had talked to McGougan and told her he "knew it was [defendant] who shot him[.]" Franklin denied making that statement to McGougan. On rebuttal, McGougan testified without any limiting instruction that Franklin called her on the phone, told her defendant "did it," told her to call Crime Stoppers, and she said "God knows I'm telling the truth."

However, defendant failed to object to this line of questioning and any error must be reviewed under the plain error rule. Defendant must therefore convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806 (1983) (applying plain error analysis to the admission of evidence); *State v. Cole*, 343 N.C. 399, 419-20, 471 S.E.2d 362, 372 (1996).

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

State v. 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) (footnotes omitted)).

"When a cross-examiner seeks to discredit a witness by showing prior inconsistent statements . . . the answers of the witness to questions concerning collateral matters are generally conclusive and may not be contradicted by extrinsic testimony." *State v. Cutshall*, 278 N.C. 334, 349, 180 S.E.2d 745, 754 (1971). "Such collateral matters . . . include testimony contradicting a witness' denial that he made a prior statement when that testimony purports to reiterate the substance of the statement." *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989); *see also State v. Mitchell*, 169 N.C. App. 417, 610 S.E.2d 260 (2005). "[O]nce a witness *denies* having made a prior inconsistent statement, the State may not introduce a prior statement in an attempt to discredit the witness; the prior statement concerns only a *collateral matter*, *i.e.*, whether the statement was ever made." *State v. Najewicz*, 112 N.C. App. 280, 289, 436 S.E.2d 132, 138 (1993).

The State should not have been allowed to introduce extrinsic evidence offered by McGougan to impeach the testimony of Franklin. However, in consideration of the eyewitness testimony of the victim, Fields, that defendant was one of his attackers, defendant has not met his burden that without the improper extrinsic evidence offered by McGougan the jury would probably have reached a different result. This assignment of error is overruled.

XI

[11] Defendant next claims he is entitled to a new trial in the attempted first-degree murder case because the trial court failed to instruct the jury that flight has no bearing on the question of premeditation and deliberation. The trial court instructed the jury that:

> Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show of [sic] consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt.

The trial court subsequently gave the following instruction on premeditation and deliberation, which are elements of the crime of attempted murder:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which

> they may be inferred, such as lack of provocation by the victim, conduct of the defendant before, during and after the attempted killing, the manner or means by which the killing was attempted.

Defendant claims that because the trial court did not instruct the jury that flight has no bearing on whether defendant acted with premeditation and deliberation, the court impermissibly lessened the State's burden to prove the elements of premeditation and deliberation beyond a reasonable doubt. While defendant did voice an objection to the inclusion of the instruction on flight, the objection was based not on defendant's flight from the scene of the crime for which he was on trial, but rather for defendant's attempted flight when he was arrested. At trial, defendant did not object to the inclusion of the instruction on flight because of a belief that such an instruction would impermissibly lighten the State's burden to prove the elements of premeditation and deliberation. Rather, defendant was arguing that his attempt to flee during his arrest should not have been considered at all, as he was actually trying to flee because of another offense.

Because defendant did not object to the trial court's instruction on premeditation and deliberation and his objection to the instruction on flight was for a reason other than that argued on appeal, we review only for plain error. *See Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) ("[A] contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court."), *disc. review denied*, 358 N.C. 550, 600 S.E.2d 469 (2004); *Odom* at 659-61, 300 S.E.2d at 378-79 (adopting plain error review for arguments alleging improper jury instructions where no objections to the instructions were made at trial). Our Supreme Court has held that the failure to specifically instruct the jury that it was not to consider the defendant's flight as evidence of premeditation and deliberation does not constitute plain error:

> [W]e note that the court did not say the jury could consider evidence of flight as evidence of premeditation and deliberation. It charged the jury that it could consider it as showing a consciousness of guilt, which is a correct statement of the law. It is speculative as to whether the jury took this to mean it could consider this as evidence of premeditation and deliberation.

State v. Gray, 347 N.C. 143, 167-68, 491 S.E.2d 538, 547 (1997), *overruled in part on other grounds by State v. Long*, 354 N.C. 534, 557 S.E.2d 89 (2001). As the challenged instruction and standard of

review here are indistinguishable from those in *Gray*, this assignment of error is overruled.

XII

[12] Finally, defendant argues the trial court erred in entering judgment for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury in violation of his right to be free from multiple convictions for the same offense. However, as defendant concedes in his brief, this Court has previously held the conviction of attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury based on the same act is not a violation of double jeopardy because "each offense requires proof of at least one element that the other does not." *State v. Peoples*, 141 N.C. App. 115, 119, 539 S.E.2d 25, 29 (2000); *State v. Ramirez*, 156 N.C. App. 249, 259, 576 S.E.2d 714, 721, *disc. review denied*, 357 N.C. 255, 583 S.E.2d 286, *cert. denied*, 540 U.S. 991, 157 L. Ed. 2d 388 (2003). Defendant cites no new authority contrary to the above. Accordingly, this assignment of error is overruled.

No prejudicial error.

Judges McCULLOUGH and TYSON concur.

EAST MARKET STREET SQUARE, INC., F/K/A BOGUES/ALSTON DEVELOPMENT CORPORATION, PLAINTIFF v. TYCORP PIZZA IV, INC. AND GILBERT T. BLAND, DEFENDANTS

No. COA05-212

(Filed 7 February 2006)

1. Corporations— piercing corporate veil—individual's control over corporations—evidence supporting findings

In an action involving piercing the corporate veil, competent evidence supported the trial court's findings of fact regarding the extent of defendant Bland's control over the corporations.

2. Corporations— piercing corporate veil—corporation as instrumentality of individual—equity

In an action to pierce the corporate veil, the trial court's findings supported its conclusions that the corporate defendant was the alter ego and mere instrumentality of the individual defend-

ant. The corporate defendant (Tycorp IV) was so dominated by the individual defendant (Bland) that it had no separate mind, will, or existence; the corporation owed an obligation to plaintiffs to pay rent under the lease and to renovate the building, which it failed to do; Bland misrepresented the financial state of his corporations; and, as equity requires placing the burden of the loss on the person responsible, there was no error in holding him responsible.

Appeal by defendant Gilbert Bland from judgment entered 30 June 2004 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 14 November 2005.

Isaacson Isaacson & Sheridan, LLP, by Jennifer N. Fountain, for plaintiff.

Carruthers & Roth, P.A., by Kenneth R. Keller and J. Patrick Haywood, for defendant.

MARTIN, Chief Judge.

On 19 October 1998, plaintiff East Market Street Square, Inc. ("East Market Street Square"), as landlord, and defendant Tycorp Pizza IV, Inc. ("Tycorp IV"), as tenant, entered into a commercial lease for premises located at 1612 East Market Street in Greensboro, North Carolina. On 18 June 2003, plaintiff filed this action against Tycorp IV and its president, Gilbert T. Bland, alleging claims for breach of the lease and damage to the leased premises. In its complaint, plaintiff sought to pierce the corporate veil of Tycorp IV and hold defendant Bland individually liable for all of the corporate defendant's liabilities to plaintiff.

The matter was tried by the court sitting without a jury. The evidence presented at trial tended to show the following: East Market Street Square is incorporated under the laws of North Carolina and owns commercial property in Greensboro consisting of a five-unit "strip" shopping center and two outparcels. Melvin "Skip" Alston is president of East Market Street Square.

Tycorp Pizza IV, Inc. is incorporated under the laws of Virginia and was formed for the purpose of operating a Pizza Hut restaurant franchise on one of the outparcels owned by plaintiff. Defendant Bland is the president, sole director, and sole shareholder in Tycorp IV. Tycorp IV is a member of the Tycorp family of companies orga-

nized by defendant Bland to own and operate Pizza Hut restaurants in North Carolina and Virginia. At the time of the trial, Tycorp companies owned and operated thirty-six Pizza Hut restaurants. At the top of the corporate structure is Tycorp Pizza, Inc., a holding company that owns all of the stock in three subsidiary corporations: (1) Tycorp Pizza of Virginia, Inc., (Tycorp VA) (2) Tycorp Pizza of North Carolina, Inc. ("Tycorp NC") and (3) Tycorp Pizza III, Inc. ("Tycorp III"). Defendant Bland is the president and sole common shareholder in the holding company. He is also the president, sole director, and sole shareholder in each of the three subsidiary corporations. Bland was the sole shareholder of Tycorp IV until February of 2003, when its shares were sold to Tycorp NC.

Each of the thirty-six restaurants owned by Tycorp companies remits a percentage of its sales to another corporation, Tycorp Group, Inc. ("Tycorp Group"), as a "management fee." Defendant Bland is the president and sole shareholder of Tycorp Group, which has approximately fifteen employees. These employees manage regional groups of restaurants and provide accounting and human resource services. Defendant Bland receives an annual salary from Tycorp Group in exchange for his services. He was compensated in the amount of $200,000 in 2003, and $150,000 in 2001 and 2002.

Defendant Bland first approached Mr. Alston about possibly renting a building from him in May of 1998. Earlier in the year, the building had been vacated by a chicken and seafood restaurant. Following their initial meeting, defendant Bland and Mr. Alston lost contact, and Mr. Alston leased the property to Ms. Gladys Shipman for the purpose of opening a "soul food" restaurant. After the lease between East Market Street Square and Ms. Shipman had been negotiated and signed, defendant Bland contacted Mr. Alston and expressed his continued interest in the property, asserting that a national franchise such as Pizza Hut would be better for the surrounding community than Ms. Shipman's independently-operated restaurant. Defendant Bland also indicated the Pizza Hut he intended to operate on the property had the potential to earn between $700,000 and $800,000 per year, although Mr. Alston believed the earning potential could be between $900,000 and $1,000,000 per year. Ms. Shipman agreed to terminate her lease in exchange for $4,000, to be paid by defendant.

Negotiations then commenced between defendant Bland and Mr. Alston. The two men personally negotiated the terms of the lease then sent it to their attorneys for review. The agreement was signed on 19 October 1998 by Mr. Alston as president of S & J Management

Corporation and defendant as president of Tycorp IV, which had been incorporated earlier the same day. The lease was for a period of ten years, with a minimum monthly base rental in the amount of $4,000. There was also a percentage rent equal to 7% of gross sales for each calendar year. Defendant Tycorp IV accepted the leased premises in its "as is" condition and acknowledged that it had examined and inspected the premises and was familiar with its physical condition. Defendant Tycorp IV further agreed to "open for business and operate one hundred percent (100%) of the Leased Premises during the Term with due diligence and efficiency so as to produce all of the Gross Sales which may be produced by such manner of operation."

It was clear to both parties that the building on the premises would require a massive renovation in order to accommodate a Pizza Hut. East Market Street Square agreed to grant defendant Tycorp IV an allowance of $75,000 for the purpose of renovating the interior and exterior of the building. There was a long list of improvements to be made. The parking lot was in a state of disrepair, a new roof and heating/air conditioning system was required, cooking equipment left over from the chicken restaurant needed to be replaced, and the interior required remodeling to comply with Pizza Hut corporate standards. Furthermore, defendant Tycorp IV intended to expand the size of the building and construct a pick-up window. Tycorp IV solicited bids for the renovations, and received one for $523,000 plus the cost of new kitchen equipment. Defendant was surprised by this high cost. Nevertheless, work proceeded. The building was gutted and defendant removed all furniture and fixtures in the summer of 2002.

In the autumn of 2002, the Tycorp companies began to experience financial difficulties. Tycorp NC, Tycorp VA, and Tycorp III had borrowed significant sums from various lenders in order to finance their purchase of the original thirty-four Pizza Hut restaurants in 1995. In 2002, the companies stopped making payments on these loans and fell into default. In response, the lenders accelerated the loans and demanded payment. Some of the notices of default prohibited the companies "from making any dividends or distributions including salaries, fees and other compensation." Tycorp NC had been paying the rent on the Market Street property for Tycorp IV since the lease was signed in October of 1998. Therefore, in February of 2003, rent payments ceased on the Market Street property. Defendant Bland testified that this was due to the acceleration of Tycorp's loans, and that there was a "very clear understanding that [Tycorp's] dollars were to be expended only in ways that would repay their loans."

Throughout this time, the gutted building stood dormant. In the summer of 2003, it caught the attention of the City of Greensboro Inspection Department. Inspectors condemned the building and ordered plaintiff to repair or demolish it due to the following conditions: (1) gutted and abandoned building shell, (2) broken windows, (3) deteriorated roof structure, (4) vegetative overgrowth of roof and gutters, and (5) lack of operable electrical, mechanical, or plumbing services. The building was eventually demolished at plaintiff's expense.

The trial court awarded damages to plaintiff for breach of the lease and property damages in the amount of $115,500 plus costs and interest. The trial court also pierced the corporate veil of Tycorp IV and held defendant Bland individually liable for the damages awarded plaintiff. Defendant Bland appeals.

Defendant Bland's sole argument on appeal is that the trial court erred in holding him individually liable for the acts and obligations of the corporate defendant Tycorp IV. In support of this argument, defendant Bland contends that (1) he did not exercise the control over Tycorp IV required to support an action to pierce the corporate veil, (2) if such control is found, it was not used to commit a tort or any unjust act, (3) no action by him was the proximate cause of injury to plaintiff, and (4) the lease was an arm's length transaction negotiated between two corporations and their respective attorneys, therefore equity does not require piercing the corporate veil.

The standard of review on appeal from a non-jury trial 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." *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). Where the trial court sits without a jury, its findings of fact "have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings." *Id.* However, we review the trial court's conclusions of law *de novo*. *Id.*

"It is well recognized that courts will disregard the corporate form or 'pierce the corporate veil,' and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985). North Carolina courts use the "instrumentality rule" to determine whether to disre-

gard the corporate entity and hold parent or affiliated corporations or shareholders liable for the acts of a corporation. *Id.* The instrumentality rule may be stated as follows:

> "[if] the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation.

Henderson v. Finance Co., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968) (emphasis in original). There are three elements necessary to pierce the corporate veil under the instrumentality rule:

(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

*Glen*n, 313 N.C. at 455, 329 S.E.2d at 330 (internal citation omitted).

[1] Defendant Bland first argues he did not exercise sufficient control over Tycorp IV to support an action to pierce the corporate veil. The trial court made the following findings of fact regarding defendant Bland's control over Tycorp IV and the other Tycorp companies:

17. Defendant Bland was the sole shareholder of Defendant Tycorp Pizza IV, Inc. and had total autonomy and control of Defendant Tycorp Pizza IV, Inc.

18. Defendant Bland controlled, completely dominated and had total autonomy of Tycorp Pizza IV, Inc., so that it had no independent identity and no separate mind, will or existence of its own.

19. Defendant Bland controlled and had total autonomy of his other corporations as well, including Tycorp Pizza, Inc.,

Tycorp Pizza of N.C., Inc., Tycorp Pizza of Virginia, Inc. and Tycorp Pizza III, Inc.

20. Defendant Bland exerted complete domination over Defendant Tycorp Pizza IV, Inc.'s policies, finances and business practices.

21. As Defendant Bland was the sole shareholder, sole director and President of Defendant Tycorp Pizza IV, Inc. and Tycorp Pizza of N.C., Inc., Defendant Bland made all the decisions for Defendant Tycorp Pizza IV, Inc. and Tycorp Pizza of N.C., Inc. and his other corporations.

22. There was no Board of Directors for Defendant Tycorp Pizza IV, Inc. to oversee Defendant Bland's decisions.

23. The only individual to answer to in transactions of business on behalf of Tycorp Pizza IV, Inc. was Defendant Gilbert Bland.

24. Defendant Tycorp Pizza IV, Inc. had no assets except for an undocumented loan from Tycorp Pizza of N.C., Inc. and had no business operation of any kind.

We must determine whether these findings of fact are supported by competent evidence in the record.

Defendant Bland testified at trial that he controlled Tycorp IV in that he made all decisions regarding its finances, policies, and business practices. He also testified he was Tycorp IV's sole director, sole shareholder, president and sole officer. This testimony constitutes competent evidence to support Finding Nos. 17, 18, and 20 that Bland was the "sole shareholder" of Tycorp IV, that he had "total autonomy over Tycorp Pizza IV, Inc. so that it had no independent identity and no separate mind, will or existence of its own," and that he "exerted complete domination over Defendant Tycorp Pizza IV, Inc.'s policies, finances and business practices."

Bland also testified that he was responsible for all contracts made by Tycorp IV except those made by Pizza Hut for its franchises, he managed the details of the lease negotiations for Tycorp IV rather than his attorneys, he interacted with Pizza Hut representatives when considering opening a franchise, and he signed the application for a certificate of authority to transact business in North Carolina on behalf of Tycorp IV. Melvin Alston, president of plaintiff, testified that all of his interactions regarding the lease negotiation were with

defendant Bland. He never heard of Tycorp IV during these negotiations; he only became aware of its existence upon receiving the first rent check under the lease. Defendant Bland presented no evidence of a Board of Directors to oversee his decisions. Therefore, there was also competent evidence to support Finding Nos. 22 and 23 that "[t]he only individual to answer to in transactions of business on behalf of Tycorp Pizza IV, Inc. was Defendant Gilbert Bland," and that "[t]here was no Board of Directors for Defendant Tycorp Pizza IV, Inc. to oversee Defendant Bland's decisions."

In Finding Nos. 19 and 21, the trial court found Bland "controlled and had total autonomy of" Tycorp Pizza, Inc., Tycorp NC, Tycorp Pizza of Virginia, and Tycorp Pizza III, Inc., and as president, director, and sole shareholder of these companies, Bland made all business decisions for them. Bland testified he was president, director, and sole common shareholder of these companies as well as Tycorp Group Inc., the management company for all the Tycorp corporations. Bland stated he "continually review[s] information with [the] staff all the time. . . . [and] as sole shareholder, digest[s] that information and make[s] decisions." He specifically claimed to have "the authority for the final decisions" of Tycorp NC. Defendants presented no evidence of any other individual or entity with the authority to conduct the business of the Tycorp group of companies. We therefore conclude competent evidence existed to support Finding Nos. 19 and 21 of the trial court.

Finally, Finding No. 24 states that "Defendant Tycorp Pizza IV, Inc. had no assets except for an undocumented loan from Tycorp Pizza of N.C., Inc. and had no business operation of any kind." Defendant Bland testified that Tycorp IV owned no real or personal property. When asked if Tycorp IV ever had any assets, he stated it "had a fair amount of cash that was being advanced to it from Tycorp Pizza of North Carolina." According to Bland, Tycorp NC made lease payments for Tycorp IV for over four years, totaling $232,622.91. Tycorp NC also paid architectural fees and renovation costs. However, Tycorp NC had lost money every year since its inception. Tycorp NC was funded by bank loans and profits made by Tycorp Pizza of Virginia, Inc. because the earnings from all thirty-six of defendant's restaurants went "into a single pot."

Defendant argues in his brief that in addition to the financing from Tycorp NC, Tycorp IV also had the following assets: a commitment from the landlord under the lease to provide a $75,000 construction allowance, $200,000 worth of restaurant equipment, a sub-

scription agreement for $1,000, and authorization from Pizza Hut to open and operate a Pizza Hut restaurant on the premises. However, these assets, in addition to advancements from a failing corporation, were insufficient to allow defendants to conduct the necessary renovations to the leased premises and to open and operate a restaurant thereon. Furthermore, Finding No. 24 states that Tycorp IV "had no business operation of any kind." Bland testified Tycorp IV "never had any operations" and "was formed to simply hold this one lease." While the trial court's statement that Tycorp IV had "no assets except for an undocumented loan from Tycorp Pizza of N.C., Inc." may have been technically incorrect, the evidence in the record does support a finding that these assets were insufficient under the circumstances to support the operation of defendants' restaurant and that Tycorp IV "had no business operation of any kind."

We conclude, based on the evidence before us, that the trial court's findings of fact regarding the extent of Bland's control over Tycorp IV and the other Tycorp companies were supported by competent evidence. We must now ask whether these findings of fact support the trial court's conclusions of law that Tycorp IV was the alter ego and mere instrumentality of the individual defendant Bland.

[2] We have previously considered the following factors in determining the level of control a corporate or individual defendant exercises over a corporation:

1. Inadequate capitalization ("thin incorporation").
2. Non-compliance with corporate formalities.
3. Complete domination and control of the corporation so that it has no independent identity.
4. Excessive fragmentation of a single enterprise into separate corporations.

Glenn, 313 N.C. at 455, 329 S.E.2d at 330-31 (internal citations omitted). However, it "is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which . . . suggest that the corporate entity attacked had 'no separate mind, will or existence of its own' and was therefore the 'mere instrumentality or tool' of the dominant corporation." *Id.* at 458, 329 S.E.2d at 332.

The trial court made the following conclusions of law regarding defendant Bland's control over Tycorp IV:

3. Defendant Tycorp Pizza IV, Inc. was inadequately capitalized.

4. Defendant Bland commingled the funds from his 36 restaurants between his corporations including Defendant Tycorp Pizza IV, Inc. and Tycorp Pizza of N.C., Inc.

5. Defendant Bland exercised complete domination and control over Tycorp Pizza IV, Inc. so that it had no independent identity and no separate mind, will or existence of its own.

6. Defendant Bland excessively fragmented his pizza restaurant enterprise into separate corporations.

7. Defendant Bland and Defendant Tycorp Pizza IV, Inc. are one and the same.

8. Defendant Tycorp Pizza IV, Inc. is the alter ego of Defendant Bland.

9. Defendant Tycorp Pizza IV, Inc. is a mere instrumentality of Defendant Bland.

These conclusions were properly drawn from the trial court's findings indicating that Tycorp IV was a shell corporation intended to shield defendant Bland and his other corporations from liability. Defendant Bland alone conducted all negotiations and made all decisions for Tycorp IV. He failed to capitalize the corporation sufficiently for it to open a Pizza Hut on the leased premises. Tycorp IV's most significant asset was the money it received from Tycorp NC, another of Bland's corporations. Indeed, Bland testified that the money from all of the Tycorp corporations went "into a single pot," that he used profits from one corporation to operate others, that he considered his corporations "as a group" rather than "separate," and that the corporations sometimes guaranteed one another's loans. However, instead of entering into the lease in question through Tycorp NC, an existing corporation operating restaurants in the immediate area, Bland created Tycorp IV solely for this particular transaction. As in *Glenn*, 313 N.C. at 459, 329 S.E.2d at 333, "the two corporations . . . functioned as a single business enterprise in substance, if not in form." In that case, our Supreme Court held the parent corporation liable for the actions of its subsidiary.

Because Bland was president, sole director, and sole shareholder of the entire hierarchy of Tycorp corporations, his creation of Tycorp IV in this instance appears unnecessary and redundant. Although we recognize that "[t]he mere fact that one person . . . owns all of the

stock of a corporation does not make its acts the acts of the stockholder so as to impose liability therefor upon him," *Henderson*, 273 N.C. at 260, 160 S.E.2d at 44; *see also* N.C. Gen. Stat. § 55-2-03(c) (2005), we agree with the trial court's conclusion that in this case, Tycorp IV was so dominated by Bland that it had no "separate mind, will or existence of its own" other than as a "mere instrumentality or tool" of Bland himself. *Glenn*, 313 N.C. at 458, 329 S.E.2d at 332.

The second element necessary to pierce the corporate veil is that a defendant must use his control of the corporation "to commit fraud or wrong" such as "the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights." *Id.* at 455, 329 S.E.2d at 330. Defendant argues his "mere breach of a contractual obligation" does not constitute an unjust act as contemplated by the Court in *Glenn*. According to defendant, North Carolina law requires a "heightened wrongful act," such as a tort or the violation of a statute, to pierce the corporate veil. However, we find defendant's argument to be without merit for two reasons. First, we consider performance under a contract to be a "positive legal duty," the violation of which constitutes a clear "wrong" done to plaintiffs. Our Supreme Court in *Glenn* defined piercing the corporate veil as "extend[ing] liability for corporate *obligations* beyond the confines of a corporation's separate entity." *Id.* at 454, 329 S.E.2d at 330 (emphasis added). It is undisputed that Tycorp IV owed an obligation to plaintiffs to pay rent under the lease and to renovate the building, which it failed to do.

The trial court also made the following conclusions of law regarding defendant Bland's use of his control of the corporation:

> 12. Defendant Bland has used his complete domination and control of Defendant Tycorp Pizza IV, Inc. and Tycorp Pizza of N.C., Inc. to commit a fraud, wrong and dishonest and unjust act in contravention of Plaintiff's legal rights.
>
> 13. The damage to the Premises by Defendants is one of the wrongs and unjust acts which Defendants inflicted upon Plaintiff.
>
> 14. The wrongs done unto Plaintiff include the damage to the building on the Premises, the control of Defendant Tycorp Pizza IV, Inc. and Tycorp Pizza of N.C., Inc. which caused the failure to pay rent and the dishonesty regarding the solvency of Defendant Tycorp Pizza IV, Inc. at the time the Lease was entered into.

15. Also, Defendant Bland used his control over Tycorp Pizza IV, Inc., Tycorp Pizza of N.C., Inc. and his other corporations to perpetrate a wrong upon the Plaintiff when he engaged in business, specifically with Plaintiff and this wrong caused injury and loss to Plaintiff.

16. A dishonest and unjust act was committed by Defendants upon Plaintiff when Defendant Bland represented himself and Defendant Tycorp Pizza IV, Inc. as a solvent individual and a solvent corporation when Defendant Tycorp Pizza IV, Inc. and Defendant Bland's other corporations, including Tycorp Pizza of N.C., Inc. were struggling financially when Defendant Bland entered into the lease with Plaintiff on behalf of Defendant Tycorp Pizza IV, Inc.

These conclusions of law were supported by the trial court's findings of fact, including its findings that (1) defendant Bland represented both he and Tycorp IV as solvent, (2) Bland continually promised plaintiff he would open a Pizza Hut on the leased premises but failed to do so, and (3) defendants removed and destroyed fixtures in the building, rendering the building worthless and resulting in its eventual demolition. These findings, which are supported by competent record evidence, and the subsequent conclusions of law indicate defendant Bland misrepresented the financial state of his corporations, resulting in the loss of plaintiff's building and the fixtures therein. This misrepresentation, in addition to the breach of contract, satisfies the second element necessary to pierce the corporate veil. We hold, therefore, the trial court properly concluded defendant Bland "used his complete domination and control of Defendant Tycorp Pizza IV, Inc. and Tycorp Pizza of N.C., Inc. to commit a fraud, wrong and dishonest and unjust act in contravention of Plaintiff's legal rights."

The third and final element required for piercing the corporate veil is that the defendant's "control and breach of duty must proximately cause the injury or unjust loss complained of." *Id.* at 455, 329 S.E.2d at 330. Defendant Bland argues the trial court erred in concluding that his "control and complete domination of Defendant Tycorp Pizza IV, Inc. and Tycorp Pizza of N.C., Inc. was the proximate cause of the injury and unjust loss suffered by Plaintiff." However, Tycorp IV's failure to perform under the contract resulted in plaintiff's loss of rental income as well as its loss of the building on its premises. After gutting the building, defendant was unable to pay for the necessary renovations and was forced to leave it dormant, result-

ing in its eventual demolition. The trial court found that "[a]lthough the Lease allowed for destruction of the building on the Premises, this was only contemplated if Defendants were to proceed with construction of a facility to operate a Pizza Hut." Defendant does not contest the trial court's finding in this respect, but simply argues that its lenders' acceleration of its loans caused the breach of lease rather than any action by defendant Bland. However, Bland's complete domination and exclusive control of the Tycorp companies' business decisions ultimately resulted in the acceleration of these loans. This argument is overruled.

Finally, defendant argues the lease in this case was an arm's length transaction negotiated between two corporations and their respective attorneys, therefore equity does not require piercing the corporate veil. "[T]he theory of liability under the instrumentality rule is an equitable doctrine. Its purpose is to place the burden of the loss upon the party who should be responsible. Focus is upon reality, not form, upon the operation of the corporation, and upon the defendant's relationship to that operation." *Id.* at 458, 329 S.E.2d at 332. Equity, therefore, requires placing "the burden of the loss" on the party responsible for the breach of contract. We have already found defendant Bland so dominated Tycorp IV as to make the individual and the corporation "alter egos." As such, the individual defendant was equally responsible for the plaintiff's loss, and we see no error in the trial court's decision to hold him personally liable for the breach of the lease.

Affirmed.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA v. GARY ANTHONY WILLIAMS

No. COA04-1734

(Filed 7 February 2006)

1. Criminal Law— length of time of recess—abuse of discretion standard

The trial court did not abuse its discretion by refusing to allow defendant a recess of more than five minutes to decide whether to present evidence in his trial for first-degree murder,

because: (1) the trial court is in a much better position to make the decision to grant a recess and the length of that recess instead of an appellate court reviewing a written transcript since the trial court is able to observe the parties and their counsel, and observe their interactions; (2) none of the factors constituting prejudice cited in *State v. Goode*, 300 N.C. 726 (1980), were present in this case; and (3) assuming arguendo that the trial court abused its discretion by refusing to grant defendant fifteen rather than five minutes for a recess, defendant failed to show he was prejudiced.

2. Evidence— police-taped telephone conversation—admission of party opponent—consistency with trial testimony

The trial court did not err in a first-degree murder and discharging a weapon into occupied property case by allowing a witness to testify regarding a police-taped telephone conversation with defendant following the shooting, because: (1) the witness's recollection of her telephone conversation with defendant was admissible under N.C.G.S. § 8C-1, Rule 801 as an admission by a party opponent; (2) the jury also listened to the audiotape of the conversation between defendant and the witness; (3) any inaccuracies or discrepancies between the audiotape and the witness's testimony go to issues of credibility and the weight to be given to the evidence which are matters solely within the province of the jury; and (4) while the witness's testimony was not verbatim identical to the language of the taped conversation, the import of the witness's testimony was consistent with the transcript of the audiotape.

3. Firearms and Other Weapons— discharging firearm into occupied property—knowledge—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of discharging a firearm into occupied property even though defendant contends there was insufficient evidence that he knew or should have known the property was occupied at the time he discharged his weapon, because: (1) reasonable grounds to believe that a building might be occupied can be found where a defendant has shot into a residence during the evening hours as homeowners are most often at home during these hours; and (2) defendant fired shots at the victim who was standing on a lighted front porch of an apartment building near a baby carriage shortly after 3:00 a.m., and a witness testified that she spoke with defendant in the car rather than inside the apartment since her family was asleep in there and it was late.

4. Homicide— first-degree murder—failure to instruct on lesser-included offense—voluntary manslaughter—imperfect self-defense

The trial court did not err in a first-degree murder case when it refused to instruct the jury on the lesser-included offense of voluntary manslaughter based on the theory of imperfect self-defense, because a trial court does not commit prejudicial error in failing to give a voluntary manslaughter instruction when a jury rejects a verdict of guilty of second-degree murder and instead finds defendant guilty of first-degree murder.

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

The assignments of error that defendant failed to argue in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from judgments entered 30 June 2004 by Judge Ernest B. Fullwood in Wayne County Superior Court. Heard in the Court of Appeals 24 August 2005.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Francis W. Crawley, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

STEELMAN, Judge.

Defendant, Gary Anthony Williams, appeals his convictions for first-degree murder and discharging a weapon into occupied property. For the reasons discussed herein, we find no prejudicial error.

The State presented evidence at trial tending to show defendant shot and killed the victim, Juhan Davis (Davis), during the early morning hours of 23 February 2003. Defendant and Davis had been involved in an altercation several hours earlier when Davis discovered his girlfriend, Joyce Banks (Banks), and defendant sitting and talking in a parked car together. The two men argued and defendant drove off in his vehicle. Davis and Banks continued to argue on the lighted front porch of her apartment building. At the time, Banks' minor son and four other children were asleep inside the apartment. Banks' brother, who also lived at the apartment, came outside and ordered Davis to leave. While the three were on the porch, defendant

walked to his vehicle, retrieved a pistol, and immediately began firing at Davis until his pistol was empty. He then returned to his vehicle and drove away. Davis subsequently died of multiple gunshot wounds. Police evidence technicians collected nine spent shell casings, bullets, and bullet fragments from the street, front yard, porch, and inside the apartment. One of the bullets fired by defendant entered an apartment window, ricocheted across the living room, and lodged in the apartment wall. Bullet fragments were also found in a baby carriage located near the front porch.

Defendant's trial began on the morning of 28 June 2004. The State rested its case shortly after four o'clock on the afternoon of 29 June 2004 and the trial court immediately excused the jury from the courtroom at 4:08 p.m. Defendant moved to dismiss the charges without argument. The trial court immediately denied this motion. Defendant's attorney then requested that court be recessed for the day so that he could consult with defendant concerning whether he would present evidence. Defense counsel advised the court: "We have talked about this, family has talked about this but couldn't make a decision until we heard everything." The trial judge told counsel he would give him five minutes. Defense counsel requested fifteen minutes, but the trial court denied the request. The judge took recess until 4:20 p.m., after which defense counsel informed the court that defendant was not going to present any evidence. The court then conducted the jury charge conference and recessed court until the following morning. When court resumed the next morning, defendant did not move the court to be allowed to present evidence. At no time did defendant advise the trial court of a specific reason why he needed a certain amount of time to decide whether or not to present evidence.

The jury found defendant guilty of first-degree murder and discharging a weapon into occupied property. The trial court sentenced defendant to life imprisonment without parole, and to twenty-nine to forty-four months imprisonment for discharging a weapon into occupied property. Defendant appeals.

[1] In his first argument, defendant contends the trial court erred in refusing to allow him more than five minutes to decide whether to present evidence in his trial for first-degree murder. We disagree.

A trial court is afforded wide latitude in making decisions which affect various procedural matters arising during the course of a trial, including whether to grant a recess, as well as the length of that

recess, and such decisions are vested within the trial court's sound discretion. *State v. Goode*, 300 N.C. 726, 729-30, 268 S.E.2d 82, 84 (1980). "When a defendant seeks to establish on appeal that the exercise of such discretion is reversible error, he must show harmful prejudice as well as clear abuse of discretion." *Id.* at 729, 268 S.E.2d at 84. The trial court is in a much better position to make the decision to grant a recess and the length of that recess than an appellate court reviewing a cold, written transcript. The trial judge will generally have conferred with counsel about scheduling matters, which is often not reflected in the record. More importantly, the trial judge is able to observe the parties and their counsel, observe their interactions, and determine the appropriateness of granting a recess, as well as the length of that recess. Since an appellate court will only reverse the trial court's ruling on such a matter where there exists a clear abuse of its discretion, defendant in the instant case must show two things in order to prevail on this assignment of error: (1) the trial court abused its discretion in allowing counsel five rather than fifteen minutes to confer with defendant; and (2) defendant was prejudiced by this ruling.

In *Goode*, our Supreme Court held:

> No defendant is *automatically* entitled to a recess at the close of the State's evidence because such motion is addressed to the sound discretion of the trial court. Even so, where, as here, the trial judge in the presence of the jury denies unnamed motions before they are made, and then immediately denies defense counsel's request for a short recess to decide whether defendant would offer evidence, a clear abuse of discretion prejudicial to defendant's cause is established. This requires a new trial.

300 N.C. at 730, 268 S.E.2d at 84. None of the factors cited by the Supreme Court in *Goode* as constituting prejudice are present here. When the State rested its case, the trial judge, without request of counsel, excused the jury from the courtroom. Defendant then made his motion to dismiss, which was denied. Finally, the court did not deny counsel's request for a short recess. It granted the request, albeit for a shorter period of time than defendant requested. Even assuming *arguendo* that the trial judge abused his discretion in refusing to grant defendant fifteen rather than five minutes for a recess, defendant has failed to show he was prejudiced. *State v. Haywood*, 144 N.C. App. 223, 233, 550 S.E.2d 38, 45 (2001). In effect, both defendant and the dissent would have this Court to hold that granting a shorter

recess in this case than defendant requested was *per se* prejudicial to defendant. Such a holding is contrary to the law of this state. *See id*; *Goode*, 300 N.C. at 730, 268 S.E.2d at 84. This argument is without merit.

[2] In his second argument, defendant contends the trial court erred in allowing Banks to testify regarding a police-taped telephone conversation with defendant following the shooting. Defendant contends Banks' testimony regarding the conversation was inaccurate and highly prejudicial. We disagree.

Banks testified, in part, to the telephone conversation with defendant as follows: "[Banks]: And so then I asked him, I said, '[w]hy did you shoot [Davis]?' He said, 'I didn't know if he had a gun. I didn't know if he had a gun.' " The transcript of the taped conversation between Banks and defendant reads, in part, as follows:

Banks:	Hey look man, why you, why you come back and do that to [Davis] like that, man?
[Defendant]:	Huh?
Banks:	Why you come back and do that to [Davis] like that?
[Defendant]:	Uum.
Banks:	Hey man, that was f----- up.
[Defendant]:	Hum?
Banks:	That was f----- up what you did, man.
[Defendant]:	I'm saying I thought [he] was [going to] shoot me.
Banks:	He didn't have no gun on him though.
[Defendant]:	I didn't know that.

Defendant contends Banks' question to him, "[w]hy you come back and do that to [Davis] like that?" in the transcript of the taped conversation differs substantially from her testimony at trial, which was "[a]nd so then I asked him, I said, '[w]hy did you shoot [Davis]?' " Defendant argues this inaccuracy rendered Banks' testimony inadmissible hearsay. We disagree.

Banks' recollection of her telephone conversation with defendant was admissible under Rule 801 of the North Carolina Rules of Evidence as an admission by a party-opponent. N.C. Gen. Stat.

§ 8C-1, Rule 801(d) (2005); *State v. White*, 340 N.C. 264, 285, 457 S.E.2d 841, 853 (1995). The jury also listened to the audio tape of the conversation between defendant and Banks. Any inaccuracies or discrepancies between the audio tape and Banks' testimony go to issues of credibility and the weight to be given to the evidence. "These are matters solely within the province of the jury." *State v. Jordan*, 321 N.C. 714, 717, 365 S.E.2d 617, 619 (1988). Moreover, while Banks' testimony was not verbatim identical to the language of the taped conversation, the import of Banks' testimony was consistent with the transcript of the audio tape. This argument is without merit.

[3] Defendant next argues the trial court erred in denying his motion to dismiss the charge of discharging a firearm into occupied property. He contends the State presented insufficient evidence that he knew or should have known the property was occupied at the time he discharged his weapon. We disagree.

Defendant's motion to dismiss requires the trial court to consider all the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Stewart*, 292 N.C. 219, 223-24, 232 S.E.2d 443, 447 (1977). "[T]he question is whether there is substantial evidence—direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the accused committed it." *Id.* at 224, 232 S.E.2d at 447.

A person is guilty of discharging a firearm into occupied property if he "intentionally, without legal justification or excuse, discharges a firearm into an occupied building with the knowledge that the building is occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons." *State v. James*, 342 N.C. 589, 596, 466 S.E.2d 710, 715 (1996); N.C. Gen. Stat. § 14-34.1 (2005). "Reasonable grounds to believe that a building might be occupied can certainly be found where a defendant has shot into a residence during the evening hours, as homeowners are most often at home during these hours." *State v. Fletcher*, 125 N.C. App. 505, 512, 481 S.E.2d 418, 423 (1997); *see also State v. Hicks*, 60 N.C. App. 718, 721, 300 S.E.2d 33, 35 (1983) (upholding the denial of a defendant's motion to dismiss the charge of discharging a weapon into occupied property and noting that people are usually at home at 5:00 a.m., when the offense occurred).

Here, the State presented evidence tending to show that shortly after 3:00 a.m. on 23 February 2003 defendant fired multiple shots at

Davis, who was standing on a lighted front porch of an apartment building near a baby carriage. Investigating officers traced one of the bullets fired by defendant through a hole in the apartment window and into the window frame in the living room. The bullet crossed the living room and lodged in the wall beside a door opening. Bullet fragments were also found in the baby carriage near the porch. At the time of the shooting, five children occupied the apartment. Before the shooting, defendant sat and spoke with Banks in a parked car. Banks testified she spoke with defendant in the car, rather than inside her apartment because her "family was in there asleep, my nieces and nephews in there asleep, and it was late." From the evidence presented, we conclude the jury could find that defendant had reasonable grounds to believe the apartment was occupied at the time he discharged his weapon. This argument is without merit.

[4] In his fourth and final argument, defendant contends the trial court committed reversible error when it refused to instruct the jury on the lesser included offense of voluntary manslaughter based on the theory of imperfect self-defense. We disagree.

"[A] trial court does not commit prejudicial error in failing to give a voluntary manslaughter instruction when a jury rejects a verdict of guilty of second-degree murder and instead finds defendant guilty of first-degree murder." *State v. Lyons*, 340 N.C. 646, 663, 459 S.E.2d 770, 779 (1995). This rule applies regardless of whether defendant asserts he is entitled to an instruction on voluntary manslaughter based on theories of heat of passion or imperfect self-defense. *Id.* at 663-64, 459 S.E.2d at 779; *State v. Price*, 344 N.C. 583, 590, 476 S.E.2d 317, 321 (1996). The rationale behind the rule is that by "finding the defendant guilty beyond a reasonable doubt of first-degree murder based on premeditation and deliberation and rejecting second-degree murder, the jury necessarily rejected, beyond a reasonable doubt, the possibilities that the defendant acted in the heat of passion or in imperfect self-defense (voluntary manslaughter) . . . ." *Id.*

In the instant case, the judge presented the jury with the possible verdicts of first-degree murder, second-degree murder, and not guilty. When the jury returned a verdict of guilty of first-degree murder based on premeditation and deliberation, this rendered harmless any error of the trial court, if there was any, in failing to submit the crime of voluntary manslaughter to the jury. *Accord id.* This argument is without merit.

[5] The remaining assignments of errors asserted in the record on appeal, but not argued in defendant's brief, are deemed abandoned. N.C. R. App. P. 28(b)(6).

In conclusion, we hold: (1) the trial court did not abuse its discretion in refusing to allow defendant fifteen rather than five minutes to confer with his attorney and decide whether to present evidence in his trial for first-degree murder; (2) the trial court did not err in admitting testimony by Banks regarding her telephone conversation with defendant; (3) the trial court properly denied defendant's motion to dismiss the charge of discharging a firearm into occupied property; and (4) the trial court did not commit reversible error in failing to instruct the jury on the lesser offense of voluntary manslaughter.

NO PREJUDICIAL ERROR.

Judge TYSON concurs.

Judge HUNTER concurs in part and dissents in part by separate opinion.

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

I concur with the portions of the majority's opinion addressing the telephone conversation between defendant and Banks, the denial of defendant's motion to dismiss, and the requested jury instructions. I disagree, however, that the trial court properly denied defendant's request for a recess of fifteen minutes in which to decide whether or not to present evidence in his trial for first degree murder. I would hold defendant is entitled to a new trial.

Defendant's trial began on 28 June 2004. The State rested its case shortly after four o'clock in the afternoon of 29 June 2004. The trial court then sent the jurors from the courtroom, at which point defendant's attorney requested the trial court "adjourn for the day or at least give us some time to make a decision to offer any evidence at all. We have talked about this, family has talked about this but couldn't make a decision until we heard everything. We just heard everything." The trial court denied defendant's request for an adjournment and informed him he had "five minutes." Defense counsel then asked, "[c]an you give me 15 minutes?" The trial court responded, "[n]o. No, sir. You've got five minutes. You knew we'd be at this point." Defense counsel stated, "Judge, I did but we truly didn't know what all the evi-

dence would be." The trial court reiterated that defense counsel had "five minutes." Defense counsel subsequently conferred with defendant and his family, after which defendant decided not to offer evidence. The jury found defendant guilty of first degree murder and discharging a weapon into occupied property, whereupon the trial court sentenced defendant to life imprisonment without parole, and to twenty-nine to forty-four months' imprisonment for his discharging a weapon into occupied property conviction.

Procedural matters relating to the conduct of a criminal trial are left largely to the sound discretion of the trial judge as long as the defendant's rights are "scrupulously afforded him." *State v. Goode*, 300 N.C. 726, 729, 268 S.E.2d 82, 84 (1980). Such discretion is not unlimited, however, and, when abused, is subject to reversal by the appellate courts. *Id.*

"It is generally recognized, by Bench and Bar alike, that the decision whether a defendant in a criminal case will present evidence or will testify in his own behalf is a matter of *paramount importance*." *Id.* at 730, 268 S.E.2d at 84 (emphasis added). "Such matters can and should be discussed generally prior to trial, but the actual decision cannot intelligently be made until the close of the State's evidence." *Id.* Appropriate recesses at the close of the State's evidence are

> deeply ingrained in the course and practice of our courts and, when requested, have been granted as a matter of course so long that "the memory of man runneth not to the contrary." The recess enables defendant and his counsel to evaluate their position. If the evidence offered by the State has made a strong case against defendant, he may decide to "throw in the towel" and tender a plea. If the State's case is weak, he may decide to rest and rely on that weakness for a verdict of acquittal. If defendant has a strong defense and credible witnesses, he may well decide to offer his evidence regardless of the strength of the State's case.

Id.

The defendant in *Goode* was charged with felonious breaking and entering a restaurant and felonious larceny of wine having a value of $108.00. At the close of the State's evidence at trial, defendant's counsel informed the trial court he had " 'motions,' " to which the trial court responded, " '[t]hey are denied. Will there be evidence for the defense?' " *Id.* at 728, 268 S.E.2d at 83. Defense counsel then requested a " 'short recess' " to confer with his client on the question of

whether to present evidence. The trial court denied defense counsel's request. The defendant ultimately testified on his own behalf against the advice of his counsel. He was convicted by a jury on both counts and given consecutive sentences of eight to ten years on each count.

Upon review, our Supreme Court noted that "[n]o defendant is *automatically* entitled to a recess at the close of the State's evidence because such motion is addressed to the sound discretion of the trial court." *Id.* at 730, 268 S.E.2d at 84. However, the Court continued, "where, as here, the trial judge in the presence of the jury denies unnamed motions before they are made, and then immediately denies defense counsel's request for a short recess to decide whether defendant would offer evidence, a clear abuse of discretion prejudicial to defendant's cause is established." *Id.*

In the present case, defendant was on trial for first degree murder and faced a potential sentence of life imprisonment without parole. Defendant's decision whether to present evidence, in comparison to the potential sentence for breaking, entering, and larceny faced by the defendant in *Goode*, was therefore of far greater consequence. Although it is true, as the trial court indicated when it stated "[y]ou knew we'd be at this point[,]" that defendant's right to present evidence was established at the beginning of the trial, "the actual decision [to present evidence] *cannot intelligently be made until the close of the State's evidence*." *Id.* (emphasis added). The reality of this fact may be seen by defense counsel's statement to the trial court that "[w]e have talked about this, family has talked about this but couldn't make a decision until we heard everything. We just heard everything."

The State here provided notice to defendant of twenty to thirty potential witnesses. At trial, twelve of the potential witnesses testified. Defendant needed time to evaluate these witnesses and their testimony in order to understand his position at the close of the State's evidence. *See Goode*, 300 N.C. at 730, 268 S.E.2d at 84 (stating that "[t]he recess enables defendant and his counsel to evaluate their position"). Defense counsel explained to the court that they needed the time because they "truly didn't know what all the evidence would be" until the State finished presenting its case. Even if defendant and trial counsel had considered only the State's witnesses in the five minutes granted by the trial court, such consideration equates to a mere twenty-five seconds per witness. However, in addition to the State's witnesses, defendant and his counsel needed time to consider the three witnesses the defense had subpoenaed. Defense counsel re-

quested fifteen minutes to confer with defendant and his family regarding a decision of "paramount importance," to evaluate the relative strengths and weaknesses of the case presented by the State. *Id.* The trial court refused to grant defendant more than five minutes to make his decision.

Five minutes was inadequate time in which to make a reasoned and intelligent decision. Notwithstanding the majority's assertion otherwise, I would not hold that denying defendant's motion for a recess constituted prejudice *per se*, but rather that the trial court's refusal here to allow defendant more than five minutes to determine whether to present evidence in his trial for first degree murder was prejudicial under the facts of this case and the law of this State. *See id.* (concluding that the defendant had established prejudicial abuse of discretion where the trial court denied defense counsel's request for a short recess to decide whether the defendant would present evidence). Defendant subpoenaed three witnesses to testify on his behalf, but he had little time, if any, to consider the potential impact of that testimony in light of the evidence presented by the State. Ultimately, defendant presented no evidence, and it is impossible to ascertain what evidence, if any, defendant would have presented had he been given more time in which to make the decision. *See id.* at 730, 268 S.E.2d at 84 (holding that the defendant established clear abuse of discretion, and that such abuse was also prejudicial).

The majority cites the case of *State v. Haywood*, 144 N.C. App. 223, 550 S.E.2d 38, *disc. review denied and appeal dismissed*, 354 N.C. 72, 553 S.E.2d 206 (2001), in support of its argument. In *Haywood*, at the close of the State's evidence and after the defendant's motion to dismiss had been denied, at approximately 4:15 p.m., counsel for the defendant requested that the court recess until morning so that he could discuss with his client whether the defendant should take the stand in his own defense. The trial court denied the motion. Defense counsel did not request a shorter recess. The defendant subsequently presented evidence and was ultimately convicted of first degree rape, first degree sexual offense, and conspiracy to commit first degree rape. The trial court sentenced him to concurrent sentences of 240 to 297 months on the first degree rape charge, 240 to 297 months on the first degree sexual offense charge, and to 151 to 191 months on the conspiracy charge.

Upon appeal, this Court found no prejudicial error, stating that "[a]ssuming *arguendo* the trial court erred in denying defendant's motion for a recess to confer with his attorney, defendant has not

shown that he was prejudiced by his decision to take the stand and present a witness in his behalf." *Id.* at 233, 550 S.E.2d at 45. This was because "[i]t was only through defendant's testimony that he was able to present evidence on the defense of necessity and evidence negating the charge of conspiracy." *Id.* Further, the trial court had not permitted the State to cross-examine the defendant regarding prior convictions for communicating threats and assault on a female because these convictions had not been furnished to the defendant in discovery. *Id.* The Court also noted that, instead of a short recess as was requested in *Goode*, the *Haywood* defendant asked for an overnight recess. As such, the Court noted, "[w]e are unable to say that the trial court here would not have granted a recess of shorter duration if defendant had clearly asked for one." *Id.*

Haywood is distinguishable from the facts of the present case. Unlike *Haywood*, defendant here renewed his request for a short recess after his request for an overnight recess was denied. Moreover, the Court in *Haywood* never answered the question of whether the trial court erred in failing to grant a recess; rather, it held that, *assuming* there was error, the defendant had failed to establish prejudice because the evidence he presented was critical to his case. Here, defendant presented no evidence. Finally, unlike the defendant in *Haywood*, defendant here faced and received a sentence of life imprisonment without parole.

In evaluating the facts of the present case in light of our case law precedent, the instant case more closely resembles *Goode* than *Haywood*. Like the case in *Goode*, there is no sound reason for the denial of defendant's request for a reasonable amount of time to confer with counsel to make an intelligent and considered decision of "paramount importance." *See Goode*, 300 N.C. at 730, 268 S.E.2d at 84 (stating that "[f]or reasons entirely obscure, the defendant in this case and his counsel had no opportunity to weigh these important matters together and reach a considered judgment"); *compare State v. Barlowe*, 157 N.C. App. 249, 258, 578 S.E.2d 660, 665 (holding, where the trial court denied the defendant's request for a continuance in her trial for first degree murder, that "[g]iven the materiality of the issue on which defendant sought expert advice and testimony and the potential penalty faced by defendant if convicted, we can find no sound reason within the record for the denial of her motion for a continuance"), *disc. review denied*, 357 N.C. 462, 586 S.E.2d 100 (2003). Our Supreme Court has stated:

> [T]he decision whether a defendant in a criminal case will present evidence or will testify in his own behalf is a matter of paramount importance. Such matters can and should be discussed generally prior to trial, but the actual decision cannot intelligently be made until the close of the State's evidence.
>
> [S]uch recesses at the close of the State's evidence are deeply ingrained in the course and practice of our courts and, when requested, have been granted as a matter of course so long that "the memory of man runneth not to the contrary."

Goode, 300 N.C. at 730, 268 S.E.2d at 84. Defendant was entitled to a reasonable amount of time to make such a critical decision in his trial for first degree murder. He requested fifteen minutes. The trial court gave him five. I would hold defendant is entitled to a new trial. *See id.* I therefore respectfully dissent.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY HERCULES COLE AND ELSIE CELESTINE COLE, HUSBAND AND WIFE, H. TERRY HUTCHENS, PA, SUBSTITUTE TRUSTEE, HERCULES COLE AND CELESTINE COLE, PLAINTIFFS V. BRANCH BANKING AND TRUST COMPANY, THOMAS M. NEVILLE, INDIVIDUALLY AND AS AGENT OF BRANCH BANKING AND TRUST COMPANY, PATRICIA DAVIS, INDIVIDUALLY AND AS AGENT OF BRANCH BANKING AND TRUST COMPANY, AND H. TERRY HUTCHENS, P.A., SUBSTITUTE TRUSTEE, DEFENDANTS

HERCULES COLE AND CELESTINE COLE, PLAINTIFFS V. VESTAL E. YARBROUGH, SHIRLEY YARBROUGH, EDWARD WINSLOW QUALITY BUILDERS, INC., BRANCH BANKING AND TRUST COMPANY, THOMAS M. NEVILLE, INDIVIDUALLY AND AS AGENT OF BRANCH BANKING AND TRUST COMPANY, PATRICIA DAVIS, INDIVIDUALLY AND AS AGENT OF BRANCH BANKING AND TRUST COMPANY, AND H. TERRY HUTCHENS, P.A., SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA05-7

(Filed 7 February 2006)

1. Attorneys— admission pro hac vice—delayed ruling

A delay of four months before hearing a motion for admission to practice pro hac vice did not deprive plaintiffs of their fundamental right to select counsel to represent them. Admission to practice pro hac vice in North Carolina is not a right but a discretionary privilege.

2. Attorneys— admission pro hac vice—denied—no abuse of discretion

The trial court did not abuse its discretion by denying admission to practice pro hac vice by the attorney chosen by plaintiffs. North Carolina attorneys had not signed all of the papers filed, so that the attorney was participating in the unauthorized practice of law, and the denial was not so arbitrary that it could not be the result of a reasoned decision.

3. Civil Procedure— voluntary dismissal—evidence not presented

The trial court did not abuse its discretion by denying plaintiffs the opportunity to present evidence as to fraud and the statute of limitations where the record indicates that plaintiffs voluntarily dismissed their claims.

4. Discovery— sanctions—order directing compliance—not a prerequisite

An order directing compliance with discovery is not a prerequisite to sanctions, and the trial court here did not err by imposing sanctions against plaintiffs and their counsel for refusing to attend a deposition.

5. Appeal and Error— assignments of error—legal issues not corresponding

Assignments of error were dismissed where plaintiffs' questions and legal issues did not correspond to the assignments of error.

6. Appeal and Error— assignments of error—failure to cite legal authority

Assignments of error which did not cite legal authority were dismissed.

Appeal by plaintiffs from an order entered 14 April 2004 by Judge J. Richard Parker in Pasquotank County Superior Court. Heard in the Court of Appeals 10 October 2005.

Moore & Moore, by Milton E. Moore; James R. Streeter, for plaintiff-appellants.

Hall and Horne, L.L.P., by John F. Green, II, for defendant-appellees Vestal E. Yarbrough and Shirley Yarbrough.

C. Everett Thompson, II for defendant-appellee Edward Winslow Quality Builders, Inc.

Mary Jane Eisenbeis for defendant-appellee H. Terry Hutchens, P.A.

G. Wendell Spivey for defendant-appellee Branch Banking and Trust Company.

Hornthal, Riley, Ellis & Maland, L.L.P., by M.H. Hood Ellis and L. Phillip Hornthal, III, for defendant-appellees Branch Banking and Trust Company, Thomas M. Neville, Patricia Davis and H. Terry Hutchens, P.A.

HUNTER, Judge.

Hercules Cole and Celestine Cole ("plaintiffs") appeal from an order entered 14 April 2004 denying plaintiffs' counsel's Motion for Admission to Practice *Pro Hac Vice* and granting defendants' motion for sanctions and attorneys' fees. For the reasons stated herein, we affirm the judgment of the trial court.

Plaintiffs hired Waverly W. Jones ("Jones") in October 2003 to represent them in an action related to the foreclosure on their house located in Elizabeth City. Jones was licensed to practice in the state of Virginia, but did not have a North Carolina law license.

Jones first appeared on behalf of plaintiffs on 13 November 2003 before the Clerk of Superior Court of Pasquotank County at the scheduled foreclosure hearing. Jones advised the clerk he had been unable to associate with North Carolina counsel and requested a continuance, which was granted. A complaint against Branch Banking and Trust Company ("BB&T"), Thomas M. Neville, Patricia Davis, and H. Terry Hutchens (collectively "defendants-BB&T") and Jones's Motion for Admission to Practice *Pro Hac Vice* were filed with the trial court on 18 December 2003. The motion for limited admission was signed by Katherine Parker-Lowe ("Parker-Lowe"), an attorney admitted to practice in North Carolina. A hearing on the filed motions was scheduled on the first available date, 8 March 2004. The foreclosure hearing was rescheduled for 21 January 2004, however, due to the ill health of one of the opposing parties. Jones filed a motion for a preliminary injunction against defendants-BB&T on 17 January 2004, and moved at the foreclosure hearing on 21 January 2004 to allow all motions scheduled for 8 March 2004 to be heard. The clerk denied the motion to continue and proceeded with the foreclosure

hearing, ordering that the trustee could proceed to foreclose on the property. Jones filed an appeal of the order of foreclosure on behalf of plaintiffs.

Jones also filed an action on behalf of plaintiffs alleging fraud and other wrongful acts against defendants-BB&T, Vestal E. Yarbrough and Shirley Yarbrough ("defendants-Yarbrough"), and Edward Winslow Quality Builders, Inc. ("defendant-Quality Builders)" on 1 March 2004. This complaint sought specific amounts of damages in excess of $10,000.00. Defendant-Quality Builders filed a motion to dismiss the complaint on 5 March 2004.

The motions originally scheduled to be heard on 8 March 2004 were cancelled on 2 March 2004 by the trial court and moved to 12 April 2004. Notices of deposition for plaintiffs were received by Jones on 11 March 2004, and scheduled for 23 March 2004. However, on 18 March 2004, Jones requested the deposition be rescheduled, as the hearing had not yet occurred on the motion for admission to practice. Defendants-Yarbrough's attorney advised Jones on 22 March that they were unable to continue the depositions due to their clients' poor health. Plaintiffs did not appear for the scheduled deposition.

On 23 March 2004, Parker-Lowe, the associated North Carolina counsel, filed a notice of withdrawal of association by local counsel. On 26 March 2004, defendants-Yarbrough filed a motion for sanctions for failure to make discovery and motion to dismiss. On the same day, defendants-BB&T filed a motion to dismiss, motion for sanctions, and motion for attorneys' fees, and defendant-Quality Builders also filed a motion for sanctions and attorneys' fees.

On 31 March 2004, plaintiffs filed *pro se* an amended complaint against defendants, amending the amount demanded in judgment to "an amount in excess of Ten Thousand Dollars ($10,000.00)[.]" Defendant-Quality Builders filed a motion for sanctions and attorneys' fees, and defendants-Yarbrough and BB&T filed motions to dismiss and motions for sanctions and attorneys' fees. Jones again filed a motion for admission to practice *pro hac vice* which was joined by James R. Streeter ("Streeter"), a North Carolina licensed attorney, on 12 April 2004.

In a hearing on 12 April 2004, the trial court denied Jones's motion for admission to practice. The trial court also denied plaintiffs' motion for continuance made by Streeter. Plaintiffs then elected to take a voluntary dismissal on all claims. The trial court heard

the remaining motions for sanctions and attorneys' fees and found Jones to have been engaged in the unauthorized practice of law. The trial court fined Jones $5,000.00, and ordered plaintiffs and Jones to pay the attorneys' fees of opposing counsel as sanctions. Plaintiffs appeal.

I.

[1] Plaintiffs first contend that the trial court's delay of nearly four months before hearing the motion for admission to practice *pro hac vice* deprived them of their fundamental right to select counsel to represent them. We disagree.

N.C. Gen. Stat. § 84-4.1 (2005) governs the limited practice of out-of-state attorneys in our North Carolina state courts. "[P]arties do not have a right to be represented in the courts of North Carolina by counsel who are not duly licensed to practice in this state. Admission of counsel in North Carolina pro hac vice is not a right but a discretionary privilege." *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 555, 291 S.E.2d 828, 829 (1982). "The right to appear *pro hac vice* in the courts of another state is not a right protected by the Due Process Clause of the Fourteenth Amendment." *In re Smith*, 301 N.C. 621, 630, 272 S.E.2d 834, 840 (1981). "The Federal Constitution does not obligate state courts to grant out-of-state attorneys procedural due process in the grant or denial of their petition for admission to practice *pro hac vice* in the courts of the state." *Id.*

As plaintiffs have no fundamental right to select out-of-state counsel to represent them in our state courts, we find this assignment of error to be without merit.

II.

[2] Plaintiffs next contend that the trial court abused its discretion by denying Jones's motion for admission to practice *pro hac vice*. We disagree.

N.C. Gen. Stat. § 84-4.1 states that the power to allow or reject an application for limited practice by an out-of-state attorney lies within the discretion of the trial court. *Id.* " '[A] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.' " *Smith v. Beaufort County Hosp. Ass'n.*, 141 N.C. App. 203, 210, 540 S.E.2d 775, 780 (2000) (citation omitted). " 'A ruling committed to a trial court's discretion 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.' " *Id.* (citation omitted).

A review of the trial court's order fails to reveal a decision so arbitrary that it could not have been the result of a reasoned decision. Rather, the trial court noted that Jones had filed two motions for admission to practice *pro hac vice* in the various actions involved in the suit, and that North Carolina attorneys had signed statements of intent in connection with both motions. However, the trial court further found that the North Carolina attorneys had not signed other papers filed with the court regarding the related matters, and that Jones had been participating in the unauthorized practice of law "from the outset of his representation of the plaintiff." The trial court then, in its discretion, denied Jones's motion for admission to practice. As the trial court clearly set out reasons for its denial of Jones's motion, we find no abuse of discretion.

Plaintiffs contend, however, that the case of *Holley v. Burroughs Wellcome Co.*, 56 N.C. App. 337, 289 S.E.2d 393 (1982), controls. In *Holley*, the trial court found that the attorney's required affidavit under section 84-4.1 did not meet the requirements of the statute, but denied the attorney's application in the exercise of its discretion. *Id.* at 344, 289 S.E.2d at 397. This Court found that the trial court's discretionary power was not invoked until all of the requirements of the statute were met, and remanded the case for further proceedings. *Id.* at 344-45, 289 S.E.2d at 397.

Holley is distinguishable from the instant case, however. Here the trial court did not find that Jones had failed to meet the requirements in his motion for admission to practice. Plaintiffs' own brief to this Court concedes that Jones's motion was filed in accordance with N.C. Gen. Stat. § 84-4.1. Rather, the trial court considered Jones's properly submitted motion, but denied it in its discretion, based on Jones's unauthorized practice of law. Plaintiffs' assignment of error is overruled.

III.

[3] Plaintiffs next contend that the trial court abused its discretion in denying plaintiffs the opportunity to present at trial evidence as to fraud and the statute of limitations. We disagree.

The North Carolina Rules of Civil Procedure permit a plaintiff to take one voluntary dismissal on an action "by filing a notice of dismissal at any time before the plaintiff rests his case[.]" N.C. Gen. Stat.

§ 1A-1, Rule 41(a)(1) (2005). When the "parties confront each other face-to-face in a properly convened session of court where a written record is kept of all proceedings, there is no necessity to file a paper writing in order to take notice of a voluntary dismissal." *Danielson v. Cummings*, 300 N.C. 175, 179, 265 S.E.2d 161, 163 (1980). "In such a case, oral notice of dismissal is clearly adequate, and fully satisfies the 'filing' requirements of Rule 41(a)(i)." *Id.*

Such a voluntary dismissal is without prejudice, and "a new action based on the same claim may be commenced within one year after such dismissal[.]" N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). "The effect of this provision is to extend the statute of limitations by one year after a voluntary dismissal." *Staley v. Lingerfelt*, 134 N.C. App. 294, 298, 517 S.E.2d 392, 395 (1999). "However, the rule may not be used to avoid the statute of limitations by taking a dismissal in situations where the initial action was already barred by the statute of limitations." *Id.*

Here, the record reveals that plaintiffs requested a voluntary dismissal immediately after the trial court, in its discretion, denied plaintiffs' motion for a continuance. After some discussion by defendants, plaintiffs asked the trial court for clarification as to the issue of voluntary dismissal. The trial court stated: "Your options are you can take voluntary dismissal that was suggested by Mr. Streeter of all the cases involved or we can proceed with the Motions to Dismiss. It doesn't make one bit of difference to me, not one bit of difference. Do you understand that?" Plaintiffs then conferred with their attorney and affirmed that they wished to take his advice and take a voluntary dismissal without prejudice. We find no merit to plaintiffs' contention that the trial court abused its discretion in denying plaintiffs the opportunity to present evidence as to fraud and the statute of limitations, as the record reflects that plaintiffs voluntarily chose to dismiss all of their claims pursuant to Rule 41(a). Plaintiffs' assignment of error is therefore overruled.

IV.

[4] Plaintiffs next allege that the trial court erred in imposing sanctions against plaintiffs and counsel for refusing to attend a deposition. We disagree.

Plaintiffs contend that the trial court was not authorized to award attorney's fees under N.C. Gen. Stat. § 1A-1, Rule 37(d) (2005) for plaintiffs' failure to appear for a properly noticed deposition because

defendants did not obtain an order compelling discovery. N.C. Gen. Stat. § 1A-1, Rule 37(d) states:

> (d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.*—If a party . . . fails (i) to appear before the person who is to take his deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule. *In lieu of any order or in addition thereto, the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees,* caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Id. (emphasis added). In interpreting this statute, this Court has noted that "[a]n order directing compliance with discovery requests, however, is not a prerequisite to the entry of sanctions for failure to respond to discovery requests." *Cheek v. Poole*, 121 N.C. App. 370, 373, 465 S.E.2d 561, 563 (1996). "Rule 37 of the North Carolina Rules of Civil Procedure grants the court discretionary power to impose sanctions for failure to comply with discovery requests." *Rose v. Isenhour Brick & Tile Co.*, 120 N.C. App. 235, 240, 461 S.E.2d 782, 786 (1995). "It is well-settled that '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." ' " *Id.* (citations omitted).

Here, plaintiffs do not contest that they failed to appear for the scheduled depositions, which were properly noticed twelve days before the scheduled depositions. We note that the record contains no evidence that plaintiffs moved for a protective order. As an order directing compliance with discovery is not a prerequisite to sanctions under Rule 37(d), we find no abuse of discretion in the trial court's imposition of sanctions for plaintiffs' failure to appear for scheduled depositions.

V.

[5] In related assignments of error, plaintiffs contend that the complaints signed and filed by an out-of-state attorney are not a nullity and further contend that the filing of a notice of appeal by an out-of-state attorney in an order of foreclosure was not error.

Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure states:

> (6) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. *Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal.* Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

N.C.R. App. P. 28(b)(6) (emphasis added). In the recent case of *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360, *rehearing denied*, 359 N.C. 643, 617 S.E.2d 662 (2005), our Supreme Court held that when arguments in a party's brief failed to address the issue challenged in the referenced assignment of error, as required by Rule 28(b)(6), the party's appeal should be dismissed for violation of the appellate rules. *Id.* at 401-02, 610 S.E.2d at 361.

Here, plaintiffs contend in the third question in their brief that: "III. Complaints signed and filed by attorney not authorized to practice law in North Carolina, to prevent the running of the statute of limitations period, and alleging fraud, are not a nullity." In their fourth question, plaintiffs contend: "IV. Filing notice of appeal from order of clerk allowing foreclosure on plaintiffs-appellants' home by attorney licensed in state of Virginia, was not error, where no showing of prejudice was made." For both questions presented to the Court, plaintiffs reference assignments of error 4, 5, and 6 as pertinent to the questions. Plaintiffs' questions and the legal issues they address do not correspond to assignments of error 4, 5, and 6, which allege as error the trial court's denial of the Admission to Practice *Pro Hac Vice*. As our Supreme Court has directed that "the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule[,]" *Viar*, 359 N.C. at 402, 610 S.E.2d at 361, we dismiss these assignments of error.

VI.

[6] In their remaining assignments of error, plaintiffs contend, respectively, that the trial court abused its discretion in denying the motion for continuance made by an attorney licensed in North

Carolina, in forcing plaintiffs to sign a voluntary dismissal order, and in imposing sanctions against plaintiffs for defendants' attorneys' fees and sanctions against counsel for unauthorized practice of law. We also dismiss these assignments of error for failure to comply with the Rules of Appellate Procedure.

Rule 28(b)(6) of our Rules of Appellate Procedure further requires that "[t]he body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(6). "The appellate courts of this state have long and consistently held that the rules of appellate practice, now designated the Rules of Appellate Procedure, are mandatory and that failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999).

Plaintiffs have failed to cite any legal authority whatsoever in support of these arguments. Accordingly, we conclude these issues do not warrant appellate review and dismiss these assignments of error. *See Pritchett & Burch, PLLC v. Boyd*, 169 N.C. App. 118, 123, 609 S.E.2d 439, 443 (holding assignment of error abandoned for failure to cite authority in support of argument), *disc. review dismissed*, 359 N.C. 635, 616 S.E.2d 543 (2005); *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 159, 610 S.E.2d 210, 214-15 (2005).

In sum, we find plaintiffs were not deprived of their fundamental right to select counsel, and the trial court did not abuse its discretion in denying plaintiffs' counsel's motion for limited admission or in imposing sanctions for failure to comply with properly requested discovery. We do not address plaintiffs' remaining assignments of error as they fail to comply with the Rules of Appellate Procedure. We, therefore, affirm the trial court's order.

Affirmed.

Chief Judge MARTIN and Judge STEELMAN concur.

STATE OF NORTH CAROLINA v. JONATHAN DENARD BOYCE

No. COA05-279

(Filed 7 February 2006)

1. Kidnapping— restraint—not a part of robbery

There was sufficient evidence that the restraint in a kidnapping was separate from that in a robbery where the victim attempted to flee through her back door when defendant forced his way through the front door; she was partially outside when defendant grabbed her shirt, pulled her inside, and then closed the door; and defendant then told her for the first time that he wanted money. The robbery occurred only after the restraint and removal were complete.

2. Sentencing— prior record points—evidence sufficient

The trial court's findings regarding defendant's prior record points were supported by the evidence where the State presented only a worksheet, but defense counsel's acknowledgment that defendant had been on probation can reasonably be construed as an admission that defendant had been convicted of at least one of the charges. All that is required for defendant's record level (II) is one conviction; moreover, defendant has not asserted that any of the prior convictions listed on the worksheet do not exist.

3. Sentencing— aggravating factor—prior record level—not in indictment or submitted to jury

There was no error in aggravating defendant's sentence based on a prior conviction where that factor was not alleged in the indictment or submitted to the jury. Aggravating factors need not be alleged in the indictment, and aggravated sentences based on prior convictions are exempt from the jury requirement.

Judge WYNN concurring in part and dissenting in part.

Appeal by defendant from judgment entered 23 August 2001 by Judge Clarence W. Carter in Forsyth County Superior Court. Heard in the Court of Appeals 6 December 2005.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellant.

STEELMAN, Judge.

Defendant, Jonathan Denard Boyce, appeals his conviction of second-degree kidnapping and the sentence imposed. For the reasons discussed herein, we find no error.

At approximately noon on 3 July 2000, defendant knocked on the front door or Mrs. Amie Dunford's home, which she shared with her husband and nine-month-old baby. Mrs. Dunford partially opened the door to defendant, who informed her he was seeking volunteers for a neighborhood watch program. Defendant asked Mrs. Dunford whether her husband was at home. She told defendant he was not, but she would get him a pad and pen so he could leave his contact information. While Mrs. Dunford went to retrieve the pen and paper, she shut and locked the door and defendant waited outside. She returned and handed defendant the paper. Defendant wrote a name and phone number on the pad and handed it back to her. When Mrs. Dunford started to shut the door, defendant attempted to force his way into the home. She bit his hand, but he kept pushing on the door. Mrs. Dunford realized she could not get the door shut so she ran to the back door and tried to get out. She opened the back door and got partially out of the doorway before defendant grabbed her by the shirt and pulled her back inside.

As defendant dragged Mrs. Dunford inside, she fell to the floor. When she looked up, she saw for the first time defendant had a gun in his hand. She began screaming and crying and begged defendant not to harm her because she was pregnant. Defendant closed the back door and told her to stop screaming. He said he did not want to harm her, he just wanted money. This was the first time defendant demanded anything of Mrs. Dunford.

Mrs. Dunford told defendant she did not have any cash, but she could write him a check. Defendant and Mrs. Dunford walked to her car where her checkbook was located. Defendant told her to write the check for $200.00 and to leave the payee's name blank. Mrs. Dunford did as instructed and gave defendant the check. Defendant told her that if she called the police he would kill her. Defendant then left.

Defendant was indicted for one count each of robbery with a dangerous weapon, second-degree kidnapping, and felonious breaking and entering. These matters came on for trial and on 23 August 2001 the jury found defendant guilty of all charges. The trial judge sentenced defendant to consecutive terms of imprisonment of 95 to 123

months for robbery with a dangerous weapon, 36 to 53 months for second-degree kidnapping, and 10 to 12 months for felonious breaking and entering. Defendant appeals.

[1] In defendant's first argument, he contends his conviction for second-degree kidnapping must be vacated because the State presented insufficient evidence of restraint separate from that inherent in the armed robbery. We disagree.

Our standard of review when ruling on a motion to dismiss for insufficient evidence is whether there is substantial evidence of each element of the charged offense and that the defendant is the perpetrator. *State v. Allred*, 131 N.C. App. 11, 19, 505 S.E.2d 153, 158 (1998). The evidence must be considered in the light most favorable to the State, giving it the benefit of every reasonable inference which can be drawn therefrom. *Id.*

A person is guilty of kidnapping if he unlawfully confines, restrains, or removes an individual from one place to another without their consent, "if such confinement, restraint or removal is for the purpose of: (2) Facilitating the commission of any felony . . . ." N.C. Gen. Stat. § 14-39(a)(2) (2005).

The charge of second-degree kidnapping in this case is based upon defendant's dragging Mrs. Dunford back into her home for the purpose of robbing her. Defendant argues this act was inherent in the robbery and was not a separate and complete act, independent of and apart from the felony of armed robbery. In support of his argument, defendant cites the seminal case of *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). We agree with defendant that *Fulcher* is controlling in this case, however, it compels this Court to hold defendant's argument is without merit.

In *Fulcher*, the defendant walked with a woman back to her motel room where she and her friend were staying. The defendant pushed her into the room and told her he had a knife. Defendant then bound the two women with tape and forced each of them to perform oral sex. The defendant was convicted of two charges of kidnapping and two charges of a crime against nature. The defendant argued that the kidnappings were merely incidental to the crimes of crime against nature. Our Supreme Court, construing the 1975 amendments to the kidnapping statute, stated:

> We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inher-

> ent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy.

Id. at 523, 243 S.E.2d 351. The Court went on to affirm the defendant's two kidnapping convictions, explaining:

> The restraint of each of the women was separate and apart from, and not an inherent incident of, the commission upon her of the crime against nature, though closely related thereto in time. Each woman was so bound, and thereby restrained, so as to reduce her ability to resist, so as to prevent her escape from the room during the commission of the crime against nature upon the other, and so as to prevent her from going to the assistance of her companion. Thus, the restraint of each was for the purpose of facilitating the commission of the felony of crime against nature.

Id. at 524, 243 S.E.2d 352.

In the instant case, defendant restrained Mrs. Dunford by grabbing her as she fled her residence and removed her by dragging her back into her residence. These were separate acts, completed prior to defendant brandishing a gun and demanding money.

Defendant argues he could not have robbed Mrs. Dunford without first dragging her back into the residence and this act was an inherent part of the robbery. However, in *Fulcher*, the defendant could not have committed the crimes against nature without binding the women to insure they could not escape. Defendant's act of grabbing Mrs. Dunford and pulling her back into the house was closely related to the robbery, but was not an inherent incident thereof. *Accord id.*

Defendant cites a number of other cases in addition to *Fulcher* in support of his argument. These cases include *State v. Beatty*, 347 N.C. 555, 495 S.E.2d 367 (1998), *State v. Pigott*, 331 N.C. 199, 415 S.E.2d 555 (1992), *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), *State v. Ross*, 133 N.C. App. 310, 515 S.E.2d 252 (1999), and *State v. Allred*, 131 N.C. App. 11, 505 S.E.2d 153 (1998). The facts in all of these cases where restraint was found to be inherent to and part of the commission of another felony are distinguishable from the facts of this case. In each of those cases, the defendant first demanded money and brandished a weapon, and thereafter removed the victims from one place to another in order to locate items to steal. Our courts arrested the

kidnapping convictions where the defendant's purpose in removing the victims was to facilitate the robbery. Where the defendant's purpose in the removal of the victims was not directly related to the robbery, our courts allowed the kidnapping convictions to stand.

In the instant case, defendant pushed open the door and Mrs. Dunford fled out the back of the house. At that point, defendant had not brandished his gun, nor demanded any money or property. It was only after the restraint and removal of Mrs. Dunford was complete that the robbery took place. As a result, the kidnapping was separate and apart from the robbery.

[2] In defendant's second argument, he contends the trial court's findings regarding his prior record points and prior record level were unsupported by the evidence, and therefore, he is entitled to a new sentencing hearing. We disagree.

Defendant contends the State failed to meet the requirements to prove a defendant's prior conviction as set forth in N.C. Gen. Stat. § 15A-1340.14(f). Proof of a defendant's prior conviction may be done in one of four ways: "(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) (2005). The burden rests on the State to prove by a preponderance of the evidence that a prior conviction exists and that the individual before the court is the same person named in the prior convictions. *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002).

The record in the instant case indicates the only evidence presented by the State was a prior record level worksheet purporting to list three prior convictions. "There is no question that a worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions." *Id.* Therefore, we must review the dialogue between counsel and the trial court to determine whether there was a "stipulation" of the prior convictions listed on the worksheet the State presented. *Id.* "[C]ounsel need not affirmatively state what a defendant's prior record level is for a stipulation with respect to that defendant's prior record level to occur." *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005).

At sentencing, the prosecutor stated that for purposes of sentencing defendant would be a record Level 2 since he had four prior record level points. The prior record points were as follows: two points for felonious possession with intent to sell and deliver a counterfeit controlled substance, a Class I felony, one point for misdemeanor possession of stolen goods, and one point because defendant was on probation or post-supervision release at the time this felony occurred. Following the State's summation of the prior record level worksheet, the trial court conducted a bench conference, after which the judge stated:

> Madam Court Reporter, let the record reflect that the district attorney has handed up, after it was reviewed by the defense counsel, AOC-600 form, the worksheet of the prior record level for felony sentencing and a prior conviction level for misdemeanor sentencing. He's handed that up to the Court, indicating the defendant had four points against him prior to this, placing him in a prior record Level 2.

The fact defense counsel did not object to the trial court's statement that he had reviewed the prior record level worksheet and the judge's summation of the point level is tantamount to an admission or stipulation that defendant had the prior convictions asserted by the State. In addition, before the judge finally imposed sentence on defendant, he inquired as to how long defendant had been on probation. At which time, the prosecutor informed the judge he had been mistaken and defendant was not now on probation. Defense counsel responded that defendant had been on probation, but was not on probation now. Defense counsel's acknowledgment that defendant had been on probation, but was no longer, can also reasonably be construed as an admission by defendant that he had been convicted of at least one of the charges listed on the worksheet. All that was required to sentence defendant as a record Level 2 is one conviction. We also note that defendant has not asserted in his appellate brief that any of the prior convictions listed on the worksheet do not, in fact, exist. *See Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 743. This argument is without merit.

[3] In defendant's third argument, he contends the trial court erred in sentencing him because the aggravating factor was not alleged in the indictments nor submitted to the jury. We disagree.

The trial court found one factor in aggravation, which was not alleged in the indictment. Our Supreme Court held that aggravating

circumstances need not be specifically alleged in an indictment. *State v. Allen*, 359 N.C. 425, 438, 615 S.E.2d 256, 265 (2005). This argument is without merit.

Defendant further argues his sentence must be vacated because the judge failed to submit the aggravating factor to the jury for determination beyond a reasonable doubt, as directed by the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). We disagree.

Under *Blakely*, a judge may not impose a sentence upon defendant from the aggravated range, unless the aggravating factor is submitted to the jury and found beyond a reasonable doubt. *Allen*, 359 N.C. at 438-39, 615 S.E.2d at 265. "However, *Blakely* specifically exempts aggravated sentences based on prior convictions from its requirements." *State v. Tedder*, 169 N.C. App. 446, 449, 610 S.E.2d 774, 776 (2005) (citing *Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412). Here, the trial court found one factor in aggravation, that defendant, as a juvenile, had been adjudged delinquent of an offense that would be a class A, B, C, D, or E felony had he been an adult. This prior conviction was not one of the convictions listed on the State's worksheet. Defendant had been adjudicated delinquent of the offenses of first-degree burglary and robbery with a dangerous weapon, each class D felonies. These convictions were established by the testimony of a clerk for juvenile court. These convictions supported the trial court's finding of the statutory aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(18a) (2005). Since the aggravated sentence was based solely upon a prior conviction, the requirement of *Blakely*, that the aggravating factor be submitted to a jury, was not applicable. *Tedder*, 169 N.C. App. at 449, 610 S.E.2d at 776. This argument is without merit.

The remaining assignments of errors asserted in the record on appeal, but not argued in defendant's brief, are deemed abandoned. N.C. R. App. P. 28(b)(6).

For the reasons discussed herein, we find no prejudicial error in defendant's trial or sentencing.

NO ERROR.

Judge LEWIS concurs.

Judge WYNN concurs in part and dissents in part by separate opinion.

WYNN, Judge, concurring in part, dissenting in part.

While I agree that the State satisfied its burden to prove Defendant's prior conviction for sentencing, and that the trial court did not err in sentencing Defendant in the aggravated range, I cannot agree with the majority's conclusion that Defendant's act of pulling the victim back into the house was not inherent to the robbery with a dangerous weapon. I, therefore, respectfully dissent.

A defendant is guilty of the offense of second-degree kidnapping if he (1) confines, restrains, or removes from one place to another (2) a person sixteen years of age or over (3) without the person's consent, (4) for the purpose of facilitating the commission of a felony. N.C. Gen. Stat. § 14-39(a)(2) (2005). "Our Supreme Court, however, has recognized that 'certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim' and has held that restraint 'which is an inherent, inevitable feature of [the] other felony' may not be used to convict a defendant of kidnapping." *State v. Allred*, 131 N.C. App. 11, 20, 505 S.E.2d 153, 158 (1998) (quoting *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)). "The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping 'exposed [the victim] to greater danger than that inherent in the armed robbery itself[.]' " *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)).

In *Fulcher*, the defendant followed a woman into her motel room, pushed the woman into the room, bound the woman and her friend with tape, and then committed crimes against nature upon them. Based upon these facts, the *Fulcher* court held that the "restraint of each of the women was separate and apart from, and not an inherent incident of, the commission upon her of the crime against nature, though closely related thereto in time." *Fulcher*, 294 N.C. at 524, 243 S.E.2d at 352.

Here, the only evidence of restraint is that Defendant grabbed the victim and pulled her back into the house when the victim stepped a foot outside the house in an attempt to escape. To commit a robbery with a dangerous weapon under section 14-87(a) of the North Carolina General Statutes, Defendant had to possess, use, or threaten to use a firearm while taking personal property *from a residence where a person was present*. *See* N.C. Gen. Stat. § 14-87(a) (2005) (emphasis added). Defendant's restraint of the victim was an essen-

tial element of robbery with a dangerous weapon under section 14-87(a), and Defendant's use of this restraint exposed the victim to no greater danger than that required to complete the robbery with a dangerous weapon. *See State v. Beatty*, 347 N.C. 555, 495 S.E.2d 367 (1998). Thus, the victim in this case was exposed only to the harm inherent in the robbery with a dangerous weapon, and not to the kind of danger and abuse that the kidnapping statute was designed to prevent. *See State v. Ripley*, 172 N.C. App. 453, 457, 617 S.E.2d 106, 109 (2005).

Because Defendant's restraint was an inherent, inevitable feature of the armed robbery which may not be used to convict a defendant of kidnapping, I would vacate Defendant's conviction for second-degree kidnapping. *See Allred*, 131 N.C. App. at 20, 505 S.E.2d at 158. I therefore dissent from the portion of the majority's opinion finding no error in Defendant's second-degree kidnapping conviction.

TIMOTHY ALLEN WARD AND DONNIE H. WARD, PLAINTIFFS V. NEW HANOVER COUNTY, DEFENDANT

No. COA05-423

(Filed 7 February 2006)

Zoning— interpretation of special use permit—declaratory judgment action—exhaustion of administrative remedies

Summary judgment for defendant county was affirmed where plaintiffs sought a declaratory judgment regarding the addition of a forklift to their marina for moving or storing boats without completing their administrative remedies for special use permits under the New Hanover County Zoning Ordinance.

Appeal by plaintiffs from order entered 20 October 2004 by Judge Ernest Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 6 December 2005.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew A. Nichols, for plaintiffs-appellants.

E. Holt Moore, III, for defendant-appellee.

LEWIS, Judge.

Timothy Allen Ward ("Timothy") and Donnie H. Ward ("Donnie") (collectively, "plaintiffs") appeal the trial court order granting summary judgment in favor of New Hanover County ("defendant"). For the reasons discussed herein, we affirm the trial court's order.

The facts and procedural history pertinent to the instant appeal are as follows: Plaintiffs are the owners of a commercial marina located in Wilmington, North Carolina. In 2002, plaintiffs requested the New Hanover County Planning Staff ("the Planning Staff") approve the use of a "forklift" on their property to move, store, launch, maintain, and repair boats. Plaintiffs contended the forklift's use was covered by a 1971 Special Use Permit ("the Permit") granted to their predecessor in title. According to plaintiffs, the Permit authorized the use of the property as a "[m]arina" and contained no express prohibition regarding the operation of a forklift on the property. In response, the Planning Staff contended the operation of a forklift on the property was prohibited and the site plan proposed by plaintiffs was inconsistent with the use allowed by the Permit.

After plaintiffs and the Planning Staff failed to reach an agreement regarding whether the forklift could be used under the terms of the Permit, plaintiffs requested the Planning Staff administratively modify the Permit to allow the use of the forklift on the property. However, on 31 October 2003, plaintiffs' counsel wrote the following letter to the Planning Staff:

> With respect to the request by [Timothy] for administrative modification of his special use permit with respect to the property . . . , please consider this our formal withdrawal of the site plan to administratively modify the special use permit. Thank you.

In April 2004, plaintiffs submitted a second site plan regarding the use of the marina. In a letter dated 7 May 2004, Senior Planner Baird Stewart ("Stewart") replied in pertinent part as follows:

> Please be advised that the New Hanover County Planning Staff and Zoning Enforcement Staff met to review your site plan for Carolina Marina & Yacht Club . . . . As noted previously any plans submitted for this project will be considered a revision to the original 1971 Special Use Permit. Per section 71-1(9) of the New Hanover County Zoning Ordinance "Minor changes shall be reviewed by the Planning Department and upon favorable recom-

> mendation by the Planning Director may be approved by the Superintendent of Inspections. Such approval shall not be granted should the proposed revisions cause or contribute to: (A) A change in the character of the Development. . . ." Any proposed revisions that constitute[] something more than a minor change as determined by [the] Staff [] would have to go back through the Planning Board and County Commissioners Public Hearing Process. . . .
>
> As indicated in previous correspondence [the Planning Staff] continues to believe that the boat ramp was originally intended to be the means to provide access to the water for boats that were being trailered by users of the facility, and that the use of a boat lift system or forklift was not envisioned for this particular marina. Therefore, [the Planning Staff] believes that the use of a boatlift or forklift or similar type equipment would be a change in the character of the development. You have indicated in previous correspondence and discussions that the use of a forklift is planned. This specific concern will need to be addressed by you with specific language noted on your plan, prior to any administrative revision being considered by [the] Staff.

Following receipt of this letter, plaintiffs' counsel wrote the County Attorney a letter dated 14 May 2004, stating in pertinent part as follows:

> This letter follows our discussions yesterday and this morning regarding [Stewart's] May 7, 2004 letter to my client . . . . I appreciate you clarifying for me that Mr. Stewart's letter is simply part of the ongoing discussions that [Timothy] and this firm have had with [defendant] regarding the site plans for [Timothy's] marina property. Accordingly, you have confirmed that Mr. Stewart's letter is not a finding or determination by the County that requires, or even allows, [Timothy] to make a formal appeal to the Board of Adjustment or other Board . . . . It is my understanding that only the County Superintendent of Inspections can issue such a determination that is subject to appeal.
>
> Please contact me if I am mistaken about the foregoing.

On 16 June 2004, plaintiffs filed a declaratory judgment complaint against defendant, alleging "judicial declaration is necessary and appropriate at this time under all of the circumstances" and requesting the trial court "decree[] that [plaintiffs] are entitled to use a fork-

lift [on the property] in connection with their operation of a commercial marina" and "issue a permanent injunction enjoining [defendant], its officers and agents from interfering with [plaintiffs'] lawful use of a forklift on [the property] under [the Permit]." On 15 July 2004, defendant filed an answer asserting, *inter alia*, that plaintiffs' complaint should be dismissed due to plaintiffs' failure to exhaust their administrative remedies. Following cross-motions for summary judgment, the trial court held a hearing on the matter on 6 October 2004. In an order entered 20 October 2004, the trial court concluded "[t]here are no material issues of fact between the parties as to whether [plaintiffs] have exhausted their administrative remedies with [defendant]," and the trial court granted summary judgment in defendant's favor. The trial court's order also dismissed as moot several motions related to the intervention of approximately thirty-three of plaintiffs' neighbors. However, the purported intervenors have neither sought appeal of this portion of the trial court order nor submitted briefs regarding the instant appeal. Plaintiffs appeal the entry of summary judgment.

The dispositive issue on appeal is whether the trial court erred by granting summary judgment in defendant's favor. Plaintiffs argue their declaratory complaint was properly filed and the trial court erred by concluding plaintiffs failed to exhaust their administrative remedies. We disagree.

"As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) (citations omitted); *see also Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004) ("If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed.") (citing *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999)).

> This is especially true where a statute establishes . . . a procedure whereby matters of regulation and control are first addressed by commissions and agencies particularly qualified for the purpose. In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. Only after the appropriate agency has developed its own record and factual

> background upon which its decision must rest should the courts be available to review the sufficiency of its process. An earlier intercession may be both wasteful and unwarranted. "To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of administrative agencies."

Presnell, 298 N.C. at 721-22, 260 S.E.2d at 615 (citations omitted).

Regarding municipal zoning classification and enforcement, N.C. Gen. Stat. § 153A-340(c) (2003) authorizes a county to create zoning ordinances or regulations which allow

> a board of adjustment [to] determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained. The regulations may also provide that the board of adjustment or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. . . . When issuing or denying special use permits or conditional use permits, the board of commissioners shall follow the procedures for boards of adjustments . . ., and every such decision of the board of commissioners shall be subject to review by the superior court by proceedings in the nature of certiorari.

Our legislature recently amended N.C. Gen. Stat. § 153A-340, transferring portions of subsection (c) to (c1) and providing, *inter alia*, that "no change in permitted uses may be authorized by variance." Session Laws 2005-426, s.5(b). These amendments became effective 1 September 2005. *Id.*

Similar to N.C. Gen. Stat. § 153A-340, N.C. Gen. Stat. § 153A-345 (2003) provides in pertinent part as follows:

> (a) A county may designate a planning agency to perform any or all of the duties of a board of adjustment in addition to its other duties.
>
> (b) The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with enforc-

> ing an ordinance adopted pursuant to this Part. Any person aggrieved . . . may take an appeal. . . .
>
> (c) The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance. The ordinance may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions that may arise in the administration of the ordinance. . . .
>
> . . . .
>
> (e) Each decision of the board is subject to review by the superior court by proceedings in the nature of certiorari. . . .

N.C. Gen. Stat. § 153A-345 was also recently amended. The amendments, effective 1 January 2006, allow a county to designate "a planning board or the board of county commissioners" to perform any or all of the duties of a board of adjustment and, *inter alia*, further prohibit the use of a variance to authorize a "change in permitted uses." Session Laws 2005-418, s.8(b).

In this case, Article X of the New Hanover County Zoning Ordinance ("the Ordinance") provides as follows:

> Duties of Building Inspector, Board of Adjustment, Courts and County Commissioners as to Matters of Appeal
>
> 108-1 It is the intention of this Ordinance that all questions arising in connection with the enforcement of this Ordinance shall be presented first to the Inspections Director or when so delegated to the Zoning Enforcement Officer and that such questions shall be presented to the Board of Zoning Adjustment only on appeal from the Inspections Director or Zoning Enforcement Officer; and that from the decision of the Board of Adjustment recourse shall be to the courts as provided by law.

Article VII of the Ordinance contains "Provisions For Uses Allowed As Special Uses" and authorizes "the Board of County Commissioners" to issue special use permits "after a public hearing and after Planning Board review and recommendation." Article VII, Section 71-1. Although Article VII requires that those applicants

issued special use permits comply with the specific conditions imposed by their permit as well as the general regulations of the Ordinance, Section 71-1(9) of Article VII allows "[t]he original applicants [issued a special use permit], their successors or their assignee [to] make minor changes in the [permitted special structure or use] provided the necessity for these changes is clearly demonstrated." Nevertheless, Section 71-1(9) also requires that such "[m]inor changes . . . be reviewed by the Planning Department," and it authorizes the "Superintendent of Inspections" to approve the changes only if the Planning Director issues a "favorable recommendation." Furthermore,

> Such approval shall not be granted should the proposed revisions cause or contribute to:
>
> (A) A change in the character of the development[,]
>
> (B) A change of design for, or an increase in the hazards to pedestrian and vehicle traffic circulation, or
>
> (C) A reduction in the originally approved setbacks from roads and/or property lines.

Id.

As detailed above, neither the Planning Staff nor the Superintendent of Inspections have reached a formal decision regarding plaintiffs' use of their property. Plaintiffs admit they originally "consulted" with members of the Planning Staff to "determine if [the Planning Staff] would approve an administrative change to the site plan for the[ir] commercial marina." Nevertheless, citing their letter of 31 October 2003, plaintiffs contend they "officially withdrew their request and new site plan for administrative approval of the proposed expansion" and are thus presently seeking an "*interpretation* . . . of [their] existing rights" under the Permit rather than an expansion of their rights under the Permit. However, plaintiffs offer no explanation for either the "Tuesday 4/27/04" filing of the "site plan for Carolina Marina & Yacht Club" referred to in Stewart's 7 May 2004 letter or the "ongoing discussions . . . with [defendant] regarding the site plans" referred to in their own 14 May 2004 letter. Instead, plaintiffs assert our Supreme Court recognized "a declaratory judgment action []as a proper forum for a legal challenge to a zoning ordinance's requirement for a Church to pave its parking lot" in *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 358 S.E.2d 372 (1987), thereby authorizing the instant action. However, we note that in a footnote detail-

ing the prior history of *Grace Baptist*, the Court expressly stated that because neither of the parties raised the issue, it was not "decid[ing] the question of whether a party may seek an injunction against enforcement of an ordinance where it has failed to exhaust its administrative remedies." *Id.* at 440 n.1, 358 S.E.2d at 373 n.1. Accordingly, we are not persuaded *Grace Baptist* stands for the proposition advanced by plaintiffs.

Plaintiffs also assert our Supreme Court's decision in *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987), "shows that . . . Superior Court is the proper venue for determining issues of *interpretation* of existing rights under special use permits." Plaintiffs are again mistaken.

In *Davidson County*, the City of High Point attained a special use permit from Davidson County which allowed High Point to upgrade a wastewater treatment facility located in an unincorporated portion of Davidson County, on the condition that any "sewer service to the citizens of Davidson County [was] subject to final approval by the Davidson County Board of Commissioners." *Id.* at 253, 362 S.E.2d at 555. The permit was issued in 1983, and it "directed the attention of those who were dissatisfied with the Board's decision on the permit to the right of appeal to Davidson County Superior Court within thirty days after the applicant's receipt of the permit." *Id.* at 254, 362 S.E.2d at 555. High Point subsequently sought to annex sixty acres in Davidson County and provide sewer service to residents through an outfall from the upgraded facility. On appeal from a judgment enjoining High Point from using the facility to provide sewer services to its citizens without prior approval from Davidson County, the Supreme Court "deal[t] with the jurisdictional conflict between the statutory power cities possess to provide services through public enterprises and the statutory power counties possess to regulate the use of land within their boundaries through zoning ordinances." *Id.* at 253, 362 S.E.2d at 554. After concluding Davidson County had no authority to restrict or regulate High Point's provision of sewer services to city residents, *id.* at 259, 362 S.E.2d at 558, the Court further rejected Davidson County's contention that High Point was precluded from challenging the condition of the special use permit, noting that

> [s]ince the City was unaware of the County's differing interpretation of [the condition regarding sewer provision], it could not have known that it should have appealed the issue . . . within thirty days of receiving the permit. . . . The County cannot now be

> heard to assert that the City should have pursued administrative remedies for a problem it was unaware existed.

Id. at 260, 362 S.E.2d at 558.

We are not persuaded *Davidson County* authorizes plaintiffs' instant declaratory judgment action. In contrast to the facts of this case, the party seeking interpretation of the special use permit in *Davidson County* was unable to pursue and exhaust the administrative remedies afforded it because it was unaware of the need to challenge the permit while those remedies existed. Here, defendant placed no such time restrictions upon the special use permit issued to plaintiffs' predecessors in title. Instead, by the express terms of the Ordinance, a special use permit's applicant, successors, and assignees are each afforded an opportunity to pursue administrative remedies related to the expansion and interpretation of the permit, regardless of when the issues underlying the remedies arise. Further, as discussed above, plaintiffs have sought an administrative remedy in the instant case, petitioning the Planning Staff for administrative modification of the Permit and submitting site plans regarding the use of the marina at least twice. They did not complete those efforts.

In sum, plaintiffs have failed to demonstrate why they should be allowed to abandon their "ongoing discussions" with defendant and file a declaratory judgment action in the trial court, notwithstanding their admitted "[f]rustrat[ion] [with] these discussions" and alleged "simpl[e] attempt[] to obtain a speedy interpretation of [their] rights" under the Permit. Therefore, as plaintiffs have failed to first exhaust their administrative remedies by obtaining a formal determination from defendant regarding their proposed use of the marina and rights under the Permit, we affirm the trial court order granting summary judgment in favor of defendant.

Affirmed.

Judges WYNN and STEELMAN concur.

IN RE C.D.A.W.

[175 N.C. App. 680 (2006)]

IN RE: C.D.A.W., A MINOR CHILD

No. COA04-1610

(Filed 7 February 2006)

1. Termination of Parental Rights— failure to appoint guardian ad litem—mental illness—chemical dependency

The trial court did not err in a termination of parental rights case by failing to appoint a guardian ad litem for respondent mother based on evidence of both her mental illness and chemical dependency, because: (1) there was no petition or adjudication for dependency, and consequently, none of the grounds for terminating respondent's parental rights involved use of N.C.G.S. §§ 7B-1111(a)(6), 7B-101(9), or 7B-1101; and (2) the DSS motion did not track the language of N.C.G.S. § 7B-1111(a)(6).

2. Termination of Parental Rights— failure to comply with reunification plan—willful abandonment of child for at least six consecutive months

The trial court did not err in a termination of parental rights case by determining that respondent mother failed to successfully comply with the reunification plan including willfully abandoning her minor child for at least six consecutive months, because: (1) respondent failed to challenge many of the detailed findings of fact that support the trial court's conclusion she neglected the minor child; (2) respondent failed to challenge the conclusion of law she neglected the minor child; and (3) as these findings and conclusions of law are binding on appeal, the Court of Appeals does not need to address the remaining alternative grounds found by the trial court.

3. Termination of Parental Rights— denial of motion for continuance—mental impairment—chemical dependency—desire to enter drug treatment facility

The trial court did not abuse its discretion in a termination of parental rights case by denying respondent mother's motion for continuance based on her mental impairment, chemical dependency, and desire to enter a drug treatment facility, because: (1) respondent failed to illustrate that a continuance would further substantial justice; (2) DSS previously offered respondent assistance to enter a reputable drug treatment facility, and respondent twice failed to attend; and (3) DSS tried repeatedly and unsuc-

cessfully for a period of 18 months to get respondent to engage in drug rehabilitation.

4. Termination of Parental Rights— judicial notice of records, court orders, and summaries—failure to show prejudice

Although the trial court erred in a termination of parental rights case by failing to rule on either petitioner's request or respondent mother's objection to petitioner's request for the trial court to take judicial notice of the records, court orders, and summaries entered in the case, this assignment of error is overruled because respondent failed to illustrate how she was prejudiced when all of the findings relating to and supporting the conclusion respondent neglected the minor child remain unchallenged.

5. Termination of Parental Rights— amendment to petition— independent sufficient grounds

Although respondent mother contends the trial court erred by allowing a DSS motion to amend the pleadings to assert N.C.G.S. §§ 7B-1111(a)(2) (reasonable progress) and 7B-1111(a)(3) (support), the Court of Appeals does not need to address whether the trial court abused its discretion in permitting these amendments to the petition to terminate parental rights, because the conclusion that respondent mother neglected the minor child is independently sufficient grounds to terminate parental rights.

6. Termination of Parental Rights— factors—successful adaptation of minor child to foster home—desire of foster parents to adopt minor child

The trial court did not abuse its discretion in a termination of parental rights case by basing disposition in whole or in part upon the successful adaptation of the minor child to the foster home and the desire of the foster parents to adopt the minor child, because: (1) although a finding by a trial court that children being settled in a foster home alone does not support a termination of parental rights, it is appropriate for the court to assess how the child is adjusting to its new home environment; and (2) a full review of the trial court order illustrated that more than one factor predominated in the court's ultimate conclusion to terminate respondent's parental rights.

7. Appeal and Error— preservation of issues—failure to argue—failure to cite authority

Although respondent mother contends that the trial court erred by determining that it was in the best interests of the minor child to terminate respondent's parental rights, this assignment of error is abandoned under N.C. R. App. P. 28(b)(6), because respondent did not provide any discernible argument or citation of authority for such a claim.

Judge WYNN dissenting.

Appeal by respondent-mother from order entered 20 June 2004 by Judge Susan E. Bray in Guilford County District Court. Heard in the Court of Appeals 20 September 2005.

Office of the Guilford County Attorney, by Assistant County Attorney James A. Dickens, for petitioner-appellee, Guilford County Department of Social Services.

Carlton, Rhodes, & Carlton, by Gary C. Rhodes, for respondent-mother.

CALABRIA, Judge.

Mrs. A.W.E. ("respondent") appeals an order terminating her parental rights. We affirm.

Respondent gave birth to C.D.A.W. ("the minor") on 15 January 2003 in High Point, North Carolina. Respondent tested HIV positive and failed to take any of her specified medications during her pregnancy. The Guilford County Department of Social Services ("DSS") filed a petition and on 27 February 2003 the minor child was adjudicated neglected and dependent. In the court's disposition order entered 27 March 2003, respondent was ordered, *inter alia*, to remain drug free and supervised visitation with her minor child was contingent upon two clean drug tests.

Prior to the adjudication and disposition, respondent entered into a case plan with DSS for reunification. Pursuant to this plan dated 31 January 2003, respondent agreed to the following: attend mental health appointments and take all prescribed medications; develop appropriate parenting skills through a parenting assessment and exhibit those skills during visitation with minor; attend drug treatment, submit to random drug testing, and remain drug free; and maintain suitable and stable housing.

From 31 January 2003 to 20 June 2003, DSS continued to assist respondent, yet her compliance was inconsistent. While she regularly attended all medical and mental health appointments through 7 April 2003, respondent failed to take her prescription medication and, as a result of her continued absences, was discharged from the Guilford County Mental Health Program; DSS provided three opportunities for a required parenting assessment, but respondent failed to attend the assessment appointments and never rescheduled; respondent attended only one visit with the minor child due to continued drug issues; respondent not only failed to remain drug free, but refused to enter drug treatment despite several DSS attempts to the contrary; respondent failed to maintain suitable and stable housing.

At the 26 June 2003 initial permanency planning hearing, the district court recommended a concurrent plan of termination of parental rights and reunification. The court noted respondent's 31 January 2003 reunification plan and provided another opportunity for her to comply with the requirements set out by DSS. DSS waited until 25 August 2003 to file a petition to terminate parental rights and on 18 September 2003, another permanency planning review hearing was held to determine whether respondent was in compliance. The court acknowledged little change from 26 June 2003.

On 15 December 2003 the district court ordered the termination of respondent's parental rights finding as grounds for termination: respondent neglected the minor child as contemplated by N.C. Gen. Stat. § 7B-1111(a)(1) and respondent willfully abandoned the minor child for at least six consecutive months as contemplated by N.C. Gen. Stat. § 7B-1111(a)(7). However, on 6 February 2004 respondent sought relief from the 15 December 2003 judgment pursuant to Rule 60 of the North Carolina Rules of Civil Procedure alleging her attorney was never served with notice of the hearing and she could not read the notice since she was illiterate. On 18 March 2004, the district court granted respondent's motion and reversed the 15 December 2003 termination order.

Following an initial continuance of the second termination of parental rights hearing from 10 May 2004 to 21 June 2004, respondent moved for another continuance since she planned to enter a residential program to treat her chemical dependency that afternoon. The court denied her motion and proceeded in the presence of her counsel but in her absence since she made the decision to attend the drug treatment program. At the close of the evidence, DSS moved to amend the petition alleging additional grounds for termination: will-

fully leaving the minor child in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress has been made in correcting the conditions which led to the removal of the minor child as contemplated by N.C. Gen. Stat. § 7B-1111(a)(2) and failing to pay reasonable child support as contemplated by N.C. Gen. Stat. § 7B-1111(a)(3). The court granted the motion and ordered the termination of respondent's parental rights. Respondent appeals.

"There is a two-step process in a termination of parental rights proceeding." *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). "At 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 Faircloth*, 153 N.C. App. 565, 575, 571 S.E.2d 65, 72 (2002) (citations omitted). "If a ground for termination is so established, the trial court must proceed to the second stage and hold a dispositional hearing." *Id.* At the dispositional hearing, "the trial court must consider whether termination is in the best interests of the child." *Id.* "Unless the trial court determines that the best interests of the child require otherwise, the termination order shall be issued." *Id.* (citations omitted).

Our standard of review for the adjudication stage "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). As to the dispositional stage we review the trial court's ruling only for an abuse of discretion. *Blackburn*, 142 N.C. App. at 614, 543 S.E.2d at 911.

[1] We first address respondent's argument that the trial court erred by failing to appoint a guardian ad litem for respondent due to evidence of both her mental illness and chemical dependency. Respondent contends her inability to care for herself and her son was the result of a mental health impairment and substance abuse and consequently, a guardian ad litem should have been appointed. We disagree.

N.C. Gen. Stat. § 7B-1111(a)(6) (2005) provides parental rights may be terminated if

> the *parent is incapable* of providing for the proper care and supervision of the juvenile, such that the *juvenile is a dependent juvenile within the meaning of G.S. 7B-101*, and that there is a

> reasonable probability that such incapability will continue for the foreseeable future. *Incapability* under this subdivision may be the result of *substance abuse*, mental retardation, *mental illness*, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile.

(Emphasis added). N.C. Gen. Stat. § 7B-101(9) (2005) defines dependent juvenile as

> [a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

Relatedly, according to N.C. Gen. Stat. § 7B-1101 (2003),[1] "[w]here it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(a)(6), and the *incapability* to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, . . . [,]" a guardian ad litem shall be appointed.

In the instant case, however, there was no petition or adjudication for dependency. Consequently, none of the grounds for terminating respondent's parental rights involved use of N.C. Gen. Stat. §§ 7B-1111(a)(6), 7B-101(9), or 7B-1101. Moreover, the DSS motion did not track the language of 7B-1111(a)(6). *See In re B.M.*, *M.M.*, *An.M*, *and Al.M.*, 168 N.C. App. 350, 357, 607 S.E.2d 698, 703 (2005) (explaining that so long as the DSS motion tracked 7B-1111(a)(6), it was unnecessary for the motion to expressly cite 7B-1111(a)(6)). Since none of the stated grounds for terminating respondent's parental rights fits within the express language of 7B-1111(a)(6), 7B-101, or 7B-1101 or within the 'exception' of *B.M.*, *supra*, it was unnecessary for the court to appoint a guardian ad litem. For the foregoing reasons, we overrule this assignment of error.

[2] Next, respondent assigns error to the trial court determination that she willfully failed to successfully comply with the reunification plan. Respondent contends the conclusion was not supported by clear, cogent, and convincing evidence and is thus contrary to the evidence in the record. In so proceeding, respondent grouped her sec-

1. Though N.C. Gen. Stat. § 7B-1101 was amended, the amended portions are effective as to actions filed on or after 1 October 2005 and thus do not affect this appeal.

ond assignment of error, that the trial court erred in concluding she willfully abandoned the minor child for at least six consecutive months, with the above-stated first assignment of error.

Respondent failed to challenge many of the detailed findings of fact that support the trial court's conclusion she neglected the minor child. Additionally, respondent failed to challenge the conclusion of law she neglected the minor child. Thus, as these findings and conclusions of law are binding on appeal, we need not address the remaining alternative grounds found by the trial court. *See In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005). These assignments of error are overruled.

[3] Respondent next argues the trial court abused its discretion in denying respondent's motion for continuance. Respondent contends her motion for continuance should have been granted due to her mental impairment, chemical dependency, and desire to enter a drug treatment facility. We disagree.

"A motion to continue is addressed to the court's sound discretion and will not be disturbed on appeal in the absence of abuse of discretion." *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (citation omitted). Moreover, "[c]ontinuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *Id.* (citation omitted). "The chief consideration is whether granting or denying a continuance will further substantial justice." *Id.* (citation omitted).

Here, respondent failed to illustrate that a continuance would further substantial justice. DSS previously offered respondent assistance to enter a reputable drug treatment facility. Respondent twice failed to attend. Specifically, the trial court found that DSS tried repeatedly and unsuccessfully for a period of 18 months to get respondent to engage in drug rehabilitation. Under the above described circumstances, we hold the trial court did not abuse its discretion in denying appellant's request for a continuance. This assignment of error is overruled.

[4] Respondent next challenges DSS's request for judicial notice. Respondent argues the trial court erred by failing to rule on her objection to petitioner's request for the trial court "to take judicial notice of the records and the court orders, and summaries" entered in this case. Respondent objected "to the extent that the findings in the orders do not contain clear, cogent, and convincing evidence, so any disposition of other matters which were not under the clear, cogent,

and convincing evidence we object to." The trial court erred by failing to rule on either petitioner's request or respondent's objection to the same. Though the basis of respondent's objection is that petitioner should not have the benefit of collateral estoppel with respect to previous findings of fact not determined by the requisite standard of proof required in a termination of parental rights proceeding, respondent failed to illustrate how this prejudiced her. This is especially so in the instant case where all of the findings relating to and supporting the conclusion respondent neglected the minor child remain unchallenged. This assignment of error is overruled.

[5] Respondent next argues the trial court erred in allowing a DSS motion to amend the pleadings to assert N.C. Gen. Stat. §§ 7B-1111(a)(2) (reasonable progress) and 7B-1111(a)(3) (support). Because the conclusion that respondent neglected the minor child is independently sufficient grounds to terminate parental rights, we need not address whether the court abused its discretion in permitting these amendments to the petition to terminate parental rights.

[6] Respondent next argues the trial court erred in basing disposition in whole or in part upon the successful adaptation of the minor child to the foster home and the desire of the foster parents to adopt the minor child. Respondent contends too much weight was given to this finding. We disagree.

Though a finding by a trial court that children being settled in a foster home *alone* does not support a termination of parental rights, *Bost v. Van Nortwick*, 117 N.C. App. 1, 8, 449 S.E.2d 911, 915 (1994) (emphasis added), it is appropriate for the court to assess how the child is adjusting to their new home environment. *See In re Mills*, 152 N.C. App. 1, 8-9, 567 S.E.2d 166, 171 (2002), *writ denied*, 356 N.C. 672, 577 S.E.2d 627 (2003). A full review of the trial court order, however, illustrates that more than one factor predominated in the court's ultimate conclusion to terminate respondent's parental rights.

Here, though the trial court did consider the minor child's positive response to a foster home, the trial court considered factors in the disposition that relate to determining the best interests. Specifically, the court found as fact and concluded as a matter of law respondent neglected the minor child. Respondent never objected to this finding or the conclusion of law. Thus, the cumulative effect of these findings is what prompted the court to determine grounds existed to terminate respondent's parental rights and

termination was in the minor child's best interests. Thus, there was no abuse of discretion in the court's determination. This assignment of error is overruled.

[7] Lastly, respondent argues the trial court erred in determining that it is in the best interest of the minor child to terminate respondent's parental rights. However, respondent's contention is void of any discernible argument or citation as authority for such a claim. Thus, according to N.C. R. App. P. 28(b)(6) (2005) this argument is abandoned.

Affirmed.

Judge LEVINSON concurs.

Judge WYNN dissents with a separate opinion.

WYNN, Judge, dissenting.

For the reasons stated in *In re L.W.*, 175 N.C. App. ——, ——, —— S.E.2d ——, —— (COA05-192) (3 Jan. 2006), I respectfully dissent.

Although the trial court did not terminate respondent's parental rights specifically under N.C. Gen. Stat. § 7B-1111(a)(6) (2005), "the issues that were present throughout the permanency planning reviews and that culminated in the termination order were intertwined in such a way as to obviate consideration of the termination order without concurrent consideration of the mental issues that were present." *Id.* at ——, —— S.E.2d at ——. For instance, the trial court's order references respondent's non-compliance with her mental health treatments and respondent's hospitalization on 14 June 2004, based on her admission that she "took too many pills." The trial court's order further cites respondent's failure to enter a drug treatment program and respondent's eviction from her apartment for having a crack pipe in her home. In light of the trial court's emphasis and reliance on respondent's mental health issues and illegal drug usage, I would hold that the trial court erred in failing to conduct a hearing regarding the appointment of a *guardian ad litem* for respondent and grant a new hearing on the petition to terminate respondent's parental rights. I, therefore, respectfully dissent.

FARRELL v. TRANSYLVANIA CTY. BD. OF EDUC.

[175 N.C. App. 689 (2006)]

SEAN FARRELL, A MINOR BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, WILLIAM FARRELL, INDIVIDUALLY; AND SUZANNE FARRELL, INDIVIDUALLY, PLAINTIFFS V. TRANSYLVANIA COUNTY BOARD OF EDUCATION; TERRY HOLLIDAY, FORMER SUPERINTENDENT OF TRANSYLVANIA COUNTY SCHOOLS IN HIS OFFICIAL CAPACITY; PATRICIA MORGAN, FORMER PRINCIPAL OF BREVARD ELEMENTARY SCHOOL, IN HER OFFICIAL CAPACITY; RON KIVINIEMI, FORMER ASSISTANT PRINCIPAL OF BREVARD ELEMENTARY AND PRINCIPAL OF PISGAH FOREST ELEMENTARY SCHOOL IN HIS OFFICIAL CAPACITY; KATHY HAEHNEL, DIRECTOR OF FEDERAL PROGRAMS AT TRANSYLVANIA COUNTY SCHOOLS IN HER INDIVIDUAL AND OFFICIAL CAPACITIES; DONNA GARVIN, FORMER SPECIAL EDUCATION TEACHER AT REVARD ELEMENTARY IN HER INDIVIDUAL AND OFFICIAL CAPACITIES; AND JANE WOHLERS, FORMER TEACHER'S AIDE AT BREVARD ELEMENTARY SCHOOL IN HER INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA05-882

(Filed 7 February 2006)

1. Appeal and Error— appealability—denials of motion to dismiss—immunity and punitive damages

Assignments of error concerning the denials of defendants' motions to dismiss in an action arising from the alleged abuse of a disabled student in a public school were dismissed as interlocutory, except for assignments of error pertaining to immunity and the related issue of punitive damages.

2. Immunity— public official—conclusory affidavit—not sufficient

A conclusory affidavit that a public official acted willfully and wantonly is not sufficient by itself to overcome public official immunity. Defendant Haehnel, director of federal programs in the Transylvania County Schools, qualifies as a public official given that she performs discretionary acts involving personal deliberation, decision, and judgment in a position created by the statutes of North Carolina.

3. Immunity— qualified—public official—personal liability

The trial court erred by denying a motion by defendant Haehnel, director of federal programs in the Transylvania County Schools, to dismiss claims asserted against her under 42 U.S.C. § 1983 in her individual capacity. Plaintiff's allegations do not establish any conduct by Haehnel that violated clearly established statutory or constitutional rights. Qualified immunity protects public officials from personal liability for performing official discretionary functions if the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Appeal by defendants from order entered 14 March 2005 by Judge J. Marlene Hyatt in Transylvania County Superior Court. Heard in the Court of Appeals 11 January 2006.

The Law Office of Stacey B. Bawtinhimer, by Stacey Bawtinhimer, and Dixon, Doub, Conner & Foster, P.L.L.C., by Jeffery B. Foster, for plaintiffs-appellees.

Cranfill, Sumner & Hartzog, L.L.P., by Ann S. Estridge and Meredith T. Black, for defendant-appellant Kathy Haehnel.

Roberts & Stevens, P.A., by Christoper Z. Campbell and Cynthia S. Grady, and Northup & McConnell, P.L.L.C., by Isaac N. Northup, Jr. and Elizabeth McConnell for joint defendants-appellants.

Tharrington Smith, L.L.P., by Ann L. Majestic and Deborah R. Stagner, and North Carolina School Boards Association, by Allison B. Schafer, for Amicus Curiae North Carolina School Boards Association.

CALABRIA, Judge.

Transylvania County Board of Education *et al.* ("defendants") and defendant Kathy Haehnel ("Haehnel") appeal from an order of the trial court, which denied, in pertinent part, their motions to dismiss. We dismiss, as interlocutory, the appeal of all defendants except Haehnel, and we reverse the trial court's denial of Haehnel's motion to dismiss.

The complaint alleged, *inter alia*, the following facts:

> 18. The Plaintiff Sean Farrell began attending the public schools of Transylvania County in the fall of 1998. Sean has cerebral palsy, developmental delay, and other disabilities which qualify him as a student with special needs. Sean's condition prevents him from communicating verbally. He has limited ability to use sign language. As a result of these special needs, Sean was placed in a specialized educational environment within the Defendant School Board's school system.
>
> . . .
>
> 20. At the beginning of the 2001-2002 school year, Sean was placed in a self-contained classroom at Brevard Elementary School and Sean's classroom teacher was Defendant Garvin. In

addition to Defendant Garvin, the classroom has three teacher's aides, two of which were Defendant Wohlers and Eva Grey.

21. Unlike some of the disabled students in Defendant Garvin's classroom, Sean was able to independently feed himself and enjoyed all varieties of food. He was, according to Defendants Garvin and Wohlers, a good eater, liked all kinds of foods, and would always clean his plate.

22. At the time Sean began attending school and through August, 2001, he functioned well within the program, and was a happy, healthy child, but for his special needs.

23. The Plaintiffs had noticed some occasional behavior changes in Sean the spring of 2001[.] [T]hese behaviors disappeared during summer school when Defendant Wohlers was not in Sean's classroom.

24. Initially during the 2001-2002 school year, Defendant Wohlers was absent due to a surgical procedure, and missed approximately the first 30 days of school.

. . .

27. Within days of Defendant Wohlers['] [return to work] in Sean's class, the Plaintiffs William and Suzanne Farrell began noticing immediate changes [in] Sean's behavior reminiscent of those which occurred in the spring

. . .

31. . . . [S]ean became depressed, became severely withdrawn, and anxious, fearful of food. Sean would cling to his mother and cry when going to school. This behavior was unusual in that Sean had always loved and enjoyed going to school.

. . .

36. The Plaintiffs were eventually told by Eva Grey, the other teacher's aide in Sean's classroom, that Sean was being treated abusively by the Defendant Wohlers. This abuse included:

a. being force fed by Wohlers at times to the point of choking on a regular basis;

b. Wohlers yelling at him and using abusive language;

c. his head being jerked back violently and hair being pulled while his face was being washed; and

d. Defendant Wohlers using a stuffed animal she knew that Sean was terrified of to intimidate him to stay on his mat for naptime.

37. Eva Grey informed the Plaintiffs that she had notified Defendant Haehnel about her disclosures to the Plaintiffs two days before[] the Plaintiffs contacted interim principal Susan Allred.

. . .

39. Defendant Haehnel and Susan Allred were assigned to the investigation and informed the Plaintiffs that they would conduct a thorough investigation of the alleged abuse.

40. After Defendant Haehnel investigated the allegations of Eva Grey that Defendant Wohlers abused Sean, she informed the Plaintiffs that Eva Grey had made up these allegations because she was jealous of Defendant Wohlers and wanted her job. Moreover Defendant Haehnel indicated that no other individual had substantiated Eva Grey's allegations and that Defendant Wohlers was exonerated.

. . .

45. Defendant Haehnel's investigation file documented that other school personnel and outside staff had complained about Defendant Wohlers' abusive behavior towards disabled students and inappropriate conduct; that Defendant Garvin's classroom was not properly supervised; and that Defendant Wohlers based on Defendant Haehnel's own personal observations acted inappropriately towards students in Defendant Garvin's classroom.

46. Teacher's aide, Roxanne Jones, who also worked in the self-contained classroom witnessed Defendant Wohlers, in the presence of Defendant Garvin, and under the authority, direction or control of Defendants Garvin, Morgan, Kiviniemi, Holliday, and the School Board:

a. yell at the children;

b. tell them to "shut up";

c. pinch them behind their ears causing bruises;

d. squeeze them under the arms causing bruises;

e. stuff food into students' mouths;

f. hold their head in a headlock, continue to stuff food into students' mouths until they gagged during which time one student projectile vomited;

g. verbally intimidate the children by yelling at them until they broke down crying;

h. hold their foreheads roughly and yank their heads back in order to wash their face in the bathroom; and,

i. made inappropriate sexual and lewd comments in front of the children.

. . .

67. Sean's condition became so severe that he was admitted to Mission Hospital from January 16 to January 24, 2002 for IV therapy and a thorough medical workup to find a cause for his severe anxiety associated with food.

. . .

71. These tests indicated that there was no physical reason for Sean's failure to eat and drink. The attending pediatric physician and residents from Mission Hospital, including the gastro-intestinal doctor and occupational therapists all agreed that Sean's eating problems were consistent with severe anxiety and depression due to suspected child abuse in the classroom.

. . .

82. Defendant Wohlers was subsequently terminated by Transylvania County Schools in part because of more abuse allegations of another disabled student and a pattern of inappropriate conduct towards students.

83. After several months, Sean was placed back in Defendant Garvin's classroom with his familiar peers, routine, and staff. Defendant Wohlers was no longer an aide in Sean's classroom and he started eating again.

. . .

85. Plaintiffs are informed and believe, and therefore allege, that the above described ongoing pattern and practice of physical and verbal abuse, by definition, are not appropriate to achieve educational goals, and they instead result in lasting and irreparable damage to Plaintiff Sean Farrell and violated his property

right to a public education as guaranteed by the North Carolina Constitution.

Based on these allegations and others, Suzanne and William Farrell (collectively "plaintiffs") filed suit individually and on behalf of the minor child Sean Farrell ("Sean") against defendants. In their complaint, plaintiffs asserted causes of action for negligent supervision, negligent hiring and retention, negligent infliction of emotional distress, and violation of substantive due process under 42 U.S.C. § 1983. The plaintiffs also sought punitive damages. The Transylvania County Board of Education filed a motion to dismiss, covering all defendants sued in their "official capacities" and Donna Garvin ("Garvin"). Defendants Haehnel and Jane Wohlers ("Wohlers") also filed motions to dismiss claims against them in their individual capacities. The trial court granted motions to dismiss the punitive damages claims against the School Board and any defendant sued in his or her official capacity. As to all other claims, the trial court denied defendants' motions to dismiss. From the denial of these motions, defendants appeal.

[1] Plaintiffs have filed a motion to dismiss, as interlocutory, the entire appeal of the joint defendants and the appeal of Haehnel except for the issues of public official and qualified immunity. Generally, "a denial of a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)[], is an interlocutory order from which no appeal may be taken immediately." *Bardolph v. Arnold*, 112 N.C. App. 190, 192-93, 435 S.E.2d 109, 112 (1993) (citation omitted). However, "[o]rders denying dispositive motions based on public official's immunity affect a substantial right and are immediately appealable." *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001). A substantial right is affected because "[a] valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit. Were the case to be erroneously permitted to proceed to trial, immunity would be effectively lost." *Slade v. Vernon*, 110 N.C. App. 422, 425, 429 S.E.2d 744, 746 (1993), *implied overruling based on other grounds*, *Boyd v. Robeson County*, 169 N.C. App. 460, 621 S.E.2d 1 (2005). Accordingly, we address Haehnel's assignments of error pertaining to immunity and the related issue of punitive damages; however, we decline to address the other defendants' assignments of error, given that they are interlocutory. *Houpe v. City of Statesville*, 128 N.C. App. 334, 340, 497 S.E.2d 82, 87 (1998) (standing for the proposition that when this Court addresses a matter, although interlocutory, because it affects a substantial right, it is in our discretion whether to address other arguments not affecting a substantial right).

[2] On appeal, Haehnel argues that the trial court erred in denying her motion to dismiss as to the negligence claims because "the face of plaintiffs' complaint reveals an insurmountable bar to recovery as the allegations establish that Dr. Haehnel, a public official, is immune from plaintiffs' claims." We agree that Haehnel is immune from plaintiffs' negligence claims in her individual capacity under the doctrine of public official immunity.

On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB Nat. Bank of North Carolina*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim. *Hyde v. Abbott Laboratories., Inc.*, 123 N.C. App. 572, 575, 473 S.E.2d 680, 682 (1996).

Under the doctrine of public official immunity, "[w]hen a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officials in determining negligence liability." *Hare v. Butler*, 99 N.C. App. 693, 699-700, 394 S.E.2d 231, 236 (1990) (citations omitted). "Officers exercise a certain amount of discretion, while employees perform ministerial duties." *Cherry v. Harris*, 110 N.C. App. 478, 480, 429 S.E.2d 771, 773 (1993) (citation omitted). "Discretionary acts are those requiring personal deliberation, decision[,] and judgment. . . . Ministerial duties, on the other hand, are absolute and involve merely the execution of a specific duty arising from fixed and designated facts." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (citations and quotations omitted). Additionally, "[t]o constitute an office, as distinguished from employment, it is essential that the position must have been created by the constitution or statutes of the sovereignty, or that the sovereign power shall have delegated to an inferior body the right to create the position in question." *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965).

Under these guidelines, this Court has recognized that school officials such as superintendents and principals perform discretionary acts requiring personal deliberation, decision, and judgment. *Gunter v. Anders*, 114 N.C. App. 61, 67-68, 441 S.E.2d 167, 171 (1994). We now consider the issue of first impression, whether a school official serving in a supervisory role, other than a superintendent or

school principal, qualifies as a public official. Specifically, we consider whether Haehnel's role as Director of Federal Programs qualifies her as a public official. The complaint in the case *sub judice* acknowledges that Haehnel is the Director of Federal Programs for Transylvania County schools and has the responsibilities of "ensuring that students with disabilities in the School System are treated in compliance with the requirements of state law and the North Carolina Constitution" and "supervising all special education teachers, aides in special education classrooms, and related service providers in the entire special education program for Transylvania County Schools." Accordingly, Haehnel qualifies as a "school administrator" under N.C. Gen. Stat. § 115C-287.1(a)(3) (2005). "School administrator[s]" include principals, assistant principals, supervisors, and directors "whose major function includes the direct or indirect supervision of teaching or of any other part of the instructional program." *Id.* Given that Haehnel performs, within her supervisory role, discretionary acts involving personal deliberation, decision, and judgment in a position created by the statutes of our State, we hold that she is a public official who qualifies for public official immunity.

Our Supreme Court has said:

> It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious . . . or that he acted outside of and beyond the scope of his duties.

Smith v. Hefner, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952) (citations omitted). Moreover, "a conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion." *Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997). *See also Dalenko v. Wake County Dept. of Human Services*, 157 N.C. App. 49, 56, 578 S.E.2d 599, 604 (2003) (holding a complaint's allegations amounted to conclusions of law and deductions of fact and were insufficient to overcome public official immunity). The only allegation that plaintiffs made regarding Haehnel acting with corruption, maliciousness, or beyond the scope of her duties is found in the 42 U.S.C. § 1983 portion of the complaint. The allegation stated, "The actions of

Defendants, as described above, were malicious, deliberate, intentional, and embarked upon with the knowledge of, or in conscious disregard of, the harm that would be inflicted upon Plaintiff." This allegation is conclusory and insufficient to overcome Haehnel's public official immunity. *See Meyer*, *supra*. Accordingly, the trial court erred in denying Haehnel's motion to dismiss the negligence claims against her in her individual capacity.

[3] In regard to the 42 U.S.C. § 1983 claims, Haehnel argues that she is immune from suit in her individual capacity under the theory of qualified immunity. "Qualified immunity protects public officials from personal liability for performing official, discretionary functions if the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Vest v. Easley*, 145 N.C. App. 70, 75, 549 S.E.2d 568, 573 (2001) (citations omitted). Assuming *arguendo* that plaintiffs properly pled its claim for relief pursuant to 42 U.S.C. § 1983, plaintiffs' allegations, nonetheless, fail to establish any conduct by Haehnel that violated clearly established statutory or constitutional rights. Accordingly, we hold that the trial court erred in denying Haehnel's motion to dismiss the claims asserted against her under 42 U.S.C. § 1983 in her individual capacity.

Because Haehnel is entitled to public official immunity as to the negligence claims and qualified immunity as to 42 U.S.C. § 1983 claims, the trial court erred in denying Haehnel's motion to dismiss plaintiffs' claims for punitive damages against her in her individual capacity. *See* N.C. Gen. Stat. § 1D-15(a) (2005) ("[p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages"). Having held that Haehnel is immune, we need not address her other argument on appeal. Moreover, since Haehnel has not argued her remaining assignments of error, we deem them abandoned pursuant to N.C. R. App. P. 28(b)(6) (2005).

Reversed in part; dismissed in part.

Judges BRYANT and SMITH concur.

RICHARD W. LEE, PETITIONER v. N.C. DEPT. OF TRANSPORTATION, RESPONDENT

No. COA05-57

(Filed 7 February 2006)

1. Appeal and Error— scope of review—de novo—error of law

The trial court did not err by applying a de novo scope of review to the State Personnel Commission's (SPC) decision in an action alleging hostile work environment and discrimination based on petitioner state employee's race as an African-American, because: (1) petitioner excepted to the SPC's decision that it lacked jurisdiction on the ground that it is based on errors of law; and (2) when the appealing party asserts that the agency's decision was based on an error of law, the trial court must apply a de novo review.

2. Public Officers and Employees— state employee—jurisdiction—racial harassment—written complaint required

The trial court erred by concluding that the State Personnel Commission (SPC) had jurisdiction to hear petitioner state employee's racial harassment claim under N.C.G.S. § 126-34.1(a)(1), because: (1) petitioner did not have a statutory right of direct appeal to SPC since an employee may appeal a claim of discrimination directly to SPC, but an employee alleging harassment must comply with N.C.G.S. § 126-34 as a prerequisite to appealing to SPC; and (2) the failure of petitioner to comply with N.C.G.S. § 126-34 by submitting a written complaint to respondent and allowing 60 days for respondent to reply was jurisdictional.

3. Public Officers and Employees— state employee—jurisdiction-retaliation for protecting right to equal opportunity for employment and compensation

The trial court erred by finding that N.C.G.S. § 126-34.1(a)(3) provided another source of jurisdiction in this case for a state employee to appeal directly to the Office of Administrative Hearings when he believed that he has been retaliated against for protecting alleged violations of his right to equal opportunity for employment and compensation, because: (1) in order to trigger the jurisdiction of the State Personnel Commission, petitioner was required to comply with N.C.G.S. § 126-34 prior to filing a petition for a contested case; and (2) petitioner's failure to follow respondent's internal grievance procedure prior to appealing his retaliation claim deprived SPC of jurisdiction.

4. Public Officers and Employees— state employee—jurisdiction—discrimination

The trial court did not err by concluding that the State Personnel Commission (SPC) had jurisdiction over petitioner state employee's discrimination claim under N.C.G.S. § 126-34.1(a)(2), because: (1) although the petition did not allege racial discrimination, the petition stated that the grievance was based upon demotion, and the prehearing statement alleged demotion due to race whereby petitioner was transferred from a truck driving job to a flagging job requiring him to stand for long periods of time; (2) the prehearing statement also stated that petitioner was sent to the wrong location when he applied to take a training course; (3) the pleadings including both the petition and the prehearing statement are construed liberally, N.C.G.S. § 1A-1, Rule 8(f); and (4) petitioner had a direct right to appeal to SPC under N.C.G.S. § 126-36 where his grievance asserts discrimination.

Judge LEWIS concurring in part and dissenting in part.

Appeal by respondent from order entered 11 June 2004 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 15 September 2005.

Attorney General Roy Cooper, by Assistant Attorney General Tina A. Krasner, for respondent-appellant.

McSurely & Osment, by Alan McSurely, for petitioner-appellee.

ELMORE, Judge.

Richard W. Lee (petitioner) was employed by the North Carolina Department of Transportation (respondent) as a member of the maintenance crew. On 10 September 1999 petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH). Subsequent to obtaining counsel, petitioner filed a prehearing statement. The petition alleged a hostile work environment and demotion with insufficient cause. The prehearing statement stated that petitioner was setting forth claims of hostile work environment and discrimination, both because of his race as an African-American.

Respondent filed a motion to dismiss the petition, and the administrative law judge (ALJ) denied this motion on 10 May 2000. The ALJ entered a recommended decision on 29 August 2001, concluding that respondent discriminated against petitioner because of his race,

created a racially hostile environment, and retaliated against petitioner for his objections to respondent's attempts to terminate him. The State Personnel Commission (SPC) considered the recommended decision and found it had no jurisdiction to hear petitioner's allegations. The SPC noted that if its finding on jurisdiction were to be reversed, then it adopts the findings and conclusions of the ALJ. Petitioner filed a petition for judicial review in Wake County Superior Court. The trial court entered an order on 11 June 2004 concluding that the SPC erred when it found it lacked jurisdiction over the issues in petitioner's case. The court remanded the case to the SPC to implement the six remedies stated in the ALJ's recommended decision. From this order, respondent appeals.

[1] Respondent assigns error to the trial court's conclusions that: (1) the SPC had jurisdiction to hear petitioner's racial harassment and retaliation claims; and (2) the SPC had jurisdiction over a discrimination claim because petitioner alleged he was demoted and denied training. This Court reviews the trial court's order regarding an agency decision for errors of law, which involves "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 18 (2002) (internal quotations omitted). Thus, we first determine whether the trial court applied the correct standard of review. Petitioner excepted to the SPC's decision that it lacked jurisdiction on the grounds that it is based on errors of law. The trial court stated that, since an error of law was raised, *de novo* review of the jurisdictional issue was proper. Where the appealing party asserts that the agency's decision was based on an error of law, the trial court must apply a *de novo* review. *See Welter v. Rowan Cty. Bd. of Comm'rs*, 160 N.C. App. 358, 361, 585 S.E.2d 472, 475 (2003). "Under a *de novo* review, the superior court 'consider[s] the matter anew[] and freely substitutes its own judgment for the agency's judgment.' " *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). Here, the trial court applied the appropriate scope of review, a *de novo* review of the SPC's decision.

[2] We next determine whether the trial court properly exercised its review. Since each type of claim that petitioner alleged against respondent has distinct jurisdictional requirements, we must review them individually. The first issue is whether the SPC lacked jurisdiction to hear petitioner's racial harassment claim asserted under N.C.

Gen. Stat. § 126-34.1(a)(10). The SPC found that petitioner failed to comply with N.C. Gen. Stat. § 126-34, which required him to submit written notice to respondent of his harassment claim prior to filing a petition for a contested case. N.C. Gen. Stat. § 126-34 provides:

> Unless otherwise provided in this Chapter, any career State employee having a grievance arising out of or due to the employee's employment and who does not allege unlawful harassment or discrimination because of the employee's age, sex, race, color, national origin, religion, creed, handicapping condition as defined by G.S. 168A-3, or political affiliation shall first discuss the problem or grievance with the employee's supervisor and follow the grievance procedure established by the employee's department or agency. *Any State employee having a grievance arising out of or due to the employee's employment who alleges unlawful harassment because of the employee's age, sex, race, color, national origin, religion, creed, or handicapping condition as defined by G.S. 168A-3 shall submit a written complaint to the employee's department or agency. The department or agency shall have 60 days within which to take appropriate remedial action. If the employee is not satisfied with the department or agency's response to the complaint, the employee shall have the right to appeal directly to the State Personnel Commission.*

N.C. Gen. Stat. § 126-34 (2005) (emphasis added). A State employee having a grievance is provided with the statutory right to appeal certain claims directly to the SPC, *i.e.*, without first filing an internal complaint or exhausting his employer's internal grievance procedures. *See* N.C. Gen. Stat. § 126-36 (2005). In accordance with this section, an employee may appeal a claim of discrimination directly to the SPC, but an employee alleging harassment must comply with N.C. Gen. Stat. § 126-34 as a prerequisite to appealing to the SPC. *See id.*

Here, petitioner did not have a statutory right of direct appeal to the SPC. The failure of petitioner to comply with N.C. Gen. Stat. § 126-34 by submitting a written complaint to respondent and allowing 60 days for respondent to reply was jurisdictional. *See* N.C. Gen. Stat. § 126-37(a) (2005) ("Appeals involving a disciplinary action, alleged discrimination or harassment, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B;

provided that *no grievance may be appealed unless the employee has complied with G.S. 126-34.*") (emphasis added). Accordingly, the SPC lacked jurisdiction to hear petitioner's racial harassment claim. The trial court erred in determining that the SPC had jurisdiction to hear the claim.

[3] Next, we address respondent's argument that the trial court incorrectly found N.C. Gen. Stat. § 126-34.1(a)(3) provided another source of jurisdiction in the case. Specifically, the trial court found that N.C. Gen. Stat. § 126-34.1(a)(3) provides jurisdiction for a State employee to appeal directly to the OAH when he believes he has been retaliated against for protesting alleged violations of his right to equal opportunity for employment and compensation. The trial court also found that respondent was on notice that the petition and prehearing statement alleged a retaliation claim and that respondent did not object to this basis for jurisdiction. We need not address the latter finding, that petitioner's allegations were sufficient to put respondent on notice of the nature of the claim, because we determine that petitioner did not have a right of direct appeal regarding this claim. Section 126-36 provides a State employee with the right to appeal directly to the OAH a grievance alleging discrimination as set forth in N.C. Gen. Stat. § 126-34.1(a)(2); however, an appeal of a grievance alleging harassment or retaliation for opposition to harassment is subject to the requirements of N.C. Gen. Stat. § 126-34. Section 126-36 is silent on a claim of retaliation for protesting alleged discrimination in violation of the employee's right to equal opportunity for employment and compensation.

We find no other section of Chapter 126 providing a direct right of appeal to an employee asserting retaliation based upon the employee's protest of an alleged violation of the right to equal opportunity for employment and compensation. *Cf.* N.C. Gen. Stat. § 126-36.1 (2005) ("Any *applicant* for State employment who has reason to believe that employment was denied in violation of G.S. 126-16 [right to equal opportunity for employment and compensation] shall have the right to appeal directly to the State Personnel Commission.") (emphasis added). In order to trigger the jurisdiction of the SPC, petitioner was required to comply with Section 126-34 prior to filing a petition for a contested case. *See Nailing v. UNC-CH*, 117 N.C. App. 318, 324, 451 S.E.2d 351, 355 (1994) (petitioner must follow requirements of Chapter 126 for commencing a contested case in order for OAH to have jurisdiction), *disc. review denied*, 339 N.C. 614, 454 S.E.2d 255 (1995); *Lewis v. N.C. Dep't. of Human Resources*,

92 N.C. App. 737, 739, 375 S.E.2d 712, 714 (1989) ("The right to appeal to an administrative agency is granted by statute, and compliance with statutory provisions is necessary to sustain the appeal."). Petitioner's failure to follow respondent's internal grievance procedure prior to appealing his retaliation claim deprived the SPC of jurisdiction. The trial court erred in concluding that the SPC had jurisdiction over a retaliation claim pursuant to N.C. Gen. Stat. § 126-34.1(a)(3).

[4] The final issue is whether petitioner alleged a discrimination claim under N.C. Gen. Stat. § 126-34.1(a)(2). The parties agree that, if alleged properly, this is a separate claim conferring subject matter jurisdiction to the SPC. Respondent contends that petitioner failed to allege discrimination in his petition because he did not allege a specific adverse employment action. Petitioner's petition did not allege racial discrimination. However, the petition stated that the grievance was based upon demotion.[1] The prehearing statement alleged demotion due to race and stated that petitioner was transferred from a truck driving job to a flagging job requiring him to stand for long periods of time. The prehearing statement also stated that petitioner was sent to the wrong location when he applied to take a training course. The trial court concluded that petitioner sufficiently alleged a discrimination claim. Construing the pleadings liberally, including both the petition and the prehearing statement, we agree. *See* N.C. Gen. Stat. § 1A-1, Rule 8(f) (pleadings must be construed so "as to do substantial justice"); *Winbush v. Winston-Salem State Univ.*, 165 N.C. App. 520, 522-23, 598 S.E.2d 619, 621-22 (2004) (petition alleging that employee was "relieved of [his] athletic duties and privileges" was sufficient to allege demotion and invoke jurisdiction of OAH and SPC; jurisdiction rests on allegations of petitioner, which must be construed liberally). Additionally, we note that petitioner has a direct right of appeal to the SPC where his grievance asserts discrimination. *See* N.C. Gen. Stat. § 126-36 (2005). Thus, the trial court correctly concluded that the SPC has jurisdiction over petitioner's discrimination claim.

For the foregoing reasons, we affirm the trial court's conclusion that the SPC has jurisdiction to hear petitioner's discrimination claim. We reverse the court's conclusions that the SPC has jurisdiction to hear petitioner's racial harassment or retaliation claims.

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1. Petitioner altered the form from "demotion without just cause" to read "demotion without [sic] Insufficient Cause."

Affirmed in part; reversed in part.

Judge HUDSON concurs.

Judge LEWIS concurs in part, dissents in part by separate opinion.

LEWIS, Judge, concurring in part and dissenting in part.

I agree with the majority's conclusion that the SPC lacked jurisdiction to hear petitioner's racial harassment and retaliation claims. However, because I disagree with the majority's conclusion that the SPC had jurisdiction to hear petitioner's racial discrimination claim, I respectfully concur in part and dissent in part.

"Construing the pleadings liberally, including both the petition and prehearing statement," the majority concludes petitioner sufficiently alleged racial discrimination on the part of respondent. However, I note that "[f]iling a petition in the OAH to commence a contested case hearing is a mandatory step for the OAH to exercise subject matter jurisdiction over [a] petitioner's appeal under Chapter 126." *Nailing v. UNC-CH*, 117 N.C. App. 318, 327, 451 S.E.2d 351, 357 (1994), *disc. review denied*, 339 N.C. 614, 454 S.E.2d 255 (1995); *see* N.C. Gen. Stat. §§ 126-37(a), 150B-123. "Whether a prehearing statement should be filed is within the discretion of the administrative law judge." *Nailing*, 117 N.C. App. at 327, 451 S.E.2d at 357 (citation omitted). Thus, "[i]f the administrative law judge requires a party to file a prehearing statement, the prehearing statement is filed *after* the contested case has already been commenced by filing the petition pursuant to N.C. Gen. Stat. § 150B-23." *Id.* at 328, 451 S.E.2d at 357 (concluding petitioner failed to timely file a contested case petition with OAH regarding discrimination based upon a handicapping condition, despite amendment of her prior prehearing statement to include such an allegation).

Here, petitioner's case was commenced by the filing of a "Petition For A Contested Case Hearing" form ("the Form") provided by the Office of Administrative Hearings. Prior to asking the petitioner to "state facts showing how [he or she] believe[s] [he or she] ha[s] been harmed by the State local agency or board," the Form provides several choices from which the petitioner may allege his or her "appeal is based on." The choices are placed in a conspicuous area of the Form, and the petitioner is expressly instructed to "check all that apply." As the majority notes, in this case petitioner altered the

"demotion without just cause" choice on his Form to read "demotion without Insufficient Cause," and he further added that his appeal was based on "Hostile Work environment." However, petitioner failed to check any of the boxes beneath the set of choices regarding "discrimination and or retaliation for opposition to alleged discrimination," and he failed to indicate which type of discrimination he suffered, despite the Form's explicit instruction that "[i]f your appeal is based upon alleged discrimination and or retaliation for opposition to alleged discrimination, you **must** specify the type of discrimination." While petitioner's prehearing statement suggests he was harassed and perhaps demoted based upon his race, the Form contains no allegation regarding discrimination in general or racial discrimination in particular.

I note that petitioner acted *pro se* when completing the Form. However, I believe the Form was designed with *pro se* petitioners in mind, and I reemphasize that its instructions are plain and its requirements are neither burdensome nor complicated. Finally, I note petitioner filled in certain portions of the form related to general workplace grievances, but left blank those portions which specifically address discrimination. Notwithstanding our general liberality in reviewing *pro se* pleadings, I conclude petitioner failed to properly allege racial discrimination in this case. Accordingly, I would hold the trial court erred by concluding the SPC had subject matter jurisdiction over petitioner's racial discrimination claims.

NELLO L. TEER COMPANY, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA04-1615

(Filed 7 February 2006)

Appeal and Error— appealability—road construction—complaint verification—statute of limitations—conditions precedent

An appeal was dismissed as interlocutory where plaintiff brought an unverified complaint seeking additional compensation in a road construction contract, plaintiff's motion to amend its complaint to add the verification was granted after the statute of limitations had run, with the verification relating back

to the date the complaint was filed, and DOT appealed from that order. The General Assembly amended N.C.G.S. § 136-29 to delete the provision specifying that time limits were conditions precedent, and thus expressed its intent that the time limits would cease to be conditions precedent and would constitute statutes of limitation. Orders denying motions to dismiss based upon the statute of limitations are interlocutory and not immediately appealable.

Appeal by defendant from order entered 31 August 2004 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 June 2005.

Vandeventer Black, LLP, by David P. Ferrell, Patrick A. Genzler, and Norman W. Shearin, for plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Fred Lamar and Assistant Attorney General Steven A. Armstrong, for defendant-appellant.

GEER, Judge.

Defendant North Carolina Department of Transportation ("DOT") appeals from the order of the trial court that allowed plaintiff Nello L. Teer Company ("Teer") to amend its complaint to add a verification and denied DOT's motion to dismiss. DOT argues that it is entitled to bring this interlocutory appeal because the trial court's ruling implicates its sovereign immunity. Even assuming, without deciding, that a failure to comply with the statutory requirements of N.C. Gen. Stat. § 136-29 (2005) violates the State's sovereign immunity, the effect of the General Assembly's amendment to § 136-29 in 1987 was to make the time limitations in that statute a statute of limitations and not a condition precedent to suit. As such, any failure to comply with § 136-29's time limits does not implicate the State's sovereign immunity, but rather requires application of the law governing statutes of limitations. Accordingly, we dismiss DOT's appeal.

Teer won a contract from DOT for the construction of certain road improvements to Interstate 85 from the Orange County line east to Cole Mill Road in Durham. The construction was complete on 6 June 1999, and DOT paid the final estimate for the work done on 17 May 2003. On 15 July 2003, Teer submitted a verified claim to DOT seeking an adjustment to the final estimate and payment in accordance with N.C. Gen. Stat. § 136-29(a). The State Highway Adminis-

trator evaluated the claim and, in a letter dated 3 November 2003, denied Teer's claim for additional compensation.

On 11 December 2003, Teer filed an unverified complaint against DOT for the additional compensation in Wake County Superior Court. On 12 February 2004, DOT filed an answer that asserted a defense of sovereign immunity generally, but did not specifically address the failure of Teer to verify its complaint under N.C. Gen. Stat. § 136-29(c). On 25 May 2004, after the time limitation in § 136-29(c) had run, DOT filed a motion to dismiss the complaint based on Teer's failure to file a verification within the time prescribed by the statute. In response, Teer filed a motion, pursuant to Rule 15 of the Rules of Civil Procedure, for leave to amend its complaint to add a verification.

A hearing was held on the two motions before Judge Howard E. Manning, Jr. on 11 August 2004. In his order entered 31 August 2004, Judge Manning denied DOT's motion to dismiss, granted Teer's motion to amend its complaint, and ordered that the verification relate back to the date the complaint was originally filed. DOT filed a notice of appeal from the trial court's order on 16 September 2004. Teer has moved to dismiss that appeal as interlocutory.

An interlocutory order is an order made during the pendency of an action that does not dispose of the case, but rather requires further action by the trial court to finally determine the rights of all the parties involved in the controversy. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Generally, there is no right to appeal from an interlocutory order unless (1) the trial court made the required certification under Rule 54 of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review. *Eckard v. Smith*, 166 N.C. App. 312, 316, 603 S.E.2d 134, 137-38 (2004), *aff'd per curiam*, 360 N.C. 51, 619 S.E.2d 503 (2005).

DOT argues that the trial court's ruling on the two motions affects DOT's sovereign immunity. Our appellate courts have consistently recognized that "[w]here the appeal from an interlocutory order raises issues of sovereign immunity . . . such appeals affect a substantial right sufficient to warrant immediate appellate review." *Peverall v. County of Alamance*, 154 N.C. App. 426, 429, 573 S.E.2d 517, 519 (2002), *disc. review denied*, 356 N.C. 676, 577 S.E.2d 632 (2003). DOT contends, without citing any authority, that its "appeal is squarely based upon the defense of sovereign immunity. Allowing

Teer to proceed with its suit without compliance with N.C. Gen. Stat. § 136-29, which must be strictly construed, violates NCDOT's sovereign immunity."

We do not find this assertion as obvious as DOT does. We note that the State has waived its sovereign immunity with respect to claims against DOT arising from construction contracts by enacting N.C. Gen. Stat. § 136-29. We also acknowledge that because "acts permitting suit are in derogation of the sovereign right of immunity, . . . they should be strictly construed." *Floyd v. N.C. State Highway & Pub. Works Comm'n*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955).

Nonetheless, it does not necessarily follow that, once an act permits suit, any failure to comply with that statute gives rise to a defense of sovereign immunity as opposed to simply no recovery or other defenses, such as a lack of subject matter jurisdiction, a failure to exhaust administrative remedies, or a violation of the statute of limitations. *See*, *e.g.*, *Middlesex Constr. Corp. v. State*, 307 N.C. 569, 575, 299 S.E.2d 640, 644 (1983) (holding that when the plaintiff failed to comply with N.C. Gen. Stat. § 143-135.3 (Supp. 1981), the trial court should have dismissed the case "for lack of jurisdiction"). At the very least, DOT's proposition—fundamental to its right to bring this interlocutory appeal—requires citation of authority. We need not, however, resolve this question since even if we assume, without deciding, that DOT has a right to appeal, its argument regarding the trial court's subject matter jurisdiction—the lynchpin for its invocation of sovereign immunity—fails.

DOT's analysis presumes that the failure to file a verified complaint within the time limitation set forth in N.C. Gen. Stat. § 136-29 deprives the trial court of subject matter jurisdiction because the time limit is a condition precedent and not a statute of limitations. As our Supreme Court has explained, "[o]rdinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover," while "a condition precedent establishes a time period in which suit must be brought in order for the cause of action to be recognized." *Boudreau v. Baughman*, 322 N.C. 331, 340-41, 368 S.E.2d 849, 857 (1988). With respect to conditions precedent, if the plaintiff does not file suit within the specified time frame, "the plaintiff 'literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.' " *Id.* at 341, 368 S.E.2d at 857 (quoting *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972)). Thus, although conditions precedent and statutes of limitations both

involve time limitations, they are different in that a condition precedent must be met before the court acquires jurisdiction, whereas a violation of a statute of limitations does not implicate the court's power to hear the case.

N.C. Gen. Stat. § 136-29(c) specifies:

> As to any portion of a claim that is denied by the State Highway Administrator, the contractor may, in lieu of the procedures set forth in subsection (b) of this section, *within six months* of receipt of the State Highway Administrator's final decision, institute a civil action for the sum he claims to be entitled to under the contract by *filing a verified complaint* and the issuance of a summons in the Superior Court of Wake County or in the superior court of any county where the work under the contract was performed. The procedure shall be the same as in all civil actions except that all issues shall be tried by the judge, without a jury.

Id. (emphases added). In arguing that this statute involves a condition precedent, DOT relies upon *C.W. Matthews Contracting Co. v. State*, 75 N.C. App. 317, 330 S.E.2d 630 (1985) and *E.F. Blankenship Co. v. N.C. Dep't of Transp.*, 79 N.C. App. 462, 339 S.E.2d 439 (1986), *aff'd per curiam by evenly divided court*, 318 N.C. 685, 351 S.E.2d 293 (1987).

DOT is correct that in *C.W. Matthews*, 75 N.C. App. at 319, 330 S.E.2d at 631, this Court held that the requirements under § 136-29 "are conditions precedent" that "must be satisfied to vest the trial court with jurisdiction to hear the action." Similarly, in *E.F. Blankenship*, 79 N.C. App. at 464, 339 S.E.2d at 440-41, the Court affirmed the dismissal of a complaint filed without a verification—even though the plaintiff subsequently filed an amended complaint with a verification—because the filing of a verification within six months was "a condition precedent to bringing this action in superior court."

Both opinions, however, construed a prior version of N.C. Gen. Stat. § 136-29, which expressly provided that its time requirements were conditions precedent to bringing an action. The statute, as it existed at the time of those two opinions, read in pertinent part:

> The submission of the claim to the State Highway Administrator within the time and as set out in subsection (a) of this section and the filing of an action in the superior court within the time as set

> out in subsection (b) of this section . . . *shall be a condition precedent to bringing such an action under this section and shall not be a statute of limitations.*

N.C. Gen. Stat. § 136-29(d) (1986) (emphasis added), *amended by* 1987 Sess. Laws ch. 847, sec. 3.[1]

In 1987, the year following *E.F. Blankenship*, the statute was amended to its current version. As part of that amendment, the General Assembly removed the language specifying that the time limitations constituted conditions precedent and not statutes of limitations. Traditional principles of statutory construction provide that " '[i]n construing a statute with reference to an amendment, it is presumed that the Legislature intended either (1) to change the substance of the original act or (2) to clarify the meaning of it.' " *Spruill v. Lake Phelps Volunteer Fire Dep't, Inc.*, 351 N.C. 318, 323, 523 S.E.2d 672, 676 (2000) (quoting *Colonial Pipeline Co. v. Neill*, 296 N.C. 503, 509, 251 S.E.2d 457, 461 (1979)). This Court has further explained that "[w]hile the presumption is that the legislature intended to change the law through its amendments, where the language of the original statute is ambiguous such amendments may be deemed, not as a change in the law, but as a clarification in the language expressing that law." *N.C. Elec. Membership Corp. v. N.C. Dep't of Econ. and Cmty. Dev.*, 108 N.C. App. 711, 720, 425 S.E.2d 440, 446 (1993).

Here, the pre-1987 version of N.C. Gen. Stat. § 136-29(d) was clear and unambiguous. There was nothing to clarify; the plain language of the statute spoke for itself. Thus, we hold that the General Assembly, in 1987, intended to change the law. As other jurisdictions have recognized, if the legislature deletes specific words or phrases from a statute, it is presumed that the legislature intended that the deleted portion should no longer be the law. *See, e.g.*, *Joe v. Lebow*, 670 N.E.2d 9, 19 (Ind. Ct. App. 1996) ("When a statute contains language which is deleted by the legislature, we presume that the legislature intended the deletion to represent a change in the law."); *State v. Eversole*, 889 S.W.2d 418, 425 (Tex. App. 1994) ("[W]hen the legislature amends a particular statute and omits certain language of the former statute in its amended version, the legislature specifically intended that the omitted portion is no longer the law. Every word

1. That version of N.C. Gen. Stat. § 136-29(b) provided for the filing of a verified complaint in superior court within six months of receipt of the State Highway Administrator's decision.

excluded from a statute must be presumed to have been excluded for a reason.").

We find the reasoning of these and similar decisions persuasive and hold that the General Assembly, by deleting the provision specifying that the time limitations were conditions precedent, expressed its intent that the time limits would cease to be conditions precedent and, instead, would constitute statutes of limitations. Any other conclusion would mean that this aspect of the 1987 amendment was without purpose, and it is well established in this State that amendments are presumed not to be without purpose. *Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992) ("[W]e follow the maxims of statutory construction that words of a statute are not to be deemed useless or redundant and amendments are presumed not to be without purpose.").

Since the time limitations of N.C. Gen. Stat. § 136-29 are not conditions precedent, the question before the trial court was whether Teer's claim was barred by the statute of limitations. Our appellate courts have specifically recognized that a statute of limitations defense does not implicate the State's sovereign immunity. *See Estate of Fennell v. Stephenson*, 354 N.C. 327, 334, 554 S.E.2d 629, 633 (2001) (distinguishing between arguments based on sovereign immunity and the statute of limitations); *Fowler v. Worsley*, 158 N.C. App. 128, 129 n.1, 580 S.E.2d 74, 75 n.1 (2003) ("Defendant's appeal, however, does not raise the issue of sovereign immunity. Instead, it requires application of the statute of limitations . . . .").

Orders denying motions to dismiss based upon the statute of limitations are interlocutory and not immediately appealable. *Thompson v. Norfolk Southern Ry. Co.*, 140 N.C. App. 115, 120-21, 535 S.E.2d 397, 401 (2000). Likewise, appeals from orders allowing motions to amend are interlocutory and subject to dismissal. *Howard v. Ocean Trail Convalescent Center*, 68 N.C. App. 494, 496, 315 S.E.2d 97, 99 (1984). Since DOT has not identified any other substantial right that would be lost if this Court does not review the denial of its motion to dismiss or the granting of the motion to amend, we dismiss this appeal. Apart from our holding regarding N.C. Gen. Stat. § 136-29, we express no opinion as to the merits of DOT's appeal of the trial court's order.

Appeal dismissed.

Judges CALABRIA and ELMORE concur.

HENRY DUNLAP DAWBARN, JR., PLAINTIFF v. LINDA KAY DAWBARN, DEFENDANT

No. COA05-364

(Filed 7 February 2006)

1. **Husband and Wife— postnuptial agreement—property transferred upon signing—not void**

   A postnuptial agreement that transferred property to defendant wife was not void as against public policy where the property was transferred upon the signing of the agreement, so that neither party had an incentive to end the marriage. Summary judgment was properly granted for defendant.

2. **Husband and Wife— postnuptial agreement—statute of limitations**

   Any claim for fraud, duress, or undue influence involving a postnuptial agreement accrued at the time the agreement was signed because plaintiff was aware of defendant's alleged threats when he signed. The statute of limitations barred plaintiff's claim and summary judgment was properly granted for defendant.

3. **Husband and Wife— postnuptial agreement—fiduciary duty—representation by attorney**

   The fiduciary duty between husband and wife terminated and was not breached where the parties went to defendant wife's attorney to sign a postnuptial agreement. Moreover, plaintiff does not point to any evidence that defendant failed to disclose information she should have disclosed. Summary judgment was correctly granted for defendant.

Appeal by Plaintiff from judgment entered 8 October 2004 by Judge Kimberly Taylor, in Superior Court, Iredell County. Heard in the Court of Appeals 6 December 2005.

Pope, McMillan, Kutteh, Simon & Privette, P.A., by Charles A. Schieck, for plaintiff-appellant.

Homesley, Jones, Gaines & Dudley, by Edmund L. Gaines and Mitchell P. Johnson, for defendant-appellee.

WYNN, Judge.

In general, public policy "is not offended by permitting . . . spouses to execute a complete settlement of all spousal interests in

each other's real and personal property and yet live together." *In re Estate of Tucci*, 94 N.C. App. 428, 438, 380 S.E.2d 782, 788 (1989). In this case, Plaintiff-husband argues that the postnuptial agreement provided an economic incentive to his Defendant-wife to leave the marriage and therefore was repugnant to public policy. The postnuptial agreement in this case transferred the property to the wife upon the signing of the agreement, whether the parties separated in the future had no effect on the terms of the agreement; thus, we hold that the agreement did not provide either party an incentive to end the marriage.

The facts show that Plaintiff, Henry Dunlap Dawbarn, Jr., and Defendant, Linda Kay Dawbarn married on 20 April 1985. On or about 25 August 1993, Defendant confronted Plaintiff about his involvement in an extramarital affair. Two days later, at Defendant's request, Plaintiff drafted a note stating his desire to transfer ownership of all three houses the couple jointly owned, with their contents, to Defendant. This transfer of property was to be construed as Plaintiff's good faith effort to stay in and continue to work on the marriage.

Subsequently, Plaintiff suggested having the agreement formalized by his attorney. Defendant responded that she already hired an attorney, Richard Rudisill, to represent her and preferred that they go to his office to formalize the agreement. On 30 August 1993, the couple met with Mr. Rudisill, and, after reviewing the Agreement at issue and the deeds at issue, Plaintiff signed the Agreement, deeds, and a memorandum of agreement. The Agreement states in relevant part:

> The parties hereto do contract and agree as follows: That since the marriage of the Parties, the property as is hereinafter specifically enumerated has been acquired or owned by either the Party of the First Part/Husband or the Party of the Second Part/Wife or both.
>
> That it is the contract and agreement of the Parties that from and after the date of this document, the property enumerated below will be the sole and separate property of the Party of the Second Part/Wife, free and clear of any right, title, claim, or interest of the Party of the First Part/Husband whatsoever, including but not limited to, claims pursuant to N.C.G.S. § 50-20 et seq, and the said Party of the First Part/Husband does hereby bargain, sell, convey and quitclaim unto Party of the Second Part/Wife all of his right, title and interest therein.

The Agreement transferred to Defendant the three homes purchased during the course of the marriage, all of the vehicles owned by the parties, and all of the furnishings in the homes. Plaintiff also assumed responsibility for all future costs associated with the homes, including, but not limited to, ad valorem taxes, repairs, and "redecorating costs and the like." At the time of the parties' execution of the Agreement, the property conveyed to Defendant was worth approximately $850,000.00. Defendant also specifically retained the right to pursue third parties through the legal system, and reserved all rights to make further claims pertaining to Plaintiff's separate property in the event there was a subsequent equitable distribution proceeding by either party at any time in the future. In January 1994, Plaintiff executed another deed convening a parcel of property to Defendant to complete the conveyance of the properties to her according to the Agreement. Plaintiff testified that this conveyance was free from "any kind of duress or coercion."

After the execution of the agreements, the parties lived together as husband and wife for more than nine years and did not treat the property as belonging solely to Defendant. In May 2003, Plaintiff asked Defendant to take out a loan on one of the pieces of property that Plaintiff had conveyed to her pursuant to the Agreement. Defendant refused, and, approximately two weeks later, the parties separated.

In August 2003, Plaintiff filed a lawsuit seeking to set aside the Agreement on the grounds of undue influence, fraud, duress, breach of a fiduciary duty, lack of consideration, and contravention of public policy. Following the depositions of both parties and the filing of several affidavits, Defendant moved the court to grant summary judgment on all claims raised in Plaintiff's complaint. After hearing oral arguments and reviewing the pleadings, deposition transcripts and affidavits tendered to the court, Judge Kimberly Taylor granted summary judgment in favor of Defendant on all claims advanced by Plaintiff in an order entered 8 October 2004. Plaintiff appeals to this Court.

"[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) (citation omitted). Also, the evidence presented by the parties must be viewed in the light most favorable to the non-

movant. *Id.* 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) (2005).

[1] In his first argument on appeal, Plaintiff contends the trial court erred in granting Defendant summary judgment on his claim that the Agreement was void at its inception as against public policy. We disagree.

North Carolina General Statute section 52-10(a) provides in pertinent part:

> (a) Contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released.

N.C. Gen. Stat. § 52-10(a) (2005). Public policy "is not offended by permitting . . . spouses to execute a complete settlement of all spousal interests in each other's real and personal property and yet live together." *Tucci*, 94 N.C. App. at 438, 380 S.E.2d at 788. However, when an agreement provides an economic inducement to leave the marriage, it is void as against public policy. *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E.2d 697 (1968).

Plaintiff relies on this Court's decision in *Matthews* to support its contention that the Agreement violates public policy. *Id.* However, the facts in *Matthews* are quite distinguishable from the facts in this case. In *Matthews*, the contract at issue provided that the plaintiff had promised "that if I ever leave [the defendant], everything I have or will have will be hers to have and hold for the benefit of our children and herself[.]" *Id.* We held that this contract was void as against public policy because enforcing the agreement would "induce the wife to goad the husband into separating from her in order that the agreement could be put into effect[.]" *Id.* at 147, 162 S.E.2d at 699.

Here, there is no evidence in the record to suggest that the Agreement provided either party any economic inducement to leave

the marriage. Because the properties became Defendant's upon the signing of the Agreement, whether the parties separated in the future had no effect on the terms of the Agreement. Thus, neither party had an incentive to end the marriage under the Agreement. Moreover, Defendant testified that the purpose of the Agreement was to show a good faith effort by Plaintiff to stay in and continue to work on the marriage. Likewise, Plaintiff's own affidavit states that the Agreement encouraged him to stay in the marriage:

> That as a result of said Agreement, I felt that I had no choice but to remain married to Linda Kay Dawbarn, even though our marriage has been less than happy for quite some time in the recent past.

Where "it appears the execution of the Agreement was intended to *encourage* the parties to reconcile and improve their marriage[,]" public policy is not violated. *Tucci*, 94 N.C. App. at 438, 380 S.E.2d at 788 (emphasis in original). Because there is no evidence in the record to suggest that the Agreement would give either spouse an incentive to end the marriage, and, based on Plaintiff's affidavit and Defendant's deposition testimony, the execution of the Agreement encouraged the parties to reconcile and remain married, the Agreement does not violate public policy. We therefore find no merit in Defendant's first assignment of error.

[2] Plaintiff next argues the trial court erred in granting Defendant summary judgment on Plaintiff's claim that the Agreement was unconscionable, executed under duress, and that the agreement at issue should be rescinded. We hold that the trial court correctly granted summary judgment in favor of Defendant on the grounds that the statute of limitations barred Plaintiff's assertions of duress.

Preliminarily, we note that a postnuptial agreement, like any other contract, is not enforceable if it is "unconscionable or procured by duress, coercion, or fraud." *Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985) (citations omitted). A determination of unconscionability requires both procedural and substantive unconscionability. *King v. King*, 114 N.C. App. 454, 457-58, 442 S.E.2d 154, 157 (1994). Procedural unconscionability "involves bargaining naughtiness in the formation of the contract, i.e., fraud, coercion, undue influence, misrepresentation, inadequate disclosure." *Id.* To prove substantive unconscionability, "[t]he inequality of the bargain . . . must be so manifest as to shock the judgment of a person of common sense, and . . . the terms . . . so oppressive that no rea-

sonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Id.* (quoting *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981)).

Under North Carolina law, there is a three-year limitation for filing an action for duress, undue influence and fraud. N.C. Gen. Stat. § 1-52(9) (2005). A cause of action for duress, undue influence and fraud accrues upon discovery by the aggrieved party of the facts constituting the fraud. *Id.* Courts in this jurisdiction have interpreted this language to mean that the "cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed." *Davis v. Wrenn*, 121 N.C. App. 156, 158-59, 464 S.E.2d 708, 710 (1995) (internal quotation and citation omitted); *see also Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 417-18, 558 S.E.2d 871, 876 (2002) (applying the date of having knowledge of an alleged undue influence as the date that a deed was executed and filed); *Biesecker v. Biesecker*, 62 N.C. App. 282, 286, 302 S.E.2d 826, 829 (1983) (holding that a wife was not entitled to claim duress more than three years after execution of the deed because the cause of action accrued when the husband threatened the wife with physical violence unless she signed the deed).

In this case, Plaintiff contends Defendant threatened to sue the person with whom he engaged in an extramarital affair unless he executed the Agreement on 30 August 1993. Because Plaintiff was aware of Defendant's alleged threats, any cause of action for fraud, duress or undue influence accrued at the time he signed the Agreement in 1993. Such claims are now barred by the three-year limitation set forth in section 1-52(9). Since a determination of unconscionability requires both procedural and substantive unconscionability, *King*, 114 N.C. App. at 457-58, 442 S.E.2d at 157, and we have found that Plaintiff's claims of procedural unconscionability are barred by the statute of limitations, we need not address Plaintiff's claim that the Agreement is substantively unconscionable. Therefore, the trial court properly granted Defendant summary judgment on Plaintiff's claim that the Agreement was unconscionable at its inception.

[3] In his final argument on appeal, Plaintiff contends the trial court improperly granted summary judgment on Plaintiff's claim that Defendant breached her fiduciary duty to Plaintiff by having the Agreement executed and seeking to enforce the Agreement more than nine years later. We disagree.

The relationship between a husband and wife creates a fiduciary duty. *Sidden v. Mailman*, 150 N.C. App. 373, 376, 563 S.E.2d 55, 58 (2002) (quoting *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119 (1986)). Where a fiduciary relationship exists between spouses involved in a transaction, each spouse has a duty of full disclosure to the other. *Id.; see also Howell v. Landry*, 96 N.C. App. 516, 525, 386 S.E.2d 610, 615 (1989) (stating "[w]hen the parties to the agreement stand in a confidential relationship to one another, there must be full disclosure between the parties as to their respective financial status."). However, when one or both of the spouses are represented by legal counsel, the fiduciary relationship terminates. *Id.* at 376-77, 563 S.E.2d at 58. In the instant case, the fiduciary duty between Plaintiff and Defendant terminated when Defendant retained Mr. Rudisill to represent her in the transaction with Plaintiff. *See id.*

Moreover, even assuming *arguendo* that the fiduciary relationship between Plaintiff and Defendant did not terminate when Defendant retained legal counsel, Plaintiff does not point to any evidence in the record to show that Defendant failed to disclose any information that she should have disclosed pursuant to the fiduciary duty that she owed Plaintiff as her husband. Plaintiff testified that he knew that Mr. Rudisill and his law firm only represented Defendant, that the Agreement would affect significant legal rights with a long range effect, that he should consult an attorney before signing it, that he had adequate time to consider the Agreement, and that he signed the Agreement free from pressure and coercion. We therefore hold that Plaintiff's argument is without merit, and the trial court properly granted Defendant summary judgment on Plaintiff's breach of fiduciary duty claim.

Affirmed.

Judges STEELMAN and LEWIS concur.

IN RE S.W.

[175 N.C. App. 719 (2006)]

IN THE MATTER OF: S.W.

No. COA05-596

(Filed 7 February 2006)

1. Termination of Parental Rights— motion to dismiss petition—untimely termination hearing—untimely entry of written termination order—failure to show prejudice

The trial court did not err by denying respondent mother's motion to dismiss the termination of parental rights petition based on the untimeliness of the termination hearing and the trial court's entry of the written termination order because respondent failed to show prejudice resulting from either of the statutory infractions under N.C.G.S. § 7B-1109(a) and (e).

2. Evidence— hearsay—exception—admission by party opponent

The trial court did not err in a termination of parental rights case by allowing a social worker to testify over respondent mother's objection to statements made by respondent to the social worker, because: (1) in termination of parental rights proceedings, the party whose rights are sought to be terminated is a party adverse to DSS in the proceeding; and (2) the statement was admissible as an exception to the hearsay rule as an admission by a party opponent under N.C.G.S. § 8C-1, Rule 801(d).

3. Termination of Parental Rights— findings of fact—conclusions of law—sufficiency of evidence

The trial court did not err in a termination of parental rights case by its findings of fact numbers 4, 6 through 19, 21, and 23, and by its conclusions of law numbers 3 through 5, because: (1) respondent mother failed in her brief to specifically address any of the findings of fact to which she excepts, and thus, she abandoned her assignments of error pertaining to those findings of fact; (2) there was competent evidence to support findings of fact numbers 4, 6 through 17, and 19 as these findings of fact were admitted in respondent's answer, if not in exact form, at least in substance; (3) although minor portions of some of the remaining findings of fact including 18 and 21 are not supported by the evidence in the record, the remaining findings of fact are more than sufficient to support the trial court's conclusions of law complained of by respondent; and (4) finding of fact 23 is supported by the testimony of the social worker presented at the hearing.

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

Although respondent mother assigns error to the trial court's conclusion of law number 11 in a termination of parental rights case, this assignment of error is deemed abandoned because respondent failed to set forth any reason or argument in support of this assignment of error as required by N.C. R. App. P. Rule 28(b)(6).

5. Constitutional Law— effective assistance of counsel—failure to object—business records exception

Respondent mother did not receive ineffective assistance of counsel in a termination of parental rights case based on her trial counsel's failure to object to the admission of petitioner's exhibits numbers one through six, or by counsel's failure to object to the trial court's taking judicial notice of several prior court orders, because: (1) the exhibits were admissible under the business records exception in N.C.G.S. § 8C-1, Rule 803(6) when there were affidavits from custodians of the records that satisfied the foundational requirements of the rule; and (2) in subsequent proceedings to terminate parental rights on the basis of neglect, the court is permitted to consider prior adjudications of neglect involving the same parent, and respondent admitted verbatim in her answer the particular finding to which she now excepts.

Appeal by respondent-mother from order entered 4 October 2004 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 16 November 2005.

Assistant Durham County Attorney Cathy L. Moore, for Durham County Department of Social Services, petitioner-appellees.

Attorney Advocate Wendy C. Sotolongo, for Guardian ad Litem, petitioner-appellees.

Peter Wood, for respondent-mother-appellant.

JACKSON, Judge.

A petition alleging S.W. to be neglected was filed 22 October 2001 after S.W. was found with her mother ("respondent") out in the rain while respondent was buying illegal narcotics. S.W. was placed in the custody of the Durham County Department of Social Services (DSS).

An amended petition alleging dependency and neglect was filed 7 November 2001. S.W. was adjudicated dependent and neglected 6 December 2001 at which time S.W. was placed in the custody of respondent. S.W. was again removed from the custody of respondent 26 December 2001 after respondent left S.W. unattended at the homeless shelter in which they both were staying from 24 December until the afternoon of 25 December. S.W. has remained in foster care since that time.

In the interim, respondent has been incarcerated periodically, failed to comply with court-ordered drug testing, failed to maintain regular contact with DSS, failed to maintain stable living arrangements, and has attended drug treatment only sporadically. Respondent had only three visits with S.W. during the course of 2003. A petition to terminate the parental rights of respondent and S.W.'s father was filed 29 August 2003. Respondent filed an answer 31 October 2003, after receiving a thirty day extension of time in which to file. S.W.'s father was served by publication and never filed an answer nor participated in these proceedings in any way and is not a party to this appeal.

A DSS social worker who was a critical witness for DSS in this proceeding was on medical and then maternity leave from sometime between September 2003 and 2 February 2004. DSS took no judicial action in this matter during the time the social worker was on leave. DSS filed a notice of hearing on the day the social worker returned to work which set the termination hearing in the case for 1 April 2004. Respondent filed a motion to dismiss the petition for failure to hold the hearing within the statutorily prescribed time after the filing of the petition. Respondent's motion was heard 2 April 2004 and was denied.

The termination hearing also was held 2 April 2004 and the termination petition was granted. Respondent filed her first notice of appeal 5 April 2004 appealing from the oral in-court grant of the termination petition. The order of termination was filed 4 October 2004. Respondent filed a second notice of appeal 14 October 2004 appealing from the 4 October written order. Appellate entries were made 21 October 2004. The written order of termination was served on respondent 10 December 2004 and respondent filed a third notice of appeal 15 December 2004.

On appeal, respondent assigns as error: (1) the trial court's denial of her motion to dismiss the Termination of Parental Rights Petition

("TPR"); (2) the trial court's failure to sign the Order of Termination within the thirty day period mandated by statute; (3) the admission of alleged hearsay testimony over respondent's objection; (4) that findings of fact numbers 4, 6 through 19, 21, and 23 were not supported by the evidence; (6) that conclusions of law numbers 3 through 5 and 11 were not supported by the findings of fact or evidence; (7) that the trial court abused its discretion in terminating her parental rights; and (8) that she received ineffective assistance of counsel at the termination hearing.

[1] We first address respondent's assignments of error regarding the untimeliness of the termination hearing and of the trial court's entry of the written termination order together. This Court uniformly has held that failure of a trial court to enter termination orders within the time standards set forth in North Carolina General Statutes, section 7B-1109(e) need only be reversed when the appellant demonstrates prejudice as a result of the delay. *In re P.L.P.*, 173 N.C. App. 1, 7, 618 S.E.2d 241, 245 (2005); *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). DSS concedes that neither the termination hearing nor the written termination order complied with the time requirements of North Carolina General Statutes, section 7B-1109(a) and (e) respectively. However, respondent fails to show prejudice resulting from either of these statutory infractions.

Although our prior cases cited above have addressed the failure of trial courts to file the written termination order within the time provided in section 7B-1109(e), we hold that the same logic must be applied to the timeliness of the termination hearing after the filing of the termination petition under North Carolina General Statutes, section 7B-1109(a). The extension of this application is logical since the issues are addressed under different subsections of the same statute.

Respondent alleges that her appellate rights were compromised by the failure to timely hold the termination hearing and to timely file the written termination order, but fails to demonstrate which rights were compromised or in what way. Respondent filed notices of appeal at each pertinent stage of these proceedings, and her appeal is being considered on its merits by this Court. Accordingly, respondent has failed to show prejudice as a result of the complained of errors and these assignments of error are overruled.

[2] Respondent next argues that the trial court erred in allowing S.W.'s social worker to testify, over respondent's objection, to statements made to her by respondent. In response to respondent's

objections, petitioner argued that the statements were admissible pursuant to the admissions of a party opponent exception to the hearsay rule. The trial court allowed the testimony after hearing from both parties.

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). One of the enumerated exceptions to the rule prohibiting the introduction of hearsay evidence is for admissions of a party opponent. This exception provides, in relevant part, "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity . . . ." N.C. Gen. Stat. § 8C-1, Rule 801(d). In termination of parental rights proceedings, the party whose rights are sought to be terminated is a party adverse to DSS in the proceeding. *In re Davis*, 116 N.C. App. 409, 412, 448 S.E.2d 303, 305, *disc. review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994). Accordingly, the social worker's testimony regarding respondent's statements to her was properly allowed. This assignment of error is overruled.

[3] Respondent next assigns as error that the trial court's findings of fact numbers 4, 6 through 19, 21, and 23 are not supported by the evidence and that the trial court's conclusions of law numbers 3 through 5 are not supported by the findings of fact. In reviewing a termination order, this Court must determine whether the trial court's findings of fact are supported by clear and convincing evidence and if its conclusions of law are, in turn, supported by those findings of fact. *In re T.C.B.*, 166 N.C. App. 482, 484-85, 602 S.E.2d 17, 19 (2004) (citing *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173-74 (2001)).

Respondent fails in her brief, to specifically address any of the findings of fact to which she excepts, therefore, she abandons her assignments of error pertaining to those findings of fact. A review of the record reveals that there is competent evidence to support findings of fact numbers 4, 6 through 17 and 19 as these findings of fact are admitted to in respondent's answer, if not in exact form, at least in substance. The portions of finding of fact number 18 regarding the dates of the social worker's medical and maternity leave and the social worker's conversation with respondent regarding these proceedings are supported by the testimony of the social worker. We are unable, however, to find any evidence in the record to support the portions of this finding of fact regarding the social worker checking

her voice mail while on leave and the absence of messages from respondent and the alleged statement by the respondent that she thought her parental rights already had been terminated. Finding of fact number 21, that DSS has provided for all of S.W.'s needs in an amount of $330.00 monthly foster care board rate and that the parents had not provided any financial support for S.W., is supported by the certified affidavit of the child support supervisor that no child support for S.W. had been received from any source and in the testimony of the social worker assigned to the case that no payments had been received outside of the child support system. We are unable, however, to find evidence in the record to support the specific amount of the foster care board rate. Finally, finding of fact number 23, that S.W. is currently in a stable, nurturing home where she is doing well and is bonded to her foster parents who already had adopted one of S.W.'s half siblings and are willing to adopt S.W. as well, is supported by the testimony of the social worker presented at the hearing.

Although we have found that minor portions of some of the trial court's findings of fact are not supported by the evidence in the record, we hold that the remaining findings of fact are more than sufficient to support the trial court's conclusions of law complained of by respondent. Accordingly, these assignments of error are overruled.

[4] Respondent next assigns error to the trial court's conclusion of law number 11, that it was in the child's best interest that respondent's parental rights be terminated, and the trial court's terminating respondent's parental rights is an abuse of discretion. Respondent fails, however, to present any argument in support of these assignments of error. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. Rule 28(b)(6) (2005). As respondent has failed to set forth any reason or argument in support of these assignments of error, they are deemed abandoned and are not considered.

[5] Respondent next argues that she received ineffective assistance of counsel in that her trial counsel failed to object to the admission of petitioner's exhibits numbers one through six. These exhibits include a certified Child Support Enforcement Affidavit and certified copies of respondent's substance abuse and medical treatment records. In support of this argument, respondent simply asserts that the exhibits in question "contain numerous hearsay statements from various med-

ical personnel . . . .” Respondent does not, however, identify any of the alleged hearsay statements.

Petitioner argues that exhibits two through six were admissible under the “business records exception” to the hearsay rule. Respondent argues that the exhibits were not admissible under the business records exception because the proper foundation had not been laid. The “business records exception” to the hearsay rule is found in North Carolina General Statutes, section 8C-1, Rule 803(6), which provides in relevant part:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness

is not excluded by the hearsay rule.

An affidavit from the custodian of the records in question that states that the records are true and correct copies of records made, to the best of the affiant’s knowledge, by persons having knowledge of the information set forth, during the regular course of business at or near the time of the acts, events or conditions recorded is sufficient to satisfy the foundation requirements of Rule 803(6). *Chamberlain v. Thames*, 131 N.C. App. 705, 716-17, 509 S.E.2d 443, 450 (1998). Affidavits satisfying these requirements are included in the record for exhibits two through six. Accordingly, these exhibits were admissible and respondent’s trial counsel did not fail to provide effective assistance in failing to object to their admission.

Respondent further contends that her trial counsel was ineffective in her representation by failing to object to the trial court’s taking judicial notice of several prior court orders. Courts may take judicial notice of prior court orders in termination proceedings. *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). The extent to which the court may rely on such prior orders in making its determination is unclear. *In re Byrd*, 72 N.C. App. 277, 280, 324 S.E.2d 273, 276 (1985).

The only error alleged by respondent to have resulted from the admission of the prior court orders in the instant case is the trial court's finding of fact number 6 that the respondent's parental rights to three other children had been terminated previously. Respondent asserts that the only evidence in the record to support this finding was the prior orders. In subsequent proceedings to terminate parental rights on the basis of neglect, the court is permitted to consider prior adjudications of neglect involving the same parent. *In re Stewart Children*, 82 N.C. App. 651, 653, 347 S.E.2d 495, 497 (1986) (citing *In re Ballard*, 311 N.C. 708, 319 S.E.2d 227). Additionally, respondent admitted to this particular finding verbatim in her answer. Accordingly, this assignment of error is overruled.

Affirmed.

Judges BRYANT and CALABRIA concur.

JEFFREY R. HUGHES AND WIFE, MELODY HUGHES, PLAINTIFFS v. K.P. WEBSTER, AND BI-LO, LLC, DEFENDANTS

No. COA05-551

(Filed 7 February 2006)

1. Pharmacists— misfilling of prescription—failure to instruct on peculiar susceptibility

The trial court erred in a negligence case arising out of defendant pharmacist's misfilling of a prescription by failing to instruct the jury on the peculiar susceptibility of plaintiff, and plaintiff is entitled to a new trial, because: (1) there was evidence at trial that an ordinary person would have been injured in the form of the normal toxicity effect of the pertinent drug such as vomiting, nausea, and slowed heart rate; (2) there was evidence that plaintiff's heart damage and stroke were caused by a hypersensitive drug reaction to the pertinent drug; (3) the jury sent a note during deliberations evidencing that the jury was confused by the instructions given by the judge; (4) there were allusions throughout the trial to a hypersensitive drug reaction of plaintiff, yet the jury was in no way instructed on what to do with this evidence; and (5) plaintiff requested a jury instruction on peculiar susceptibility while defendants requested one as well in the lan-

guage of N.C.P.I. Civ. 102.20, and given the incomplete state of the record, through no fault of appellant, it cannot be said that plaintiff waived his objection and failed to preserve any error for appeal.

2. Witnesses— qualifications—expert testimony

The trial court did not abuse its discretion in a negligence case arising out of the misfilling of a prescription by excluding a doctor's opinion on causation, because: (1) the doctor admitted that he was not an expert in the area in which he was testifying and further admitted that he came to have his opinion solely by reading the opinion of another expert in the field; and (2) the exclusion was harmless where the same opinion was elicited from several other experts throughout the trial.

3. Appeal and Error— mootness—proper notice—new trial

Although plaintiff contends the trial court erred in a negligence case arising out of the misfilling of a prescription by excluding the expert opinion as to loss of future wages and failing to exclude the testimony of defendants' experts where proper notice was not given pursuant to the order issued by the court, this issue is moot where notice can be properly given at a new trial granted on other grounds.

Appeal by plaintiffs from judgment and order entered 1 October 2004 and order entered 21 December 2004 by Judge Christopher M. Collier in Cabarrus County Superior Court. Heard in the Court of Appeals 7 December 2005.

Ferguson Scarbrough & Hayes, P.A., by James E. Scarbrough, for plaintiff appellants.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for defendant appellees.

McCULLOUGH, Judge.

Plaintiffs appeal from judgment entered after a jury verdict finding that plaintiff Jeffrey R. Hughes was injured, through the negligence of defendants, entitling them to recover $50,000.00 and from an order awarding costs. A new trial must be awarded.

FACTS

On 5 April 2002, plaintiffs (Mr. and Mrs. Hughes) filed a complaint against defendants (Webster and Bi-Lo) alleging negligence on the

part of Webster as an employee of Bi-Lo in the misfilling of Mr. Hughes' prescription which was the proximate cause of injury to Mr. and Mrs. Hughes. Webster and Bi-Lo filed a motion to dismiss and answer on 10 June 2002 denying negligence and liability for damages alleged to have been suffered by Mr. and Mrs. Hughes. Before trial, an order was entered on 1 March 2004 requiring Mr. and Mrs. Hughes to disclose all experts and expert opinions to be used at trial on or before 1 April 2004 and requiring Webster and Bi-Lo to then disclose all of their experts and expert opinions to be used at trial within thirty days. In the pretrial order pursuant to a conference with both side's attorneys, it was stipulated that Webster and Bi-Lo were negligent in filling the prescription of Mr. Hughes and that the only remaining issues at trial were whether Mr. and Mrs. Hughes were injured or damaged by the negligence of Webster and Bi-Lo and to what amount of damages, if any, Mr. and Mrs. Hughes were entitled.

The case proceeded to trial by jury on 21 June 2004. The evidence at trial tended to show that Mr. Hughes went to Bi-Lo Pharmacy to have a prescription for Aciphex 20 mg. refilled by Pharmacist Webster who misfilled the prescription giving Mr. Hughes Aricept 10 mg. bottled and labeled as Aciphex 20 mg. Unaware of the mistake, Mr. Hughes took the misfilled prescription from 22 May 2001 to 28 May 2001 when he began to experience nausea, dizziness, vomiting, weakness, headaches, tingling in his fingers, sweating, shortness of breath, and a slowed heart rate. Around 28 May 2001, while in the hospital, Mr. Hughes sustained damage to his heart and suffered a stroke. Mr. Hughes was released from the hospital and again, unknowingly, resumed taking the misfilled prescription. The adverse symptoms recurred and Mr. Hughes returned to the hospital on 9 June 2001. Once again Mr. Hughes was released from the hospital whereupon he resumed taking the misfilled prescription from 12 June 2001 to 23 June 2001 until he again experienced adverse symptoms and was readmitted to the hospital. The prescription ran out 5 July 2001 at which time Mr. Hughes returned to Bi-Lo for a refill and discovered that he had been taking a drug other than the one which he was prescribed.

The expert testimony showed that the normal toxicity effects of Aricept included nausea, vomiting, and slowed heart rate. Experts testifying on behalf of Mr. and Mrs. Hughes testified at trial that in their opinion, the heart damage and stroke suffered by Mr. Hughes was either directly caused by taking Aricept or by a hypersensitive adverse drug reaction. Experts testifying for Webster and Bi-Lo testi-

fied that it was their opinion that the drug Aricept did not cause Mr. Hughes' heart problems. The Hugheses also offered video deposition testimony of Dr. Kelling, the primary care physician of Mr. Hughes, which contained the opinion that Aricept was the cause of the nonischemic cardiomyopathy. Webster and Bi-Lo objected to this testimony by Dr. Kelling arguing that this opinion had not been disclosed prior to trial in accordance with the previous court order. Dr. Kelling also testified in his video deposition that his opinion had changed as to the cause of the heart damage based on reading an opinion of another expert and further admitted that he was not an expert in the area. The court excluded the opinion of Dr. Kelling as to the cause of Mr. Hughes' heart damage. A motion was made by Mr. and Mrs. Hughes on 30 June 2004 to exclude evidence of the opinions of Mr. Doering and Dr. Hadler as to the cause of Mr. Hughes' cardiomyopathy and stroke, contending that the experts' opinions were not properly disclosed as they had changed since discovery, and no supplementation to discovery answers were provided by Webster and Bi-Lo. Webster and Bi-Lo also made an objection to any testimony by Mr. Hughes' economist regarding loss of future wages where the opinion was not disclosed in discovery. The trial court sustained the objection and excluded any testimony as to loss of future wages.

On 30 June 2004 and 1 July 2004 the Hugheses submitted several requests for special jury instructions to the trial judge. The requested jury instructions included an instruction on sequence of events, peculiar susceptibility, proximate cause, and foreseeability. The parties stipulated on appeal that the court reporter was unable to take down all statements at the charge conference. The parties further stipulated that there was a detailed discussion at the charge conference in which both parties requested portions of North Carolina Civil Pattern Jury Instruction 102.20. After holding the charge conference, the trial judge decided not to give Pattern Jury Instruction 102.20 or any instruction on peculiar susceptibility. During deliberations the jury submitted a note stating, "Is the question was he injured or damaged or was he injured or damaged specifically by Aricept?" In response to this question, the trial judge re-read the proximate cause instruction given earlier to the jury.

The jury found that Mr. Hughes was injured or damaged by the negligence of Webster and Bi-Lo and that he was entitled to recover $50,000.00 but found that Mrs. Hughes was not injured or damaged by their negligence and entitled to no damages. A judgment and order awarding costs was entered 1 October 2004 awarding $50,000.00 in

damages and $23,869.44 in costs to Mr. Hughes. Mr. and Mrs. Hughes filed a motion for a new trial on 1 October 2004 which was denied by order entered 21 December 2004.

Plaintiffs now appeal.

ANALYSIS

I

[1] On appeal, plaintiffs first contend that the trial court erred in failing to instruct the jury on the peculiar susceptibility of the plaintiff Mr. Hughes. We agree.

On appeal, this Court considers a jury charge contextually and in its entirety. *Jones v. Development Co.*, 16 N.C. App. 80, 86, 191 S.E.2d 435, 439, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). The charge will be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]" *Id.* at 86-87, 191 S.E.2d at 440. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988) ("Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.").

In general, where the facts of a case warrant a jury instruction on peculiar susceptibility, and where the trial court fails to charge the jury accordingly, such a failure may constitute reversible error. *See Casey v. Fredrickson Motor Express Corp.*, 97 N.C. App. 49, 387 S.E.2d 177, *disc. review denied*, 326 N.C. 594, 393 S.E.2d 874 (1990). The peculiar susceptibility doctrine is relevant to the issue of proximate causation, and without the instruction, the jury may conclude that the defendant was negligent, but that such negligence did not proximately cause the plaintiff's injuries. *See id.* at 54, 387 S.E.2d at 180. Thus, if the facts in the instant case warranted a jury instruction on peculiar susceptibility due to a pre-existing mental or physical condition, the trial court's failure to instruct the jury accordingly would constitute reversible error. *See Taylor v. Ellerby*, 146 N.C. App. 56, 552 S.E.2d 667 (2001).

A jury instruction on peculiar susceptibility is warranted where a pre-existing condition aggravates an injury suffered by the plaintiff.

See id. "The general rule is that if the defendant's act would not have resulted in any injury to an ordinary person, he is not liable for its harmful consequences to one of peculiar susceptibility, except insofar as he was on notice of the existence of such susceptibility, **but if** his misconduct amounted to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered by plaintiff notwithstanding the fact that these damages were unusually extensive because of peculiar susceptibility." *Lockwood v. McCaskill*, 262 N.C. 663, 670, 138 S.E.2d 541, 546 (1964) (emphasis added).

In the instant case, there was evidence at trial that an ordinary person would have been injured in the form of the normal toxicity effect of the drug Aricept such as vomiting, nausea and slowed heart rate. Further there was evidence that Mr. Hughes' heart damage (cardiomyopathy) and stroke were caused by a hypersensitive drug reaction to Aricept. This evidence warrants an instruction on peculiar susceptibility. Moreover, the jury sent a note during deliberations asking, "Is the question was he injured or damaged or was he injured or damaged specifically by Aricept?" evidencing that the jury was confused by the instructions given by the judge. There were allusions throughout the trial to a hypersensitive drug reaction of Mr. Hughes, yet the jury was in no way instructed on what to do with this evidence.

Mr. Hughes requested a jury instruction on peculiar susceptibility and Webster and Bi-Lo requested one as well in the language of N.C.P.I.—Civ. 102.20. The transcript of the charge conference evinces that there was a lengthy discussion regarding N.C.P.I.—Civ. 102.20; however, the transcript is incomplete. It appears from the record that Mr. Hughes was requesting peculiar susceptibility language in the instructions when he was diverted to a discussion of N.C.P.I.—Civ. 102.20. In the transcript it appears that there was further discussion as to what paragraphs of this pattern jury instruction should be given and there is an indication that Mr. Hughes agreed to the decision not to give one of the paragraphs. However, this Court does not find that his agreement to this was an acquiescence for the trial judge to fail to instruct the jury entirely on peculiar susceptibility. Therefore, given the incomplete state of the record, through no fault of the appellant, it cannot be said that Mr. Hughes waived his objection and failed to preserve any error for appeal. He is therefore entitled to a new trial.

II

[2] Next plaintiff Mr. Hughes contends that the trial court erred in excluding Dr. Kelling's opinion on causation. We disagree.

It is well established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2005). When making such determinations, trial courts are not bound by the rules of evidence. *Id.* In this capacity, trial courts are afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion. *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988). A three-step inquiry must be made in determining whether the expert testimony is admissible: "(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?" *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citation omitted).

In the instant case, there were two grounds for excluding the opinion of Dr. Kelling as to causation. The first ground was that Dr. Kelling changed his opinion from the time of his initial deposition and his deposition given as trial testimony. Dr. Kelling stated in his initial deposition that he did not know the cause of Mr. Hughes' cardiomyopathy and in his deposition for trial he testified that Aricept was the cause. Failure to disclose this opinion was in direct violation of the pretrial order requiring disclosure by 1 April. However, this ground is moot.

The second ground for excluding the opinion of Dr. Kelling rested on the fact that he did not have the requisite expertise to proffer this opinion. Dr. Kelling admitted that he was not an expert in the area in which he was testifying and further admitted that he came to have his opinion solely by reading the opinion of another expert in the field. These are not appropriate qualifications for expert testimony. Moreover, the exclusion was harmless where the same opinion was elicited from several other experts throughout the trial. *See State v. Richardson*, 341 N.C. 658, 462 S.E.2d 492 (1995) (Any error in exclusion of evidence is harmless where evidence of the same import was

admitted through the testimony of other witnesses.). Therefore, this assignment of error is overruled.

III

[3] Further, plaintiff contends that the trial court erred in excluding the expert opinion as to loss of future wages and failing to exclude the testimony of defendants' experts where proper notice was not given pursuant to the order issued by the court. This issue is moot where notice can be properly given at a new trial.

Accordingly, the trial court did not err in excluding the opinion of Dr. Kelling as to causation but did commit reversible error in failing to instruct the jury on peculiar susceptibility, and therefore a new trial must be granted. The remaining assignments of error are either meritless or deemed moot due to the decision to grant a new trial.

New trial.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA v. ANTOINE DONYELL MELTON

No. COA05-108

(Filed 7 February 2006)

1. Evidence— hearsay—business records exception—laboratory report

The trial court did not commit plain error in a first-degree rape of a child under the age of thirteen case by allowing the State to introduce as substantive evidence the results of a laboratory report without presenting the maker of the report for cross-examination and confrontation where the laboratory report confirmed that defendant tested positive for genital herpes and the child had also tested positive for genital herpes because the testimony concerning the laboratory report fell within the business records exception under N.C.G.S. § 8C-1, Rule 803(6) since, although the test was performed after defendant had been arrested, it was performed before defendant was indicted, and there was no evidence that anyone at the laboratory either had

any knowledge about the criminal prosecution or had any motive to distort the results of the laboratory report.

2. Constitutional Law— right of confrontation—testimonial laboratory report—harmless error

Even if admission of a laboratory report confirming that defendant tested positive for genital herpes constituted testimonial evidence that violated defendant's right of confrontation under *Crawford v. Washington*, 541 U.S. —— (2004), in a prosecution for first-degree rape of a child, this error was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt.

Appeal by defendant from judgment dated 5 August 2004 by Judge Milton F. Fitch, Jr. in Superior Court, Wilson County. Heard in the Court of Appeals 1 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Miles & Montgomery, by Lisa Miles, for defendant-appellant.

McGEE, Judge.

Antoine Donyell Melton (defendant) was convicted of first-degree rape of a child (the child) under the age of thirteen. The trial court sentenced defendant to 192 months to 240 months in prison. Defendant appeals.

[1] Defendant's issues on appeal do not require a statement of the facts for an understanding of our Court's determination of those issues. Defendant argues "the trial court committed plain error [by] allowing the State to introduce as substantive evidence the results of a laboratory report without presenting the maker of the report for cross-examination and confrontation." The laboratory report confirmed that defendant tested positive for genital herpes and was relevant because the child had also tested positive for genital herpes. Defendant argues the report contained inadmissible hearsay and that its introduction into evidence violated defendant's Sixth Amendment right of confrontation under *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

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) (2005). Hearsay evidence is inadmissible at trial unless an exception to the hearsay rule applies. N.C. Gen. Stat. § 8C-1, Rule 802 (2005). The State contends the laboratory report falls within the business records exception to the hearsay rule. The following documents fall within the business records exception:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2005).

In *State v. Deanes*, 323 N.C. 508, 374 S.E.2d 249 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989), our Supreme Court discussed the requirements for introduction of laboratory reports under the business records exception:

> "In instances where hospital records are legally admissible in evidence, proper foundation must, of course, be laid for their introduction. The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam*."

Id. at 526-27, 374 S.E.2d at 261 (quoting *Sims v. Insurance Co.*, 257 N.C. 32, 35, 125 S.E.2d 326, 329 (1962)). The Court emphasized the importance of the *ante litem motam* requirement, and quoted Black's Law Dictionary's definition of *ante litem motam* as follows: " 'At [a] time when declarant had no motive to distort [the] truth[,]' " and " '[b]efore suit brought, before controversy instituted. Also before the

controversy arose.' " *Deanes*, 323 N.C. at 527, 374 S.E.2d at 261 (quoting Black's Law Dictionary (5th ed. 1979)).

In *Deanes*, the defendant was charged with first-degree rape of a five-year-old girl. *Deanes* at 510, 374 S.E.2d at 252. Subsequently, a doctor who examined the girl took a sample of the girl's vaginal discharge and sent it to a private laboratory for analysis. *Id.* at 514, 374 S.E.2d at 254. The Court summarized the laboratory manager's trial testimony as follows:

> He identified the original computer worksheet, and a copy documenting the work performed on the child's specimen. The copy was introduced in evidence. [He] testified further that the test was done in the regular course of business using standard procedures and that the information was recorded promptly using standard procedures. [He] testified further that he had not known until he was called to testify that morning that there was any legal involvement with the case. [He] summarized the procedures used in the lab to confirm that the culture from the child's specimen tested positive for gonorrhea.

Id. The State also introduced evidence that the defendant had tested positive for gonorrhea. *Id.* The defendant was convicted of first-degree rape. *Id.* at 510, 374 S.E.2d at 252.

On appeal to our Supreme Court, the defendant argued the laboratory report was inadmissible hearsay not within the business records exception because it had not been prepared *ante litem motam*. *Id.* at 526, 374 S.E.2d at 261. The Court noted the laboratory manager was a qualified witness who identified the laboratory report documenting the work performed on the girl's specimen. *Id.* at 527, 374 S.E.2d at 261. The Court also noted the laboratory manager's testimony that a medical technologist had performed the test within the regular course of business shortly after the laboratory received the specimen. *Id.* at 527, 374 S.E.2d at 261-62.

The Court recognized that the test was performed after the defendant had been arrested and charged with the rape of the girl. *Id.* at 527, 374 S.E.2d at 262. However, the Court noted there was no evidence that anyone at the laboratory either had any knowledge about the criminal prosecution or had any motive to distort the results of the laboratory report. In fact, the laboratory manager testified he did not know about the defendant's criminal prosecution until the morning he was called to testify concerning the laboratory report. *Id.*

Therefore, the Court concluded the testimony concerning the laboratory report fell within the business records exception. *Id.* at 527, 374 S.E.2d at 261.

The testimony of the laboratory manager for Laboratory Corporation of American (Lab Corp) in Burlington, North Carolina, regarding the laboratory report in the case before us, was likewise admissible under the business records exception. As in *Deanes*, the laboratory manager in the present case was a qualified witness to testify regarding the laboratory report. He identified the laboratory report as a "regular Lab Corp report" which documented the results of the tests performed on defendant's blood. Also, the laboratory report was prepared within several days after the laboratory received defendant's blood sample.

As in *Deanes*, Lab Corp conducted the tests on defendant's blood sample after defendant's arrest on or about 22 May 2003. However, defendant was not indicted for the first-degree rape of the child until 12 January 2004. Also, as in *Deanes*, there was no evidence in the present case to suggest that anyone at Lab Corp had a motive to distort the results of the tests. Moreover, there was no evidence that anyone at Lab Corp even knew about defendant's criminal prosecution. In fact, it appears the hospital, not the Wilson County Sheriff's office, ordered the tests from Lab Corp because the nurse for the Wilson County Sheriff's office testified that she sent defendant's blood sample to the hospital. Under the test set forth in *Deanes*, the laboratory report at issue in the present case qualified as a business record.

[2] Defendant argues that even if the laboratory report fell within the business records exception, its introduction violated defendant's right to confront the witnesses against him pursuant to *Crawford v. Washington*. In *Crawford*, the Supreme Court held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). However, the Court also held that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law[.]" *Id.* The Supreme Court did not provide a comprehensive definition of "testimonial" evidence. *Id.*

We note that the Supreme Court in *Crawford* indicated that business records are nontestimonial "by their nature." *Id.* at 56, 158

L. Ed. 2d at 195-96; *see also*, *State v. Windley*, 173 N.C. App. 187, 193-94, 617 S.E.2d 682, 686 (2005) (recognizing the Supreme Court's indication that business records are nontestimonial). However, in a recent decision, our Court held that laboratory reports may be testimonial under certain circumstances. *State v. Huu The Cao*, 175 N.C. App. 434, 440, 626 S.E.2d 301, 305 (2006). We must therefore determine if the laboratory report at issue in the present case is testimonial or nontestimonial pursuant to the test set forth in *Cao*.

In *Cao*, the defendant was convicted of two counts of selling cocaine and two counts of possession with intent to sell or deliver cocaine. *Id.* at 436, 626 S.E.2d at 302. At trial, the State presented evidence that the defendant had sold crack cocaine to an undercover police officer on two occasions. *Id.* at 435, 626 S.E.2d at 302. After each transaction, the police officer "placed the crack cocaine he received from [the] [d]efendant in an evidence envelope, sealed it, turned it over to property control, and requested that the substances be tested for the presence of cocaine." *Id.* at 435-36, 626 S.E.2d at 302. The laboratory technician who conducted the tests on the substances did not testify at trial. Rather, the police officer read to the jury the contents of the laboratory reports, which confirmed that the substances contained crack cocaine. *Id.* at 436, 626 S.E.2d at 302. On appeal, the defendant argued that pursuant to *Crawford*, the trial court committed plain error by allowing the officer to testify regarding the contents of the laboratory reports without the laboratory technician being available for cross-examination. *Id.* at 436, 626 S.E.2d at 302-03.

In *Cao*, we held:

> [L]aboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial business records only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst.

Id. at 440, 626 S.E.2d at 305. Upon application of this rule to the facts in *Cao*, our Court concluded that, although "the laboratory reports' specification of the weight of the substances at issue would likely qualify as an objective fact obtained through a mechanical means[,]" the record did not contain enough information about the procedures

used to identify the presence of cocaine to allow the Court to determine whether that portion of the procedure met the test. *Id.* at 440, 626 S.E.2d at 305. However, we held that, even assuming the introduction of the laboratory reports was error, it was harmless beyond a reasonable doubt. *Id.* at 440-41, 626 S.E.2d at 305.

In the present case, the record also does not contain sufficient information to enable this Court to determine whether the procedures employed by Lab Corp were mechanical. However, as in *Cao*, even assuming the admission of the laboratory report was error, we conclude the error was harmless beyond a reasonable doubt. Where a trial court's error amounts to constitutional error, the State bears the burden on appeal to show the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2005); *State v. Garcia*, 174 N.C. App. 498, 504, 621 S.E.2d 292, 297 (2005). The State may meet its burden by showing there was overwhelming evidence of a defendant's guilt. *Garcia*, 174 N.C. App. at 504, 621 S.E.2d at 297.

In the present case, the child testified about the rape and identified defendant as her attacker. Testimony of both a medical doctor, who conducted a physical examination of the child, and a child protective services worker, who met with the child, corroborated the child's testimony regarding defendant's rape of the child.

The child's mother also provided independent evidence that defendant had genital herpes. The child's mother further testified that when she accused defendant of raping the child and asked defendant why he had done it, defendant responded: "Babe, I don't know. I don't know why I did it." Because there was overwhelming evidence of defendant's guilt, the trial court did not commit plain error by failing to act on its own to exclude the testimony regarding the laboratory report.

No error.

Judges WYNN and GEER concur.

ALLEN PARKER, PLAINTIFF v. BRIAN KEITH HENSLEY, DEFENDANT

No. COA05-299

(Filed 7 February 2006)

1. Costs— attorney fees—failure to make findings of fact

The trial court erred in a negligence case arising out of an automobile accident by failing to make findings to support the $500 award of attorney fees under N.C.G.S. § 6-21.1, and the case is remanded to the trial court to make proper findings to support whatever amount the trial judge decides in his discretion is appropriate in this case, because: (1) where a trial court awards attorney fees under N.C.G.S. § 6-21.1, the trial court must also make findings of fact supported by competent evidence concerning the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence; and (2) the mere recitation that the fees are reasonable without further findings is inadequate.

2. Costs— denial—abuse of discretion standard

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by denying plaintiff costs under N.C.G.S. § 6-20.

Judge JOHN concurring in part and dissenting in part.

Appeal by Plaintiff from judgment entered 28 September 2004 by Judge Jerry R. Tillett in Superior Court, Edgecombe County. Heard in the Court of Appeals 15 November 2005.

Braxton H. Bell, for plaintiff-appellant.

Poyner and Spruill, LLP, by Randall R. Adams, for defendant-appellee.

WYNN, Judge.

"If the trial court elects to award attorney fees, it must also enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence." *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 572, 551 S.E.2d 852, 856 (2001) (citation omitted). In this case, Plaintiff argues that the trial court awarded Plaintiff attorney fees under North Carolina General Statute section 6-21.1 without making any findings of fact to support the *amount* of the award.

See N.C. Gen. Stat. § 6-21.1 (2005). As we agree with Plaintiff's contention, we remand this case to the trial court for further findings of fact.

This matter arises from a vehicular collision on 10 March 2003, in which Plaintiff's new pickup truck was damaged as a result of Defendant's negligence. Plaintiff demanded Defendant's liability insurance carrier, Farm Bureau Mutual Insurance Company, replace his damaged truck with a new truck. But Farm Bureau declined to replace Plaintiff's truck, agreeing instead to repair the truck and address any issue regarding "diminution in value" after completing the repairs. The truck was repaired at a cost of $5,737.63, which is not an issue in this matter. Instead, the parties disagreed as to the amount to be attributable for "diminution in value" (Farm Bureau initially offered up to $2000, but Plaintiff demanded $8,500.00).

Plaintiff retained counsel and filed suit on 18 July 2003. In October 2003, Defendant served an Offer of Judgment for $4,385.73, but Plaintiff requested $8,500.00 plus attorney fees and costs, or, alternatively, "a comparable truck less minimal allowance for mileage, loss of use and attorney fees and costs." Thereafter, the parties unsuccessfully attempted to mediate this matter.

This matter went to trial on 1 June 2004. Before jury selection, Defendant offered $6,000.00 but Plaintiff demanded $7,500.00. In closing arguments, however, Plaintiff asked the jury for a total verdict of $5,500.00, which was the maximum "diminution in value" Plaintiff's evidence supported. The jury returned a verdict for Plaintiff in the amount of $4,500.00 for "diminution in value".

Following the jury verdict, Plaintiff moved for an award of $8,964.50 in attorney fees[1] and $1,701.00 in costs. On 24 August 2004, the trial court awarded Plaintiff attorney fees in the amount of $500.00, but denied Plaintiff's request for costs.

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[1] Plaintiff first argues that the trial court failed to make findings to support the award of attorney fees in the amount of $500.00 under North Carolina General Statute section 6-21.1. We agree.

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1. Plaintiff's motion also stated:

> 29. Plaintiff retained counsel . . . on a one-third contingency fee plus cost contract.
>
> 30. Notwithstanding this one-third contract contingency fee contract counsel for the Plaintiff waives the one-third fee provision and relies on the Court for an award of attorney fees consistent with N.C.G.S. § 6-21.1.

Preliminarily, we note that the issue on appeal concerns the *amount* of the attorney fee award, not whether attorney fees should be awarded which the trial court in this case, *in its discretion*, elected to do after considering the factors under *Washington v. Horton*, 132 N.C. App. 347, 351, 513 S.E.2d 331, 334 (1999) (holding that the decision to allow attorney fees rests with the trial judge, and that decision may only be reversed for an abuse of discretion). *See* N.C. Gen. Stat. § 6-21.1 (providing that where the recovery of damages is $10,000.00 or less in a property damage suit, upon a finding that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis for such suit, the presiding judge has discretion to grant attorney fees).

The amount of attorney fees is also discretionary. *Black v. Standard Guaranty Ins. Co.*, 42 N.C. App. 50, 53, 255 S.E.2d 782, 784 (1979). However, the trial court's discretion is not "unbridled." *Thorpe*, 144 N.C. App. at 571, 551 S.E.2d at 856. Indeed, where a trial court awards attorney fees under North Carolina General Statute section 6-21.1, the trial court must also make findings of fact supported by competent evidence concerning "the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence." *Id.*; *see also Porterfield v. Goldkuhle*, 137 N.C. App. 376, 528 S.E.2d 71 (2000). The mere recitation that the fees are "reasonable" without further findings is inadequate. *Id.*

Here, the amount of attorney fees awarded is not supported by the trial court's findings of fact or conclusions of law. The trial court awarded attorney fees in the amount of $500.00 where Plaintiff's counsel provided an affidavit and detailed worksheet outlining his fees to support an award in the amount of $8,964.50. The trial court awarded attorney fees based only on the following conclusion:

> 18. For all of the foregoing reasons the Court finds, in its discretion that Plaintiff should recover attorney's fees in the amount of $500.00.

Although the trial court heard arguments in support of attorney fees, it failed to make findings concerning: (1) the reasonable time and labor for Plaintiff's counsel to expend, (2) skill required by this case, (3) the customary fee for similar cases and (4) the experience and ability of the Plaintiff's attorney. *See Thorpe*, 144 N.C. App. at 572, 551 S.E.2d at 856. Because the trial court's findings of fact are insufficient for us to determine whether the amount of the award of attor-

ney fees is reasonable, we remand for the trial court to make findings of fact on the time and labor expended by Plaintiff's counsel, the skill required and the customary fee for similar work, and Plaintiff counsel's experience or ability. We note, however, that we do not disapprove of the actual amount awarded by the trial court in this case; indeed, we return this matter to the trial court to make proper findings to support whatever amount the trial judge decides in his discretion is appropriate in this case.

[2] Plaintiff next contends the trial court erred in denying him costs under North Carolina General Statute section 6-20. An award of costs under section 6-20 is discretionary. *See* N.C. Gen. Stat. § 6-20 (2005) (providing, "[C]osts may be allowed or not, in the discretion of the court[.]"). As we can discern no abuse of discretion by the trial court, we uphold the denial of costs in this matter.

Remanded in part, Affirmed in part.

Judge STEELMAN concurs.

Judge JOHN concurs in part and dissents in part with separate opinion.

JOHN, Judge, concurring in part and dissenting in part.

Because I believe the amount of attorney fees awarded plaintiff by the trial court did not constitute an abuse of discretion, I must respectfully dissent from that portion of the majority opinion remanding for additional findings. I concur in that portion of the majority opinion affirming the trial court's denial of an award of costs.

The majority remands "for the trial court to make findings of fact on the time and labor expended by Plaintiff's counsel, the skill required and the customary fee for similar work, and Plaintiff counsel's experience and ability." However, these factors were not contested in the trial court. Counsel for plaintiff proffered to the trial court a detailed affidavit containing all the information the majority deems lacking in the court's judgment. Counsel for defendant stated he "d[id no]t disagree with Mr. Bell's affidavit" and that he felt the rate and hours represented were "fair."

Contested below was the question of whether the amount of time expended by plaintiff's counsel was commensurate with a case in which the maximum amount of recovery supported by plaintiff's evi-

dence (and which amount plaintiff's counsel sought in his jury argument) was *less* than the sum offered by defendant in settlement (and which latter figure likewise was *greater* than the jury verdict). Thus the issue before this Court is not whether the trial court's judgment contained findings irrelevant to the dispute at hand, but whether the trial court's order constituted an abuse of discretion in light of its exhaustive, four-page recitation of findings addressing, and its consideration of, the guidelines set out in *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999).

To show an abuse of discretion, an appellant must demonstrate the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). In *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 553 S.E.2d 431 (2001), *disc. review denied*, 356 N.C. 315, 571 S.E.2d 220 (2002), this Court considered whether the trial court abused its discretion in awarding attorney fees absent "appropriate findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Id.* at 468, 553 S.E.2d at 444. In that case, as in the case *sub judice*, an extensive affidavit was presented to the trial court addressing such matters, and the award of fees was not challenged upon those grounds but rather upon the contention that portions of the requested fees were unrelated to the matter at hand. *Id.* The trial court's award of attorney fees in *Whiteside*, *see id.*, contained a statement similar to the trial court's recitation herein that it had reviewed "the entire record, including Plaintiff's Motion for Attorney's Fees, the arguments of counsel, the Court file, and the Court's own recollection of how this case was tried[.]" This Court concluded in *Whiteside* that, under the circumstances presented and notwithstanding the absence of the findings noted above, it "c[ould] not find an abuse of discretion" and affirmed the award of attorney fees. *Id.*

In the instant case, all the information required by the majority opinion of the trial court in the form of findings of fact was without question before that court, and is essentially uncontested and irrelevant to the court's award of attorney fees. The trial court set forth extensive findings addressing the *Washington* factors and in consideration thereof reasoned that "Plaintiff should recover attorney's fees in the amount of $500.00." Reviewing the trial court's plenary findings and following the mandate of *Whiteside*, *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("a

panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court"), I cannot say the court's decision was "manifestly unsupported by reason or [wa]s so arbitrary that it could not have been the result of a reasoned decision." I therefore vote to affirm the trial court's judgment in its entirety.

IN THE MATTER OF: O.S.

No. COA05-492

(Filed 7 February 2006)

Child Support, Custody, and Visitation— nonsecure custody hearing—change of legal custody—jurisdiction

The trial court lacked authority to transfer custody of the minor child to his father and to permanently remove legal custody of the minor from respondent mother in a nonsecure custody hearing without an adjudication or disposition of the juvenile petition.

Appeal by respondent from an order entered 15 December 2004 by Judge Christopher W. Bragg in Union County District Court. Heard in the Court of Appeals 30 November 2005.

Dale Ann Plyler for petitioner-appellee Union County Department of Social Services.

William L. McGuirt for Guardian ad Litem.

Joe Hutcherson for respondent-appellee father.

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

HUNTER, Judge.

Respondent-mother ("respondent") appeals from a nonsecure custody review hearing order placing custody of her minor child, "O.S.," with his father. Respondent argues the trial court erred in transferring custody of the child to his father without an adjudication hearing. We agree and vacate the order of the trial court.

On 27 September 2004, the Union County Department of Social Services ("DSS") filed a juvenile petition alleging O.S. was a neglected and dependent child in that he had been abandoned, lived in an environment injurious to his welfare, and lacked appropriate caretakers. Specifically, the petition alleged that DSS had been contacted by a family with whom respondent and her child had been staying. The family, who had a lengthy history of DSS involvement, reported that respondent had left her child with them and failed to return. The family did not know how to contact respondent, nor did they know her last name. Respondent did not inform the family of her whereabouts or when she planned to return for her child. The family informed DSS that respondent-father had approached them and wanted to take the child to his residence. The family was "willing to give [the minor child] to [respondent-father] even though they did not know him nor did they know he was the legal father." The petition further alleged that respondent had no stable residence and was "living with numerous people . . . she does not really know." The order for nonsecure custody, issued 27 September 2004, found there was a reasonable factual basis to believe that O.S. had been abandoned. A nonsecure custody hearing was held the following day. Respondent did not attend the hearing; however, respondent-father attended the hearing and voiced his desire to have custody of the child. As paternity had not been established, the trial court continued legal custody of the child with DSS with physical placement in foster care.

The trial court continued to hold nonsecure custody review hearings on 6 October 2004 and 3 November 2004 pending eventual adjudication. Respondent did not attend these hearings. In the meantime, paternity testing revealed respondent-father to be the biological father of O.S. DSS subsequently conducted a home study of respondent-father's residence and interviewed persons acquainted with respondent-father. Following its investigation, DSS recommended that O.S. be placed with respondent-father.

On 17 November 2004, the trial court conducted a further nonsecure custody review hearing. Respondent was present at the hearing. No testimony was given; rather, the trial court reviewed only the juvenile petition and a document prepared by DSS entitled "Reasonable Efforts Report." Following the hearing, the trial court found that "[f]or the purposes of the nonsecure hearing, DSS has shown by clear and convincing evidence that there is a reasonable factual basis to believe the matters alleged in the petition are true and . . . [t]he juvenile has been abandoned by [respondent]." The trial court found and

concluded that "[p]ursuant to N.C.G.S. 7B-1101(2) this court would have jurisdiction to make a child custody determination under the provisions of N.C.G.S. 50A-201, 50A-203, or 50A-204." The trial court then concluded that it was in the best interest of O.S. to place legal custody with respondent-father, and entered an order accordingly. The trial court noted that "DSS does hereby and in open court take a voluntary dismissal of the petition in this matter." The trial court informed respondent that visitation with her son was now in the discretion of respondent-father, and that if she wanted to regain custody of her child, she would have to file a civil suit. From the nonsecure custody review order placing legal custody of O.S. with his father, respondent appeals. Respondent-father does not appeal.

Respondent argues the trial court lacked jurisdiction to grant legal custody to respondent-father without an adjudication or disposition of the juvenile petition. We agree that the trial court was without authority to enter the custody order at issue.

Section 7B-506 of the North Carolina General Statutes provides for nonsecure custody hearings in pertinent part as follows:

> (a) No juvenile shall be held under a nonsecure custody order for more than seven calendar days without a hearing on the merits or a hearing to determine the need for continued custody. . . .
>
> (b) At a hearing to determine the need for continued custody, the court shall receive testimony and shall allow the guardian ad litem, or juvenile, and the juvenile's parent, guardian, custodian, or caretaker an opportunity to introduce evidence, to be heard in the person's own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that the juvenile's placement in custody is necessary. The court shall not be bound by the usual rules of evidence at such hearings.
>
> . . .
>
> (d) If the court determines that the juvenile meets the criteria in G.S. 7B-503 and should continue in custody, the court shall issue an order to that effect. The order shall be in writing with appropriate findings of fact and signed and entered within 30 days of the completion of the hearing. The findings of fact shall include the evidence relied upon in reaching the decision and purposes which continued custody is to achieve.

N.C. Gen. Stat. § 7B-506 (2005). Section 7B-506 contains no provision authorizing the trial court to determine permanent legal custody of a juvenile before adjudication of the petition.

In the case of *In re Guarante*, 109 N.C. App. 598, 427 S.E.2d 883 (1993), this Court reversed an order of the trial court resulting from a nonsecure custody hearing. In *Guarante*, DSS obtained nonsecure custody orders for five children pursuant to an investigation and later served five petitions alleging abuse, neglect, and/or dependency upon the childrens' caretakers, the Brakes. A five-day hearing was held (pursuant to former N.C. Gen. Stat. § 7A-577, now a seven-day hearing under N.C. Gen. Stat. § 7B-506) to determine the need for continued nonsecure custody pending an adjudicatory hearing set for 19 August 1991. At the five-day hearing, the trial court ordered the children to be returned to the home of the Brakes and dismissed all of the petitions. DSS appealed the order, alleging the trial court did not have the authority to dismiss the petitions at the five-day hearing. On appeal, this Court agreed with the position of DSS that the trial court overreached its authority in dismissing the petition, stating that the hearing

> was clearly denominated a hearing to determine the need for continued custody. The judge therefore had the discretion to either continue nonsecure custody or to return the children to their home. He did not have the authority to dismiss the petitions, according to DSS, because in so doing he made an unauthorized determination of the merits of the case. There is no express statutory authority allowing the judge to dismiss the petitions at a five-day hearing.

Id. at 600, 427 S.E.2d at 884. The Court noted that neither party was on notice that the judge would decide the merits of the case or dismiss the petitions. "Obviously, preparation for a custody hearing is much different than for a more formal adjudicatory hearing at which the evidence rules are applicable." *Id.* at 600-01, 427 S.E.2d at 885. The Court continued:

> The interests of the parents or custodians are adequately protected by a five-day custody hearing. If the court finds continued custody unnecessary, the children are immediately returned to the home pending the adjudicatory hearing. The children's interests are better protected by allowing such cases to proceed to an adjudicatory hearing, rather than permitting a judge to attempt to evaluate the merits of the case at an informal custody

> hearing. We note that it would have been patently unfair to the Brakes had the judge made a final adjudication adverse to them at the five-day hearing.

Id. at 601, 427 S.E.2d at 885.

We find *Guarante* instructive in the instant case. The purpose of the nonsecure custody hearing is to determine whether continued nonsecure custody of the juvenile is necessary pending adjudication on the merits of the case. N.C. Gen. Stat. § 7B-506(a). If continued nonsecure custody is warranted under the criteria set forth in section 7B-503, the trial court must issue an order to that effect. N.C. Gen. Stat. § 7B-506(d). In continuing custody, the trial court may place the child in the *temporary* custody of a relative pending adjudication unless such placement would be contrary to the child's best interests. N.C. Gen. Stat. § 7B-506(h)(2). If continued custody is not warranted, the child should be returned to the home pending adjudication on the merits of the case. *Guarante*, 109 N.C. App. at 601, 427 S.E.2d at 885.

Here, the trial court stated that it was maintaining the nonsecure custody order. It then, however, placed permanent legal, rather than temporary, custody of the child with respondent-father. DSS then dismissed its juvenile petition. Without the juvenile petition, the trial court no longer had any jurisdiction over the case. The trial court informed respondent that if she wanted visitation with her child, she would have to seek permission from respondent-father; and that if she wanted to regain custody, she would have to file an action under Chapter 50. In effect, the trial court evaluated the merits of the case during the informal nonsecure custody hearing stage, without ever receiving direct evidence in the case. *See Guarante*, 109 N.C. App. at 600, 427 S.E.2d at 884. None of the allegations contained in the juvenile petition were ever proven by the clear, cogent, and convincing evidence standard utilized at an adjudication hearing. *See* N.C. Gen. Stat. § 7B-805 (2005); *Guarante*, 109 N.C. App. at 601, 427 S.E.2d at 885. Thus, respondent lost custody of her child without any of the allegations against her having been proven. *See Guarante*, 109 N.C. App. at 601, 427 S.E.2d at 885. We conclude the trial court did not have the statutory authority to permanently remove custody of the minor child from respondent before adjudication of the merits of the case. *See id.*

The trial court stated it had the authority to make a child custody determination "[p]ursuant to N.C.G.S. 7B-1101(2)." As DSS concedes, this is a clearly erroneous statement by the trial court.

Section 7B-1101 of the General Statutes governs the termination of parental rights, which is not at issue in the instant case.

We hold the trial court was without authority to permanently remove legal custody of the minor child from respondent before adjudication of the merits of the allegations brought by DSS in the juvenile petition. Given our determination, we need not address respondent's remaining assignments of error. We vacate the order of the trial court.

Vacated.

Judges McCULLOUGH and GEER concur.

THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFF v. STEVEN F. LONG, AND WIFE, LORRAINE R. LONG; TRSTE, INC., TRUSTEE; WACHOVIA BANK, N.A., BENEFICIARY; SPRUILLCO, LTD, TRUSTEE; CAPITAL FACTORS, INC., BENEFICIARY; AND ANY OTHER PARTIES IN INTEREST DEFENDANTS

No. COA05-283

(Filed 7 February 2006)

1. Eminent Domain— takings—sewer line easement—replacement system—not a separate taking

There was not a separate taking in a sewer project where plaintiff installed a new leach field, pipe and pump to replace a septic system rendered inoperable by a new permanent sewer easement (the original taking). The installation of the new septic system did not necessarily flow from construction of the improvement, but was an effort to accommodate defendants' need for a new system, to which defendants consented.

2. Eminent Domain— takings—sewer line easement—replacement system—not an additional taking—instruction on damages

There was no additional taking in a sewer project where plaintiffs built a new septic system to replace a system rendered inoperable by the new sewer line easement, and no error in the court's instruction that the jury could (rather than must) consider the condition of the old and new systems.

3. Easements— sewer line—replacement system—costs born by owners

The owners must bear any costs in maintaining and operating a new pump-based septic system installed to replace a gravity system rendered inoperable by a sewer line easement. Plaintiff installed the new system for the owners' personal benefit, retained no ownership in the new system, and the owners were the only ones directly benefitting.

Appeal by defendants from order entered 12 November 2004 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 October 2005.

Office of the City Attorney, by Assistant City Attorney Catherine C. Williamson, for plaintiff-appellee.

The Odom Firm, PLLC, by T. LaFontine Odom, for defendants-appellants.

CALABRIA, Judge.

Steven and Lorraine Long ("Long"), along with TRSTE, Inc., trustee, and Wachovia Bank, N.A., (known collectively as "defendants"), appeal the 12 November 2004 order concluding the City of Charlotte's ("plaintiff") installation of a new septic system including pump tank ("pump"), 400 feet of a 2-inch pipe ("pipe"), and new leach field ("field") was not an additional taking of defendants' property for which defendants are entitled to compensation. We affirm.

On 12 August 2003, pursuant to N.C. Gen. Stat. § 136-103, plaintiff instituted an eminent domain action by filing a complaint, declaration of taking, and notice of deposit of $6,200.00 as either full compensation or as a credit against just compensation. The plaintiff acquired a permanent sanitary sewer easement and temporary construction easement across defendants' property to install both an 8-inch gravity sewer line and a 16-inch pressurized sewer force main for a development of homes.

The permanent easement ran through defendants' existing leach field rendering their gravity septic waste disposal system ("disposal system") inoperable. Due to this consequence, plaintiff hired a licensed soil scientist to determine suitable locations for the installation of a replacement field for defendants' disposal system. The defendants requested installation of a new field in a wooded area 400

feet from the back of their home. Because the new field, measuring approximately one and one-half times larger than the original, was at a higher elevation than the defendants' home, plaintiff had to install a pump out of defendants' front yard to remove waste from the home to the new field. In an area between the newly installed pump and field, the plaintiff installed the pipe. The pump, operated by electricity, was connected to the defendants' electric panel. Plaintiff contracted with a third party to perform this work and paid all costs associated with the installation of the "new" septic waste disposal system.

On 20 July 2004, defendant filed an answer, responded to the declaration of taking and notice of deposit, and counterclaimed for inverse condemnation. Specifically, defendant alleged that in addition to the permanent sewer easement and temporary construction easement, plaintiff appropriated portions of defendants' property outside the easements for the pump, pipe and field. On 28 July 2004, plaintiff replied to the counterclaim and denied appropriating any further property of defendants.

On 23 September 2004, defendants filed a motion pursuant to N.C. Gen. Stat. § 136-108 to ascertain whether plaintiff had taken property outside the easements. On 12 November 2004, the trial court determined plaintiff's installation of the pump, pipe, and field outside the permanent and temporary easements failed to constitute an additional taking of defendants' property for which they were entitled compensation. In addition, in ascertaining just compensation due defendants for the sewer and construction easements, the trial court concluded the jury may consider the effect of this taking on defendants' use of their property, specifically the condition of their inoperable system and its replacement. Defendants appeal.

[1] Defendants first argue the trial court erred in concluding the plaintiff's installation of the pump, pipe, and field did not constitute an additional taking. Defendants contend such an appropriation of land constituted inverse condemnation since the damage to the land outside the easements was ineluctably tied to the construction of both the sewer force main and sewer line. We disagree.

Inverse condemnation, "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency," *Charlotte v. Spratt*, 263 N.C. 656, 662-63, 140 S.E.2d 341, 346

(1965) (internal citation and quotation marks omitted), requires the following: "(1) a taking (2) of private property (3) for a public use or purpose." *Adams Outdoor Advertising of Charlotte v. N.C. Dep't of Transp.*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993). A taking, or "entering upon private property . . . devoting it to a public use, or . . . informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof," *Ledford v. N.C. State Highway Comm'n*, 279 N.C. 188, 190-91, 181 S.E.2d 466, 468 (1971), "requires 'substantial interference with elemental rights growing out of the ownership of the property.' " *Adams*, 112 N.C. App. at 122, 434 S.E.2d at 667 (quoting *Long v. City of Charlotte*, 306 N.C. 187, 198-99, 293 S.E.2d 101, 109 (1982)). Importantly, in order to illustrate a taking "[a] plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are *not merely consequential or incidental*. *Id.* (emphasis added).

"[A] municipality is solely liable for the damages that *inevitably or necessarily flow* from the construction of an improvement. . . ." *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 110, 338 S.E.2d 794, 799 (1986) (emphasis added). Thus, "[d]amages to land outside the easements which inevitably or necessarily flow from the construction of the [improvement] result in an appropriation of land for public use [to which] [s]uch damages are embraced within just compensation to which defendant landowners are entitled." *Id.*

Ferrell is instructive in determining what is and what is not considered 'inevitably and necessarily' tied to the construction of an improvement and thus compensable as a taking under inverse condemnation. In *Ferrell*, a contractor entered defendant's property and built a temporary roadway outside the already acquired easements so as to haul in supplies for the project. *Id.* at 105, 338 S.E.2d at 796. The same contractor, also outside of the prescribed easements, used another portion of defendant's property as a "staging area" to store pipes and equipment. *Id.* This Court determined that because "the contractor's use of the roadway over defendant's property was *essential to provide access* to the City's sewer outfall construction site, . . . *such use thus necessarily flowed* from the construction of the improvement. . . ." *Id.* at 112, 338 S.E.2d at 800 (emphasis added). Conversely, "[u]nlike the evidence regarding the contractor's use of the roadway, the evidence regarding its use of the staging area does *not show* that *such use was necessary to complete the project*." *Id.* at 113, 338 S.E.2d at 800 (emphasis added). This

Court holds plaintiff's conduct clearly fails to amount to an additional taking and plaintiff's action in the instant case was more like the staging area in *Ferrell*, and less like the roadway.

Plaintiff's installation of the pump, pipe, and field on defendants' property did not *necessarily flow* from construction of the improvement, here the 8-inch sewer line and 16-inch sewer main force. The installation was not part of the improvement project, but rather the plaintiff's subsequent and separate effort to accommodate defendants' need for a new septic system. In fact, defendants consented to the installation of the new pump, pipe, and field and plaintiff reciprocated by expending $16,000.00 to cover the cost. Defendants incorrectly assert a separate taking has occurred. This assignment of error is overruled.

[2] Defendants next argue the trial court erred in holding the jury *may* consider the effect of the "additional taking" on defendants' use of their residence. Specifically, defendants contend the jury *must* consider the condition of their inoperable gravity septic system and the replacement system installed by plaintiff since plaintiff's actions constituted inverse condemnation. We disagree.

N.C. Gen. Stat. § 136-112(1) (2005) provides as the proper measure of damages for inverse condemnation "[w]here only a part of a tract is taken, the measure of damages for said taking *shall* be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the *remainder* immediately after said taking. . . ." (Emphasis added). Furthermore, " '[t]he fair market value of the remainder immediately after the taking contemplates the project in its completed state and any damage to the remainder due to the user [sic] to which the part appropriated may, or probably will, be put.' " *Dep't. of Transp. v. Bragg*, 308 N.C. 367, 370, 302 S.E.2d 227, 229 (1983) (quoting *Bd. of Transp. v. Brown*, 34 N.C. App. 266, 268, 237 S.E.2d 854, 855 (1977)).

In the instant case, a judge or jury determines the amount of just compensation due defendants by calculating the difference between the fair market value of defendants' entire tract prior to the taking of both the permanent sanitary sewer easement and the temporary construction easement, and the fair market value of the remainder of defendants' property immediately after both the taking of these easements and the completion of the project itself. This calculation must include any potential damage caused to the remainder of defendants' property due to the use of the easements. The court determined the

amount of just compensation due defendants by measuring the damages for the taking of the sewer and construction easements, not the installation of the new septic system comprised of the pump, pipe, and field. In addition, we note defendants argue that an additional taking occurred and the effect of that additional taking upon the fair market value of their property *must* then be calculated. This premise was expressly refuted above as no additional taking occurred. This assignment of error is overruled.

[3] Defendants' remaining assignment of error is that the trial court erred in finding that defendants alone would have to bear the electrical as well as any maintenance and repair costs to operate the newly installed pump. We disagree. Here, plaintiff expended $16,000.00 to install a new pump, pipe, and field solely for the Longs' personal benefit. The plaintiff retained no ownership rights in this newly installed septic system. The only individuals directly benefitting from this new septic system are the Longs. Thus, any future electrical, maintenance or repair costs must be borne by the actual owners of this new septic system, the Longs. This assignment of error is overruled.

Affirmed.

Judges HUDSON and BRYANT concur.

IN RE: ELECTION PROTEST OF BILL FLETCHER

No. COA05-706

(Filed 7 February 2006)

Elections— protest—appeal

An appeal in an election protest was dismissed as moot where the General Assembly enacted a session law which provided that all election contests for Article III offices (as this was) would be heard by the General Assembly, and the General Assembly certified plaintiff's opponent as being elected. A decision for plaintiff on appeal would not permit the relief he sought because the Board of Elections lacks the statutory authority to revoke the certification of election. Also, plaintiff's broadside assignment of error violates the Rules of Appellate Procedure.

Appeal by Bill Fletcher from order entered 17 March 2005 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 January 2006.

Tharrington Smith, L.L.P., by Michael Crowell and Deborah Stagner, and Hunter, Higgins, Miles, Elam and Benjamin, PLLC, by Robert N. Hunter, Jr., for Bill Fletcher.

Attorney General Roy Cooper, by Solicitor General Christopher G. Browning, Jr., Special Deputy Attorney General Susan K. Nichols, and Special Deputy Attorney General Alexander McC. Peters, for appellee North Carolina State Board of Elections.

Wallace, Nordan & Sarda, L.L.P., by John R. Wallace and Joseph A. Newsome, for appellee June S. Atkinson.

ELMORE, Judge.

Bill Fletcher (Fletcher), the Republican candidate for Superintendent of Public Instruction in the 2 November 2004 election, appeals an order of the trial court abating his election protest. Fletcher received 1,647,184 votes and Democratic candidate June Atkinson (Atkinson) received 1,655,719 votes. As a result, Atkinson led Fletcher by 8,535 votes. The ballots of 4,438 voters in Carteret County who voted using one-stop absentee voting equipment prior to election day were not recorded and could not be retrieved. Also, 120 ballots in Cleveland County were discarded and likewise could not be retrieved. Following the election, Fletcher requested a recount and filed election protests pursuant to N.C. Gen. Stat. § 163-182.9 with the county boards of election. Fletcher alleged that the counting of provisional ballots by voters who did not reside in the precincts where the ballots were cast was unconstitutional.[1] His protests were also based upon the 4,438 votes lost in Carteret County and the 120 ballots inadvertently discarded in Cleveland County. The North Carolina State Board of Elections (Board of Elections) heard and denied Fletcher's election protests, determining that out-of-precinct ballots were constitutional and that the remaining lost votes were not enough to affect the election outcome. By its 30 November 2004 decision, the Board of Elections ordered that Atkinson be certified

1. The North Carolina State Board of Elections determined that 11,310 out-of-precinct provisional ballots were counted. Fletcher asserts that the actual number is higher. Nonetheless, it is undisputed that the number of out-of-precinct provisional ballots exceeded the difference in votes between Fletcher and Atkinson and thus affected the result.

as the winner and a certificate of election issued to her. Pursuant to N.C. Gen. Stat. § 163-182.14, Fletcher appealed to the Wake County Superior Court. In an order entered 17 December 2004, the trial court affirmed the order of the Board of Elections. Fletcher appealed to the North Carolina Supreme Court and filed a petition for Writ of Supersedeas and motion for temporary stay in order to stay the certification of Atkinson as the winner of the election. The Supreme Court granted Fletcher's petition for discretionary review and issued a temporary stay of certification. Prior to oral argument in the Supreme Court, Atkinson filed a petition with the General Assembly asking it to hear and determine the outcome of the contested election for Superintendent of Public Instruction, an Article III office, pursuant to its jurisdiction under Article VI, Section 5 of the North Carolina Constitution.

On 4 February 2005 the Supreme Court issued its decision reversing the trial court and remanding for further proceedings consistent with its opinion, *see James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005). The Court addressed three separate election challenges: the election protest of Fletcher; an election protest filed by Trudy Wade, a candidate for Guilford County Commissioner at large; and a declaratory judgment action filed in Wake County Superior Court by Fletcher, Wade, and William James, a Mecklenburg County voter. All three challenges involved the same issue of whether a provisional ballot cast outside the voter's precinct of residence on election day may be lawfully counted. *See id.* at 262-63, 607 S.E.2d at 639-40. The Court noted that the issue before it was not the ultimate outcome of the two elections involved but, rather, whether these elections were conducted in compliance with the Constitution and with the North Carolina General Statutes. *Id.* at 262, 607 S.E.2d at 639. The Court, declining to decide the constitutional question, held that counting out-of-precinct provisional ballots violates the administrative regulations issued by the Board of Elections and the plain language of N.C. Gen. Stat. § 163-182.15. *Id.* at 268-69, 607 S.E.2d at 643-44.

Subsequently, the General Assembly enacted Session Law 2005-3, providing that under Article VI, Section 5 of the North Carolina Constitution, all election contests for Article III offices would be heard by the General Assembly. This new enactment also provided that upon the initiation of a contest under this Article, all judicial proceedings involving the election contest shall be abated. Session Law 2005-3 was ratified and signed into law on 10 March 2005. Section 3(b) provides that "[f]or any election in 2004, notice of the intent to

contest the election shall be filed within 10 days of this act becoming law[.]" *See* 2005 N.C. Sess. Laws 3, § 3(b); *see also* N.C. Gen. Stat. § 163-182.13A, Editor's Note (2005). In compliance with this law, Atkinson amended her petition to the General Assembly by filing a notice of intent to contest an election in the General Assembly on 10 March 2005.

Upon remand of Fletcher's election protest, the Wake County Superior Court determined that Session Law 2005-3 was applicable to the election protests arising from the 2004 election for Superintendent of Public Instruction. As Atkinson's petition in the General Assembly to determine the outcome of the election was pending, the court abated Fletcher's election protest. From this order entered 17 March 2005, Fletcher appeals.

Fletcher assigns as error the trial court's determination that the election protest was abated as a matter of law by Session Law 2005-3. Following the filing of Fletcher's appeal, the General Assembly determined that Atkinson received the highest number of votes in the 2004 election; the Board of Elections issued Atkinson a certificate of election; and Atkinson was sworn into the office of Superintendent of Public Instruction. On 26 August 2005 Atkinson filed a motion to dismiss Fletcher's appeal, stating that the appeal has become moot because neither this Court nor the Board of Elections has the authority to rescind a certificate of election already issued, and thus Fletcher cannot obtain the ultimate result he seeks, a new determination of who received the highest number of votes. Although the retroactive application of Session Law 2005-3 to certain 2004 election contests might implicate, *inter alia*, procedural and due process rights, we must exercise judicial restraint where the legal effect of a decision by this Court would not provide the result the appellant is seeking.

> When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

Parent-Teacher Assoc. v. Bd. of Education, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969) (citations omitted); *see also Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783,

787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

Here, a decision in favor of Fletcher would not permit him the relief he is seeking, to have the certificate of election revoked and a new determination made on the election outcome. "The declaration of election as contained in the certificate conclusively settles *prima facie* the right of the person so ascertained and declared to be elected to be inducted into, and exercise the duties of the office." *Cohoon v. Swain*, 216 N.C. 317, 319, 5 S.E.2d 1, 3 (1939). The Board of Elections lacks the statutory authority to revoke Atkinson's certificate of election. Indeed, the certificate of election is not subject to challenge except through an action *quo warranto*. *Id.*; *see also Ledwell v. Proctor*, 221 N.C. 161, 164, 19 S.E.2d 234, 236 (1942). As such, Fletcher's appeal is moot and we dismiss it on this basis.

As an alternative basis for our dismissal, we find that appellant's brief is in violation of the North Carolina Rules of Appellate Procedure. Appellant's assignment of error does not direct this Court to the particular legal error at issue or to any record references clarifying the legal basis assigned as error. The assignment of error states: "The superior court erred in holding that petitioner's election protest was abated as a matter of law by Session Law 2005-3." Appellant's brief addresses and argues violations of procedural and substantive due process rights; violation of the law of the case doctrine; and violation of the principle of separation of powers. Such a broadside assignment of error is in violation of our Rules. Rule 10 provides, in pertinent part, as follows:

> 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.

N.C.R. App. P. 10(c)(1). Appellant's failure to comply with this Rule concerning assignments of error subjects his appeal to dismissal. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360-61 (2005). Accordingly, Fletcher's appeal is dismissed as moot and for violation of the Rules of Appellate Procedure.

Dismissed.

Judges McCULLOUGH and LEVINSON concur.

IN THE MATTER OF: B.D.W.

No. COA05-388

(Filed 7 February 2006)

1. Juveniles— delinquency—second-degree kidnapping—defective indictments—false imprisonment

The trial court erred by adjudicating a juvenile delinquent on the charges of second-degree kidnapping under N.C.G.S. § 14-39, and the case is remanded for imposition of adjudication on two counts of false imprisonment and entry of a disposition consistent with the adjudication, because: (1) the petitions failed to set out one of the eight purposes required by statute for proof of kidnapping, and thus, are fatally defective; (2) the petitions here did not incorporate by reference this essential element in the other petitions alleging common law robbery and sex offense; and (3) the trial court's adjudication of the minor as delinquent as to the two counts of second-degree kidnapping contained all the elements of false imprisonment.

2. Juveniles— jurisdiction—amendment to juvenile petition a nullity

Plaintiff's motion to declare an amendment by the trial court to the juvenile petitions (regarding the defective kidnapping petitions) as a nullity is granted, because the trial court lacked jurisdiction to amend the petition in 2005 after the juvenile perfected his appeal to this Court in 2004.

Appeal by juvenile from an order entered 21 July 2004 by Judge Marcia H. Morey in Durham County District Court. Heard in the Court of Appeals 16 November 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Alexander M. Hightower, for the State.

Russell J. Hollers III for juvenile-appellant.

HUNTER, Judge.

B.D.W., a juvenile, appeals from a final order adjudicating him delinquent on two counts of second degree kidnapping, one count of common law robbery, and two counts of simple assault. For the reasons stated herein, we vacate the adjudications of delinquency as to the two counts of second degree kidnapping.

The State presented evidence tending to show that on 21 June 2004, B.D.W., a thirteen-year-old male, gained access along with two other male juveniles to a neighborhood pool by climbing a fence. Two other boys, C.S., an eleven-year-old, and H.W., a thirteen-year-old, were already swimming at the pool. C.S. and H.W. attempted to leave the pool, but were threatened by B.D.W. and the other juveniles and forced into the girls' bathroom.

B.D.W. took a hat and the access key to the pool from H.W. and a bicycle from C.S. B.D.W. then blocked the bathroom door while the other juveniles forced C.S. and H.W. to remove their clothes, kiss one another, and lick one another's bodies, including genitalia. B.D.W. and another juvenile also hit C.S. and H.W. in the face and body before releasing them. The hat and key were recovered from B.D.W. B.D.W. testified at the hearing.

The trial court adjudicated B.D.W. delinquent as to two counts of kidnapping, two counts of assault, and one count of common law robbery. After a dispositional hearing, the trial court ordered B.D.W. committed to the Department of Juvenile Justice for confinement in a Youth Detention Center for not less than sixteen months. B.D.W. appeals.

I.

[1] B.D.W. contends the trial court erred in adjudicating B.D.W. delinquent on the charges of second degree kidnapping as the indictment failed to allege all elements of the crime. We agree.

"When a petition is fatally deficient, it is inoperative and fails to evoke the jurisdiction of the court." *In re J.F.M. & T.J.B.*, 168 N.C. App. 143, 150, 607 S.E.2d 304, 309, *appeal dismissed and disc. review denied*, 359 N.C. 411, 612 S.E.2d 320 (2005). "Because juvenile petitions are generally held to the standards of a criminal indictment, we consider the requirements of the indictments of the offenses at issue." *Id.*

B.D.W. was charged with second degree kidnapping under N.C. Gen. Stat. § 14-39 (2005). Section 14-39 sets out the elements of kidnapping as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

Id. "Since kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute." *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). "The indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment." *Id.*

Here, the petition for delinquency states that "the juvenile unlawfully, willfully and feloniously, did: . . . kidnap H.W.[,] a person under the age of 16 years by unlawfully restraining him without the consent of his parent or legal guardian pursuant to G.S. 14-39." An otherwise identical petition naming C.S. as the victim was submitted for the second charge of second degree kidnapping. The indictments here fail to set out one of the eight purposes required by statute for proof of kidnapping, and are therefore fatally defective.

The State contends that the failure to include the purpose for which the kidnapping was conducted is not fatally defective, as sufficient notice of the element was provided by the accompanying petitions alleging common law robbery and sex offense arising from the

same transaction. Our Court has previously addressed this argument and found it to be without merit.

In *State v. Moses*, 154 N.C. App. 332, 572 S.E.2d 223 (2002), the defendant was indicted for two charges arising from the same transaction, robbery with a dangerous weapon, and assault with a deadly weapon inflicting serious injury. *Id.* at 335-36, 572 S.E.2d at 226. The indictment for assault with a deadly weapon was defective as it failed to identify the deadly weapon used in the assault. *Id.* at 336, 572 S.E.2d at 226. However, the indictment for robbery with a dangerous weapon identified the weapon as a bottle, and the State contended the defendant was therefore properly given notice as to the element of the deadly weapon in the assault charge. *Id. Moses* recognized that " '[i]t is settled law that each count of an indictment containing several counts should be complete in itself.' " *Id.* at 336, 572 S.E.2d at 226 (citations omitted). *Moses* held that although "allegations in one count may be incorporated by reference in another count[,]" *id.* at 336, 572 S.E.2d at 226-27, when an indictment fails to include an essential element and does not incorporate by reference another indictment, the indictment "does not adequately enable defendant to prepare for trial and avoid the possibility of double jeopardy, or allow the court to enter judgment on the offense." *Id.* at 337, 572 S.E.2d at 227.

As in *Moses*, the petition here failed to include an essential element and did not incorporate by reference the other petitions alleging common law robbery and sex offense. As " 'each count of an indictment containing several counts should be complete in itself[,]' " and the petitions here as to kidnapping omitted an essential element, the adjudication as to these offenses must be vacated. *Id.* at 336, 572 S.E.2d at 226 (citations omitted).

" 'The crime of false imprisonment is a lesser included offense of the crime of kidnapping.' " *State v. Harrison*, 169 N.C. App. 257, 265, 610 S.E.2d 407, 414 (citations omitted), *disc. review on additional issues denied*, 360 N.C. 71, 622 S.E.2d 496 (2005). "The difference between kidnapping and the lesser included offense of false imprisonment is the *purpose* of the confinement, restraint, or removal of another person." *State v. Surrett*, 109 N.C. App. 344, 350, 427 S.E.2d 124, 127 (1993). "If the purpose of the restraint was to accomplish one of the purposes enumerated in the kidnapping statute then the offense is kidnapping." *Id.* at 350, 427 S.E.2d at 127-28. "If, however, an unlawful restraint occurs without any of the purposes specified

in the statute the offense is false imprisonment." *Id.* at 350, 427 S.E.2d at 128.

Here, the trial court's adjudication of B.D.W. as delinquent as to the two counts of second degree kidnapping contains all the elements of false imprisonment. We therefore remand for imposition of adjudication on two counts of false imprisonment and entry of a disposition consistent with the adjudication. *See State v. Miller*, 146 N.C. App. 494, 504-05, 553 S.E.2d 410, 417 (2001) (remanding for imposition of judgment and resentencing on lesser included false imprisonment when jury's verdict of guilty of second degree kidnapping contained all the elements of the lesser included offense of false imprisonment, and evidence was insufficient to prove kidnapping purpose alleged in indictment).

II.

[2] Plaintiff also filed a motion with this Court to declare an amendment by the trial court to the juvenile petitions a nullity. For the following reasons, we grant this motion.

B.D.W. gave notice of appeal on 27 July 2004, and filed his appellant's brief, concerning the assignment of error addressed *supra*, with this Court on 1 June 2005. A hearing was held on 16 June 2005 regarding B.D.W.'s continued detention pending appeal, pursuant to N.C. Gen. Stat. § 7B-2605 (2005).

During that hearing, the State made an oral motion to amend the alleged defective kidnapping petitions to include the missing element. Arguments on this motion were heard on 29 July 2005 and the motion to amend the petitions was granted on 3 August 2005 by the trial court.

Although the trial court had jurisdiction under section 7B-2605 to enter an order as to B.D.W.'s custody pending the appeal to this Court of the disposition, this specific exception to N.C. Gen. Stat. § 1-294 relates only to matters affecting the custody or placement of the juvenile. *See In re Huber*, 57 N.C. App. 453, 459, 291 S.E.2d 916, 920 (1982). N.C. Gen. Stat. § 1-294 (2005) states that "[w]hen an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]" *Id.*

As the trial court lacked jurisdiction to amend the petition in 2005 after B.D.W. perfected his appeal to this Court in 2004, such amend-

ment is a nullity and we, therefore, grant plaintiff's motion. *See In re Miller*, 162 N.C. App. 355, 359, 590 S.E.2d 864, 866 (2004).

Vacate and remand for imposition of adjudication and sentence on false imprisonment.

Judges McCULLOUGH and GEER concur.

MELVIN CROOM, AS ADMINISTRATOR OF THE ESTATE OF BOBBY DARIEN CROOM, PLAINTIFF v. MARCELLUS HUMPHREY AND MACK WESLEY MARROW, JR., DEFENDANTS

No. COA05-318

(Filed 7 February 2006)

1. Motor Vehicles— passing vehicle—crossing centerline at curve

The trial court did not err in a negligence case arising out of an automobile accident by denying plaintiff's motion for a directed verdict and subsequent motion for judgment notwithstanding the verdict regarding whether defendant driver's attempt to pass decedent violated N.C.G.S. § 20-150(d) which prohibits motorists from crossing the centerline of a highway at a curve when defendant began crossing the center markings while his truck was emerging from a curve in the highway, the road was marked with a broken yellow line adjacent to the lane in which defendant was traveling, and there was a solid yellow line adjacent to the opposite lane, because: (1) given the Legislature's decision to delegate road-marking determinations to DOT, the Court of Appeals is not inclined to construe N.C.G.S. § 20-150 to prohibit passing on a portion of the highway which DOT has marked to permit passing; and (2) for the purposes of N.C.G.S. § 20-150 a "centerline" is a solid yellow line which indicates that passing from the adjacent lane is forbidden.

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

Although plaintiff contends the trial court erred in a negligence case arising out of an automobile accident by failing to include certain instructions in its charge to the jury, plaintiff has waived his right to contest the propriety of the court's instruc-

tions, because: (1) the record reveals that plaintiff did not object to the alleged omissions either during the charge conference or following the court's charge to the jury; and (2) even assuming arguendo that plaintiff's arguments concerning the jury instructions are properly before the Court of Appeals, these arguments are entirely without merit.

3. Negligence— motion for new trial—abuse of discretion standard

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by denying plaintiff's motion for a new trial.

Appeal by plaintiff from judgment entered 16 January 2004 and an order entered 25 June 2004 by Judge Jerry Braswell in Greene County Superior Court. Heard in the Court of Appeals 3 November 2005.

Narron & Holdford, PA, by Ben L. Eagles, for plaintiff appellant.

Hodges & Coxe, by Bradley A. Coxe, for defendant appellees.

McCULLOUGH, Judge.

Plaintiff, the administrator of the estate of Bobby Darien Croom, appeals from a judgment entered in defendants' favor following a jury verdict for defendants and from an order denying plaintiff's motion for judgment notwithstanding the verdict and motion for a new trial. We affirm.

FACTS

On 13 September 1996, defendant Marcellus Humphrey was working for defendant Mack Marrow, Jr., as a truck driver. Humphrey's duties on 13 September required him to drive a tractor-trailer northbound on North Carolina Highway 58. While on a two-lane portion of the highway, Humphrey approached a Toyota Corolla being driven by Bobby Croom, which he attempted to pass. After emerging from a curve, Humphrey moved his truck into the left lane of the highway and accelerated. While Humphrey was attempting to pass, Croom attempted to turn his vehicle into a driveway on the left, and the vehicles collided. Croom was taken to the hospital and treated for injuries sustained in the collision. Regrettably, Croom later died of cardiac arrest.

Plaintiff, the administrator of Croom's estate, filed a complaint against Humphrey and his employer, Mack Marrow, Jr., alleging, *inter alia*, negligence by Humphrey and seeking damages for Croom's injuries and death. Following a trial, a Greene County jury found that Croom had not been injured by negligence on the part of Humphrey. The trial court entered judgment accordingly and subsequently denied plaintiff's motion for judgment notwithstanding the verdict and motion for a new trial. Plaintiff now appeals.

I.

[1] On appeal, plaintiff first argues that the trial court erred by denying his motion for a directed verdict and subsequent motion for judgment notwithstanding the verdict. This contention concerns a purely legal issue: whether Humphrey's attempt to pass Croom necessarily violated section 20-150(d) of the North Carolina General Statutes, which prohibits motorists from crossing "the centerline" of a highway at a curve.

The evidence at trial established that Humphrey crossed the yellow markings on the center of the road in order that he might pass Croom. Humphrey began crossing the center markings while his truck was emerging from a curve in the highway. The road was marked with a broken yellow line adjacent to the lane in which Humphrey was traveling and a solid yellow line adjacent to the opposite lane. These markings indicated that Humphrey was permitted to move into the left lane to pass Croom if he could do so safely.

Section 20-150(d) of the North Carolina General Statutes provides that "[t]he driver of a vehicle shall not drive to the left side of the centerline of a highway . . . upon a curve in the highway where such centerline has been placed upon such highway by the Department of Transportation, and is visible." N.C. Gen. Stat. § 20-150(d) (2005). The question for this Court is what the word "centerline" means as it is used in this statute.

The General Assembly has neither provided a definition of the word "centerline" nor supplied qualifying examples. Rather, it has left the issue of highway markings to the discretion of the Department of Transportation (hereinafter "DOT"). *See* N.C. Gen. Stat. § 136-18(5) (2005) (granting DOT the power to "make rules, regulations and ordinances for the use of, and to police traffic on, the State highways . . . ."); N.C. Gen. Stat. § 136-30 (2005) (vesting DOT with discretion concerning how to "mark highways in the State high-

way system"); 1991 N.C. Sess. Laws c. 530, § 2 (repealing subsection (c) of N.C. Gen. Stat. § 136-30.1, which required that DOT mark highways in accordance with the Manual on Uniform Traffic Control Devices for Streets and Highways published by the United States Department of Transportation). Significantly, subsection (e) of section 20-150 references the discretion of DOT to mark the highways. N.C. Gen. Stat. § 20-150(e) (2005) ("The driver of a vehicle shall not overtake and pass another on any portion of the highway which is marked by signs, markers or markings placed by the Department of Transportation stating or clearly indicating that passing should not be attempted.").

Given the Legislature's decision to delegate road-marking determinations to DOT, we are not inclined to construe section 20-150 to prohibit passing on a portion of the highway which DOT has marked to permit passing. Accordingly, for the purposes of section 20-150 a "centerline" is a solid yellow line which indicates that passing from the adjacent lane is forbidden.

Plaintiff argues that our Supreme Court's decision in *Walker v. Bakeries Co.*, 234 N.C. 440, 67 S.E.2d 459 (1951) compels a different result. In *Walker*, the trial court erroneously instructed the jury that "if there was a solid line and if the plaintiff had a clear unobstructed view for a distance of 500 feet or more, the law did not require him to wait until he got away from this line before he could pass." *Id.* at 442, 67 S.E.2d at 460-61. The Supreme Court reversed because the instruction did not comport with section 20-150(d), but the Court did not address the issue of what qualifies as a "centerline" under the statute. *Id.* at 443, 67 S.E.2d at 461. However, given that *Walker* involved a road that was marked with a solid yellow line, its holding does not conflict with our interpretation of section 20-150(d).

The corresponding assignment of error is overruled.

II.

[2] Plaintiff next argues that the trial court erred by failing to include certain instructions in its charge to the jury. The record reveals that plaintiff did not object to the alleged omissions either during the charge conference or following the court's charge to the jury. Accordingly, plaintiff has waived his right to contest the propriety of the court's instructions. *See* N.C. R. App. P. 10(b)(2) (2005) ("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 . . . ."); *Oakes v. Wooten*, 173 N.C. App. 506, 515, 620 S.E.2d 39, 46 (2005) ("[Appellant] here failed to object to the trial court's instruction . . . . This issue is therefore not properly preserved for appellate review."). However, even assuming *arguendo* that plaintiff's arguments concerning the jury instructions are properly before us, we conclude that these arguments are entirely without merit. The corresponding assignments of error are overruled.

III.

[3] Plaintiff also argues that the trial court erred by denying his motion for a new trial. The decision of whether to grant a new trial to an unsuccessful party is consigned to the discretion of the trial court. *Campbell v. Pitt County Memorial Hosp.*, 321 N.C. 260, 264-65, 362 S.E.2d 273, 275-76 (1987). We discern no abuse of discretion in the instant case. The corresponding assignment of error is overruled.

Affirmed.

Judges ELMORE and LEVINSON concur.

SAMUEL L. WILDER, PLAINTIFF v. EVELYN D. HILL, AND THE ESTATE OF WILLIE V. DAVIS, DEFENDANTS

No. COA05-641

(Filed 7 February 2006)

Collateral Estoppel and Res Judicata; Wills— failure to make devise—not raised in prior caveat

Plaintiff's complaint for fraud and undue influence was correctly dismissed for res judicata where plaintiff had an adequate remedy in a prior caveat which he did not pursue. Plaintiff's claim here involved an alleged promise of a devise by the decedent in return for assistance; the only admissible evidence was a prior will; and plaintiff did not produce that will during the prior caveat.

Appeal by plaintiff from judgment entered 23 March 2005 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 10 January 2006.

Frank Cherry for plaintiff-appellant.

No brief for defendant-appellees.

HUNTER, Judge.

Samuel L. Wilder ("plaintiff") appeals from judgment of the trial court dismissing his complaint against Evelyn D. Hill ("Hill") and the estate of Willie V. Davis (collectively, "defendants") on the basis of *res judicata*. Plaintiff contends he is entitled to proceed with his civil suit. We affirm the judgment of the trial court.

On 23 November 2003, plaintiff filed a complaint against defendants in New Hanover County Superior Court alleging claims of fraud and undue influence regarding the will of plaintiff's stepfather, Willie Davis ("Davis"). According to the complaint, Davis executed a will in 1964 which named his wife (plaintiff's mother) as primary beneficiary, and named plaintiff as a secondary beneficiary to his estate. Davis's estate included a family residence located at 1101 Chestnut Street in Wilmington, North Carolina. After plaintiff's mother died in 1998, plaintiff gave Davis monies for maintenance of the Chestnut Street residence. Plaintiff alleged he did so upon the understanding that he would, along with Hill, who was Davis's daughter, inherit the residence upon Davis's death. Unbeknownst to plaintiff, Davis executed a new will in 1998 devising the property to Hill and her children and excluding plaintiff as a beneficiary. Plaintiff alleged in his complaint that Hill induced Davis to revoke the 1964 will and "by unlawful threats and intimidation coerced Willie V. Davis to exclude the plaintiff from his [1998] Will[.]" The complaint noted that when Davis died, plaintiff executed a successful caveat proceeding challenging the 1998 will. Plaintiff contended in his complaint he was entitled to money damages equal to "one-half of the value of the property at 1101 Chestnut Street or $35,000 . . . or . . . all funds advanced to [Davis] from 1995 to 2000 for taxes and upkeep of the property . . . ."

Plaintiff's first cause of action, that of fraud, was dismissed by order of the trial court dated 11 January 2005. The order found that:

1. Plaintiff's claim in essence is that the decedent, Willie V. Davis, promised him that he would devise him a one-half interest in his home place at 1101 Chestnut Street in return for him providing financial assistance for the upkeep and taxes on the home.

2. Plaintiff concedes that the only evidence of this agreement other than the alleged statements of the decedent, Willie V. Davis, which are barred by the Statute of Frauds, is a prior will made by Willie V. Davis in 1964.

3. The parties agree that the said previous will gave no direct statement of a promise to make the bequest in return for help in paying taxes or expenses and that prior case law prohibits the admission of prior Wills without such specific promises or agreements.

The trial court therefore dismissed plaintiff's first cause of action. Plaintiff did not appeal from this order.

Defendants' motion to dismiss plaintiff's second cause of action, that of undue influence, was heard by the trial court on 14 March 2005. Upon review of the case, the trial court made the following pertinent findings:

3. The Second Cause of Action alleged undue influence by the Defendant Evelyn D. Hill to cause Willie V. Davis to alter his will to omit Plaintiff from his will.

4. Plaintiff had previously filed a Caveat against the will of Willie V. Davis which was tendered for probate by Evelyn D. Hill that matter being in file 00E1070 in New Hanover County. The Caveat was successful and the will tendered for probate was disallowed.

5. The issue of undue influence of Evelyn D. Hill as to the preparation of the will of Willie V. Davis was one of the issues presented to the Jury at the Caveat proceeding.

6. The Plaintiff presented no further claims in the Caveat action nor did he present any other will for probate or other claims which he alleges in this action that he had against the parties.

7. The Estate of Willie V. Davis, following the voidance of the will by the caveat, was to be distributed by intestate succession, pursuant to which Plaintiff took nothing.

Based on these findings, the trial court concluded that plaintiff's claim against defendants was barred by *res judicata* and collateral estoppel "in that the same issue was determined by the Jury in the Caveat proceeding even though this action is premised upon a differ-

ent claim." The trial court entered an order dismissing plaintiff's claim against defendants. Plaintiff appeals.

Plaintiff argues the trial court erred in dismissing his claim on the basis of *res judicata* and collateral estoppel. Plaintiff contends he could not have raised the issue of damages in the former caveat proceeding, and therefore the fact that the jury found undue influence in the caveat proceeding does not bar plaintiff from the present action against defendants.

"In general, '[t]he purpose of a caveat is to determine whether the paperwriting purporting to be a will is in fact the last will and testament of the person for whom it is propounded.' " *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 419, 558 S.E.2d 871, 878 (quoting *In re Spinks*, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5 (1970)), *disc. review denied*, 355 N.C. 490, 563 S.E.2d 563 (2002). " 'The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paperwriting which has been admitted by the clerk of superior court to probate in common form.' " *Id.* (citation omitted).

> The Clerk of Superior Court as *ex officio* Judge of Probate has jurisdiction to take proof of wills and issue letters testamentary or of administration thereon. As Judge of Probate he has the sole power in the first instance to determine whether a decedent died testate or intestate and whether a script offered for probate is his will.

In re Will of Charles, 263 N.C. 411, 415, 139 S.E.2d 588, 591 (1965). "When a *caveat* is filed the Superior Court acquires jurisdiction of the whole matter in controversy. Any other script purporting to be the decedent's will should be offered and its validity determined in the *caveat* proceeding." *Id.* at 416, 139 S.E.2d at 591-92 (citations omitted).

Plaintiff contends that, as the purpose of the caveat proceeding is limited to a determination of whether the challenged will is valid or not, he could not have brought the action for damages, and the trial court therefore erred in dismissing his complaint on the ground of *res judicata*. Plaintiff is correct in asserting that the purpose of a caveat proceeding is limited and that where adequate remedy cannot be obtained in a caveat proceeding, the plaintiff is entitled to proceed with a tort claim. *See Murrow v. Henson*, 172 N.C. App. 792, 800, 616 S.E.2d 664, 669 (2005). Where a plaintiff may gain adequate relief in a

caveat proceeding, however, "a direct attack by *caveat* [is] a complete and adequate remedy at law, such that a plaintiff is not entitled to equitable relief." *Baars*, 148 N.C. App. at 419, 558 S.E.2d at 878.

In this case, plaintiff's complaint alleged the existence of an earlier 1964 will which named him as a beneficiary. Plaintiff never presented this will during the caveat proceeding, however, and Davis's estate was distributed by intestate succession, pursuant to which plaintiff took nothing. Plaintiff's claim to inherit lay in the alleged 1964 will, the existence and validity of which he failed to establish during the caveat proceeding. As plaintiff had adequate remedy in the caveat proceeding, he may not now seek a civil remedy. The trial court therefore properly dismissed plaintiff's complaint.

The judgment of the trial court is affirmed.

Affirmed.

Judges WYNN and JACKSON concur.

CARRIE ALLEN NICHOLSON, WIDOW OF KENNEDY F. NICHOLSON, DECEASED EMPLOYEE, AND QUANTILLA NICOLE NICHOLSON, ADULT CHILD, AND KENYA LORRAINE NICHOLSON, ADULT CHILD, AND KEITH TYRONE ALLRED, ALLEGED DEPENDENT MINOR CHILD, PLAINTIFFS v. EDWARDS WOOD PRODUCTS, EMPLOYER, AND FORESTRY MUTUAL INS. CO., CARRIER, DEFENDANTS

No. COA05-629

(Filed 7 February 2006)

Workers' Compensation— full Commission's failure to follow order—agreement to provide support even though technical exclusion from the definition of child

A de novo review revealed that the full Industrial Commission erred in a workers' compensation case by failing to follow an order reflecting an agreement between the parties that 400 weeks of benefits under N.C.G.S. § 97-38 were owed to a minor dependent of decedent employee notwithstanding the minor's technical exclusion from the definition of child under N.C.G.S. § 97-2(12), and the full Commission's opinion and award is vacated, because: (1) the full Commission stated in its opinion and award that notwithstanding the minor's technical exclusion from the defini-

tion of child under N.C.G.S. § 97-2(12), it found the minor to be a dependent child under N.C.G.S. § 97-38(3); (2) the order encompassed the bargained-for agreement of the parties and should have been followed in the absence of one of the grounds set forth in N.C.G.S. § 1A-1, Rule 60(b); and (3) the Commission never invoked Rule 60(b) and made findings to support relief from the order.

Appeal by defendants from Opinion and Award of the Industrial Commission entered 1 December 2004 by Commissioners Christopher Scott, Bernadine S. Ballance, and Pamela T. Young. Heard in the Court of Appeals 7 December 2005.

No brief filed for plaintiffs-appellees.

Lewis & Roberts, P.L.L.C., by Jeffrey A. Misenheimer and Sarah E. Cone, for defendants-appellants.

CALABRIA, Judge.

Edwards Wood Products ("defendant-employer") and Forestry Mutual Insurance Co. ("defendant-carrier") appeal from an Opinion and Award of the Industrial Commission, concluding that although Keith Tyrone Allred ("Allred") was not technically a "child" of Kennedy Nicholson ("the decedent") within the meaning of N.C. Gen. Stat. § 97-2(12) (2005), he was a "dependent child" within the meaning of N.C. Gen. Stat. § 97-38(3) (2005). Pursuant to this determination, the Industrial Commission awarded Allred benefits until he reached the age of eighteen. We vacate the Opinion and Award.

On 15 August 2002, the decedent was employed as a transportation driver for defendant-employer. On that date, the decedent was involved in a compensable accident that resulted in his death. At the time of his death, the decedent and his wife Carrie Allen Nicholson ("Nicholson") had two minor biological children, Kenya Lorraine Nicholson and Quantilla Nicole Nicholson. The decedent and Nicholson also cared for a boy, Allred, who they raised since he was approximately two months old. Allred was age seven (7) at the time of the accident. Nicholson testified that she and the decedent took care of Allred and provided sole support for him. However, the decedent and Nicholson never officially adopted Allred because his biological father would not sign a relinquishment of his parental rights.

Deputy Commissioner Theresa B. Stephenson subsequently reviewed, *inter alia*, the issue of whether Allred qualified as a "child" within the meaning of the Workers' Compensation Act. In an Opinion and Award of 20 February 2003, the deputy commissioner concluded that Allred "qualifies as a 'child' under [N.C. Gen. Stat. §] 97-39 and therefore he is presumed to be wholly dependent upon the earnings of the deceased employee and is entitled to a share of the compensation available pursuant to [N.C. Gen. Stat. §] 97-38." The deputy commissioner then awarded Allred benefits until he reached the age of eighteen (18). From that Opinion and Award, defendants filed a Motion for Reconsideration, which was denied and, at defendants' request, converted into an appeal to the Full Commission.

The Full Commission heard this matter on 5 March 2004. Thereafter, the parties entered into a consent agreement that stated, in pertinent part,

> [Allred] is not a "child" under the Act, but was wholly dependent upon the deceased-employee at the time of his death. The parties therefore agree that Keith is entitled to 400 weeks of benefits pursuant to [N.C. Gen. Stat.] § 97-38. The parties agree that these payments will be made to Carrie[] Nicholson for the use and benefit of Keith until the expiration of the 400 week period.

The minor biological children were also awarded 400 weeks of benefits in the consent agreement. The agreement was subsequently converted into an order when it was signed by Commissioner Christopher Scott and filed on 5 October 2004. Thereafter, on 1 December 2004, the Full Commission entered an Opinion and Award, determining that Allred was a "dependent child" under the Act and entitled to benefits until he reached the age of eighteen (18). Defendants appeal.

Defendants argue that the Full Commission erred by failing to follow the order. We agree.

Appellate review of an Opinion and Award of the Industrial Commission "is limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Roberts v. Century Contractors, Inc.*, 162 N.C. App. 688, 690-91, 592 S.E.2d 215, 218 (2004). The Industrial Commission is the sole judge of the credibility of witnesses and the strength of evidence. *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109-10, 561 S.E.2d 287, 291 (2002). Accordingly, findings of fact of the Industrial Commission are con-

clusive on appeal if supported by competent evidence, even if the evidence might support a contrary finding. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856 (1997). However, questions of law are reviewed *de novo*. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997).

The Full Commission in its Opinion and Award determined that "the consent order reflected an agreement between the parties that 400 weeks of benefits pursuant to [N.C. Gen. Stat. §] 97-38 were owed to [Allred] and that this amount was not in controversy." The Commission therefore stated, "[t]he only issue remaining for the Full Commission to resolve is whether [Allred] is entitled to compensation beyond 400 weeks until his 18th birthday." We review *de novo* whether the order resolved the question whether Allred is entitled to compensation beyond 400 weeks.

The plain language of the order stated that Allred is "not a 'child' under the Act" but, nonetheless, defendants opted to provide him 400 weeks of benefits. Although the Full Commission interpreted the order as resolving only the issue of whether Allred was entitled to 400 weeks of benefits and not whether Allred was entitled to benefits beyond the 400 weeks, we disagree with its interpretation. In its Opinion and Award, the Full Commission stated, "Notwithstanding [Allred's] technical exclusion from the definition of 'child' under § 97-2(12), the Commission, reading the Act in its entirety and taking into account other pertinent definitions, finds [Allred] to be a "dependent child" pursuant to § 97-38(3)." By this conclusion of law, the Full Commission clearly contradicts the order's determination that Allred is "not a 'child' under the Act." The order encompassed the bargained-for agreement of the parties and should have been followed in the absence of one of the grounds set forth in N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). *See*, *generally*, *Thacker v. Thacker*, 107 N.C. App. 479, 420 S.E.2d 479 (1992). Because the Full Commission never invoked Rule 60(b) and made findings to support relief from the order, we hold the Full Commission erred in failing to follow the order. Accordingly, we vacate its Opinion and Award.

Having vacated the Full Commission's Opinion and Award, we need not address appellants' other assignments of error.

Vacated.

Judges BRYANT and JACKSON concur.

AARON AND LOIS A. AKERS, ET AL., PETITIONERS v. CITY OF MOUNT AIRY, A NORTH CAROLINA MUNICIPAL CORPORATION, RESPONDENT

No. COA05-140

(Filed 7 February 2006)

Appeal and Error— appealability—order remanding annexation ordinance—no showing of substantial right

Petitioners' appeal from a superior court order remanding an annexation ordinance to the Mount Airy Board of Commissioners (BOC) for amendment to conform the boundaries of the annexation area to the requirements of N.C.G.S. § 160A-48(c)(3) is dismissed as an appeal from an interlocutory order, because: (1) the superior court's order expressly indicated that it was not a final judgment, but rather that the court was remanding the matter to the BOC for further proceedings before entry of a final judgment; (2) an order by a superior court, sitting in an appellate capacity, that remands to a municipal body for additional proceedings is not immediately appealable; and (3) petitioners have not demonstrated that a substantial right would be affected in the absence of immediate review.

Appeal by petitioners from order entered 27 May 2004 by Judge Steve A. Balog in Surry County Superior Court. Heard in the Court of Appeals 18 October 2005.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr. and Roddey M. Ligon, Jr.; and Edwin M. Woltz, for petitioners-appellants.

Tharrington Smith, L.L.P., by Michael Crowell and Kristopher B. Gardner; and Gardner, Gardner & Campbell, P.L.L.C., by Hugh B. Campbell, III, for respondent-appellee.

GEER, Judge.

Petitioners, owners of land subjected to annexation by the City of Mount Airy, appeal a superior court order remanding the annexation ordinance to the Mount Airy Board of Commissioners for amendment to conform the boundaries of the annexation area to the requirements of N.C. Gen. Stat. § 160A-48(c)(3) (2005). Because the superior court order does not dispose of the case, but rather requires further proceedings, it is interlocutory. Petitioners have not demonstrated that a

substantial right would be affected in the absence of immediate review and, therefore, we dismiss the appeal.

On 21 April 2003, the City adopted an annexation ordinance extending its corporate limits to encompass land owned by petitioners effective 1 May 2004. On 18 June 2003, the petitioners sought review of the annexation ordinance in Surry County Superior Court pursuant to N.C. Gen. Stat. § 160A-50 (2005). During a 5 April 2004 bench trial, petitioners argued that the City failed to comply with the statutory mandates of N.C. Gen. Stat. §§ 160A-47, -48, and -49 (2005) and that the annexation ordinance should, therefore, be declared null and void.

After hearing testimony and reviewing the record of annexation filed pursuant to N.C. Gen. Stat. § 160A-50(c), the superior court entered an order containing 122 findings of fact and 26 conclusions of law. Based on those findings and conclusions, the court

> ORDERED pursuant to G.S. 160A-50(g)(2) that [the annexation ordinance] is remanded to the Mount Airy Board of Commissioners for amendment of the boundaries of the annexation area to conform to the requirement of G.S. 160A-48(c)(3) that 60 percent of the acreage in the urban portion which is not used for commercial, industrial, governmental or institutional purposes consist of parcels three acres or less in size. The Mount Airy Board of Commissioners shall amend the ordinance within 90 days following entry of this Order, otherwise the annexation ordinance shall be void. *The Mount Airy Board of Commissioners shall notify the court of the amendment of the ordinance and, upon receipt of such notification establishing that the ordinance complies with G.S. 160A-48(c)(3), final judgment shall be entered for the city and the petitioners' petition shall be dismissed.*

(Emphasis added.) Petitioners have appealed from this order of remand.

Since the question whether an appeal is interlocutory presents a jurisdictional issue, this Court has an obligation to address the issue *sua sponte* regardless whether it is raised by the parties. *Heritage Pointe Builders, Inc. v. N.C. Licensing Bd. of Gen. Contractors*, 120 N.C. App. 502, 504, 462 S.E.2d 696, 698 (1995), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996). Generally, an order "made during

the pendency of an action, which does not dispose of the case, but leaves it for further action," is interlocutory and not immediately appealable. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

The superior court's order expressly indicated that it was not a final judgment, but rather that the court was remanding the matter to the City's Board of Commissioners for further proceedings *before* entry of a final judgment. The order is, therefore, interlocutory. An interlocutory order may be immediately appealed in only two circumstances: (1) when the trial court, pursuant to N.C.R. Civ. P. 54(b), enters a final judgment as to one or more but fewer than all of the claims or parties and certifies that there is no just reason to delay the appeal; or (2) when the order deprives the appellant of a substantial right that would be lost absent appellate review prior to a final determination on the merits. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). Since Rule 54(b) does not apply in this case, the sole question before the Court is whether the superior court's order deprives petitioners of any substantial right.

The appellant has the burden of showing that a substantial right would be lost without immediate review. *Mills Pointe Homeowner's Ass'n v. Whitmire*, 146 N.C. App. 297, 299, 551 S.E.2d 924, 926 (2001). Further, under the North Carolina Rules of Appellate Procedure, the appellant is required to include in its brief "[a] statement of the grounds for appellate review," explaining the jurisdictional basis for review in this Court. N.C.R. App. P. 28(b)(4). When, as here, an appeal is interlocutory, "the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Id.*

In violation of this rule, petitioners' brief fails to include a statement of grounds for appellate review or any other explanation as to why an interlocutory appeal should be allowed. This Court has previously held: "It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order . . . ." *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. Nevertheless, we have reviewed the record and the briefs and can identify no substantial right that will be lost to petitioners absent an immediate appeal. Indeed, this Court has consistently held that an order by a superior court, sitting in an appellate capacity, that remands to a municipal body for additional proceedings is not imme-

diately appealable. *See, e.g.*, *Heritage Pointe Builders*, 120 N.C. App. at 504, 462 S.E.2d at 698 (1995) (appeal of superior court's remand to a licensing board for rehearing dismissed as interlocutory); *Jennewein v. City Council of the City of Wilmington*, 46 N.C. App. 324, 326, 264 S.E.2d 802, 803 (1980) (appeal of superior court's remand to a city council for a *de novo* hearing dismissed as interlocutory). Accordingly, petitioners' appeal is dismissed.

Appeal dismissed.

Judges WYNN and McGEE concur.

IN THE MATTER OF A.L.A., A MINOR CHILD

No. COA05-505

(Filed 7 February 2006)

Appeal and Error; Child Abuse and Neglect— failure to appeal from dispositional order—writ of certiorari futile

Respondent father's appeal from an order entered 1 December 2004 adjudicating his daughter to be a neglected and abused child is dismissed, because: (1) respondent failed to appeal from the district court's final dispositional order entered on the same date; and (2) respondent's request for the Court of Appeals to deem this appeal to be a petition for writ of certiorari would be futile based on the fact that the district court has since entered an order terminating respondent's parental rights.

Appeal by respondent from order entered 1 December 2004 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 30 November 2005.

County Attorney S. C. Kitchen, by Deputy County Attorney Thomas W. Jordan, Jr., for petitioner-appellee.

Mercedes O. Chut for respondent-appellant.

Wendy C. Sotolongo for guardian ad litem-appellee.

GEER, Judge.

Respondent father appeals from an order entered 1 December 2004, adjudicating his daughter A.L.A. to be a neglected and abused child. Because he has not appealed from the district court's final dispositional order entered on the same date, we grant the motion to dismiss filed by petitioner Durham County Department of Social Services ("DSS") and the guardian ad litem. Although the respondent father has asked us to deem his appeal to be a petition for writ of certiorari, to do so would be futile since the district court has since entered an order terminating his parental rights.

A.L.A. was born on 26 March 2002. On 12 August 2002, DSS filed a petition alleging that A.L.A. was an abused and neglected child. According to the petition, doctors at the Duke University Medical Center believed that she was suffering from shaken baby syndrome resulting in bilateral subdural hematomas in the front of her brain. In March 2003, A.L.A. was adjudicated abused and neglected and was removed from the custody of her parents. The parents claimed at the time that no one had shaken the baby, but rather that her head injuries resulted from a car accident.

After A.L.A. spent a period in foster care and then time living with her parents, the court formally returned custody of A.L.A. to her parents in mid-November 2003. In late November 2003, however, A.L.A.'s father took her to the emergency room at Duke University Medical Center. A.L.A. was also seen in the emergency room again a few days later with similar symptoms. Although her father stated that she had a seizure after falling off a tricycle onto a carpeted floor, doctors at Duke concluded that she had suffered a new subdural hematoma, most likely caused by someone shaking the child.

On 12 December 2003, DSS filed a second petition alleging abuse and neglect. On the same date, the district court entered an order for nonsecure custody returning A.L.A. to the custody of DSS. After hearing three days of testimony in September and October 2004, including expert testimony from both petitioner and the respondent father, the court continued the proceedings before conducting an additional day of testimony on 15 November 2004 as to the dispositional phase. The court then entered two separate orders on 1 December 2004: (1) an adjudication order concluding that A.L.A. was neglected and abused and (2) an order of disposition continuing custody of the child in DSS and directing DSS to cease reunification efforts with A.L.A.'s parents. The respondent father filed a notice of appeal of the "final order of

adjudication signed by Durham County District Court Judge James T. Hill on November 30, 2004."[1] DSS and the guardian ad litem have moved to dismiss the respondent father's appeal under N.C. Gen. Stat. § 7B-1001(3) (2003).[2]

N.C.R. App. P. 3(d) requires that a notice of appeal designate the order from which appeal is taken. In this case, the notice of appeal references only the order of adjudication. As petitioners note in their motion to dismiss, N.C. Gen. Stat. § 7B-1001(3) (emphasis added) authorizes an appeal from an "order of *disposition after an adjudication* that a juvenile is abused, neglected, or dependent." This Court has previously held in *In re Laney*, 156 N.C. App. 639, 642, 577 S.E.2d 377, 379, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 762 (2003), that an appeal from an adjudication order and a temporary dispositional order was not properly before this Court under N.C. Gen. Stat. § 7B-1001(3). Similarly, we have dismissed an appeal in a juvenile delinquency case when the notice of appeal referenced only the adjudication and not the disposition. *In re A.L.*, 166 N.C. App. 276, 277-78, 601 S.E.2d 538, 538-39 (2004). *Laney* and *A.L.* require dismissal.

The respondent father nevertheless argues that he should be permitted to appeal under N.C. Gen. Stat. § 7B-1001(4), which allows an appeal from "[a]ny order modifying custodial rights." Even if this general provision could override the more specific language of N.C. Gen. Stat. § 7B-1001(3), a question we do not reach, the adjudication order did not modify custody, but rather stated that "[t]he child shall continue in the nonsecure custody of [DSS] with placement authority in that agency pending a hearing on disposition." Moreover, the dispositional phase was the phase specifically addressing custody of A.L.A. and, as we have noted, the father has not appealed from the dispositional order.

Alternatively, the respondent father requests that we treat his appeal as a petition for writ of certiorari under N.C.R. App. P. 21. On 1 November 2005, however, the respondent father's parental rights were terminated. Even if we were to grant the father's request, we would then be required to dismiss the appeal as moot under *In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 498 (2005) ("[A] trial court retains jurisdiction to terminate parental rights during the pendency

1. A.L.A.'s mother is not a party to this appeal.

2. We note that N.C. Gen. Stat. § 7B-1001 has been substantially amended. 2005 N.C. Sess. Laws 398, sec. 10. The amendments apply to petitions or actions filed on or after 1 October 2005, 2005 N.C. Sess. Laws 398, sec. 19; therefore, the present litigation is unaffected by the changes.

of a custody order appeal in the same case. The termination order necessarily renders the pending appeal moot."). *See also In re Stratton*, 159 N.C. App. 461, 464, 583 S.E.2d 323, 325 (holding that order terminating parental rights rendered moot an appeal from an initial adjudication and disposition), *appeal dismissed and disc. review denied*, 357 N.C. 506, 588 S.E.2d 472 (2003). This appeal is, therefore, dismissed.

Appeal dismissed.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. DAVID AHMADI-TURSHIZI

No. COA05-482

(Filed 7 February 2006)

Drugs— indictment—3,4 methylenedioxymethamphetamine

Defendant's convictions for offenses involving methylenedioxymethamphetamine (MDMA) were vacated where the indictment did not include "3,4," as it was listed in N.C.G.S. § 90-89. Schedule I does not include any substance which contains any quantity of "methylenedioxymethamphetamine."

Appeal by defendant from judgment entered 4 June 2004 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 10 January 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kevin Anderson, for the State.

Brannon Strickland, PLLC, by Anthony M. Brannon, for defendant-appellant.

JACKSON, Judge.

On 15 March 2002, while at a nightclub in Raleigh, North Carolina, David Ahmadi-Turshizi ("defendant") was approached by an undercover female police officer working for the Raleigh Police Department. Defendant knew the woman from having gone to high school

with her, but did not know that she had become a police officer. The two began talking, and shortly thereafter the officer asked defendant if he could help her to obtain some drugs. At first defendant was shocked that she was asking for drugs, but after repeated requests, defendant found an individual in the club who would sell the officer five pills of ecstasy, or methylenedioxymethamphetamine.

Defendant knew the undercover officer was asking for his help in obtaining illegal drugs, but he wanted to impress and help her. The individual selling the drugs gave the pills directly to defendant, and the officer left her money on the bar, which was retrieved by the individual selling the pills. The officer spoke with defendant for a short time after the sale, and then left the nightclub to meet with her commanding officers. Defendant and the officer continued to talk to each other and see each other for several weekends after the night of 15 March 2002; however defendant did not assist her with obtaining drugs on any of these subsequent meetings.

On 25 February 2003, defendant was indicted for: (1) felonious possession of methylenedioxymethamphetamine, with intent to sell and deliver; (2) felonious sale of methylenedioxymethamphetamine; and (3) felonious delivery of methylenedioxymethamphetamine. All of the charges stemmed from the events on the night of 15 March 2002 and the early morning hours of 16 March 2002. Following a trial by jury, defendant was found guilty on all charges on 3 June 2004. The trial court entered judgment on the verdict and sentenced defendant to a term of imprisonment for a minimum of eleven months and a maximum of fourteen months. The trial court suspended defendant's sentence and placed him on supervised probation for twenty-four months. Defendant appeals from his convictions.

Defendant contends the trial court lacked jurisdiction on all of his charges when the indictment failed to allege a substance listed in Schedule I of North Carolina General Statutes, section 90-89(3), and thus was facially insufficient. We agree.

In order for a trial court to have jurisdiction over a defendant, the " 'indictment must allege all of the essential elements of the crime sought to be charged.' " *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414, *disc. review denied*, 360 N.C. 73, 622 S.E.2d 624 (2005) (quoting *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996)). When a defendant has been charged with possession of a controlled substance, the identity of the controlled substance that defendant allegedly possessed is considered to be an essential ele-

ment which must be alleged properly in the indictment. *Id.* An indictment is invalid when it " 'fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *Id.* (quoting *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998)).

In the instant case, defendant was charged with three offenses: felony possession with intent to sell and deliver methylenedioxymethamphetamine; felony sale of methylenedioxymethamphetamine; and felony delivery of methylenedioxymethamphetamine. Defendant's indictment identified the controlled substance that he allegedly possessed, sold and delivered as "methylenedioxymethamphetamine a controlled substance which is included in Schedule I of the North Carolina Controlled Substances Act."

Schedule I of the North Carolina Controlled Substances Act, North Carolina General Statutes, section 90-89, identifies a long list of controlled substances by their specific chemical names. Included in this list is:

> (3) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:
>
> . . . .
>
> c. 3, 4—Methylenedioxymethamphetamine (MDMA).

N.C. Gen. Stat. § 90-89(3)(c) (2004). For each of defendant's three charges, the indictment listed the alleged controlled substance only as "methylenedioxymethamphetamine," which is not a substance that appears in Schedule I.

In *State v. Ledwell*, a panel of this Court held that when an indictment fails to list a controlled substance by its chemical name as it appears in Schedule I of North Carolina General Statutes, section 90-89, the indictment must fail. 171 N.C. App. at 333, 614 S.E.2d at 415. In *Ledwell*, the defendant's indictment alleged felony possession of "methylenedioxyamphetamine (MDA)," but failed to include "3, 4" as required by Schedule I of our Controlled Substances Act. *Id.* This Court recognized that the Schedule I controlled substances list did not "include any substance which contains any quantity of 'methyl-

enedioxyamphetamine (MDA)' ", and as such, the defendant's indictment was fatally flawed and his conviction was vacated. *Id.*

In the instant case, although the controlled substance which defendant is alleged to have possessed, sold, and delivered, is not the same substance as in *Ledwell*, we hold that *Ledwell* is controlling. Defendant's indictment listed the controlled substance he allegedly possessed, sold, and delivered to be "methylenedioxymethamphetamine" but failed to include "3, 4" as required. Schedule I does not include any substance which contains any quantity of "methylenedioxymethamphetamine." As the substance listed in defendant's indictment does not appear in Schedule I of our Controlled Substances Act, the indictment is fatally flawed and each of defendant's convictions for felonious possession of methylenedioxymethamphetamine, with the intent to sell and deliver, sale of methylenedioxymethamphetamine, and delivery of methylenedioxymethamphetamine, must be vacated. *See*, *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 415.

As defendant's convictions have been vacated, we decline to address defendant's additional assignments of error.

Vacated.

Judges WYNN and HUNTER concur.

KATHRYN L. GRAYSON, PLAINTIFF v. HIGH POINT DEVELOPMENT LIMITED PARTNERSHIP AND CBL/G.P., INC., DEFENDANTS

No. COA05-555

(Filed 7 February 2006)

Premises Liability— slip and fall—icy parking lot—plaintiff's knowledge of hazard

Dangerous conditions which are open and obvious do not create a liability for a landowner. Here, plaintiff's own testimony demonstrates that she knew of the hazardous condition of the icy parking lot in which she fell.

Appeal by plaintiff from judgment entered 18 March 2005 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 1 December 2005.

Morgan, Herring, Morgan, Green, Rosenblutt & Gill, LLC, by John Haworth, for plaintiff-appellant.

Brotherton Ford Yeoman & Worley, PLLC, by Steven P. Weaver, for defendant-appellees.

JACKSON, Judge.

Plaintiff filed a complaint, alleging negligence on the part of defendants, after she was injured in a fall upon property owned by defendants. Defendants filed an answer denying negligence and asserting plaintiff's contributory negligence as an affirmative defense. Defendants subsequently moved for summary judgment and a hearing on the Summary Judgment Motion was held 17 March 2005. After hearing argument from counsel, the trial court granted defendants' motion and entered summary judgment in defendants' favor. Plaintiff appeals.

The undisputed facts of the case are that plaintiff was a salesperson at the Belk's store at the Oak Hollow Mall ("the mall"). Belk leased its store space from defendants. On 27 January 2004, plaintiff was returning to her vehicle in a parking lot at the mall after completing work. Plaintiff's vehicle was parked in an area designated for employee parking. While walking to her vehicle, plaintiff slipped on some ice and fell. As a result of the fall, plaintiff suffered fractures of both wrists.

A heavy snow fall had occurred in the area of the mall beginning on 25 January 2004 and ending on 26 January 2004. The resulting snow and ice had not been removed from the mall's parking lot when plaintiff crossed the parking lot going to work at approximately 1:00 p.m. on the day of her fall. Plaintiff testified that she was aware of the snow and ice when she arrived at work and that "it was bad, but it was during the day and it had not froze over."

When plaintiff left work, it was dark outside. In spite of the darkness, plaintiff was able to see that the parking lot was covered with ice as the lights in the parking lot were shining on the ice. Plaintiff testified that the condition of the parking lot was worse than when she went into work and she knew that the ice would be slippery and took short steps to keep from falling. Plaintiff even commented to two co-workers who were walking with her that "somebody's going to get killed out here" as she stepped onto the ice in the parking lot. Plaintiff slipped on the ice and fell almost immediately after making that comment.

Defendant was granted summary judgment in the action and plaintiff appeals.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

The moving party has the burden of establishing that there is no triable issue of fact. *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998). Once the moving party has met its burden, the burden then shifts to the non-moving party to forecast evidence demonstrating that a genuine issue of material fact exists. *Id.* at 526, 495 S.E.2d at 911. If the non-moving party cannot make such a forecast of evidence, then summary judgment is appropriate.

Generally, summary judgment is not appropriate in negligence actions. *See Barnes v. Wilson Hardware Co.*, 77 N.C. App. 773, 775, 336 S.E.2d 457, 458 (1985). When the forecast of evidence demonstrates that the plaintiff cannot satisfy an essential element of his claim or overcome an affirmative defense established by the defendant, however, summary judgment should be granted. *Patterson v. Pierce*, 115 N.C. App. 142, 143, 443 S.E.2d 770, 771 (citing *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992)), *disc. review denied*, 337 N.C. 803, 449 S.E.2d 749 (1994). Also, "when it appears that there can be no recovery for plaintiff even if the facts as alleged by plaintiff are taken as true[,]" it is proper for a trial court to enter summary judgment in favor of defendant. *Jacobs v. Hill's Food Stores, Inc.*, 88 N.C. App. 730, 732, 364 S.E.2d 692, 693 (1988) (citations omitted).

In the case *sub judice*, plaintiff contends that defendants were negligent in failing to keep the parking lot in a reasonably safe condition, and that negligence proximately caused her injuries. Our Supreme Court has held that all persons, other than trespassers, on a landowner's property are owed a duty of reasonable care. *Nelson v. Freeland*, 349 N.C. 615, 631, 507 S.E.2d 882, 892, (1998), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). A duty of reasonable care means that a landowner must not expose lawful visitors to danger unnecessarily and must provide such visitors with warnings of hidden hazards of which the landowner has actual or constructive knowledge. *Bolick*

v. Bon Worth, Inc., 150 N.C. App. 428, 430, 562 S.E.2d 602, 604, *disc. review denied*, 356 N.C. 297, 570 S.E.2d 498 (2002).

However, "[a] landowner is under no duty to protect a visitor against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered. . . . Similarly, a landowner need not warn of any 'apparent hazards or circumstances of which the invitee has equal or superior knowledge.' " *Von Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000) (citations omitted), *aff'd per curiam*. 353 N.C. 445, 545 S.E.2d 210 (2001). Accordingly, dangerous conditions which are open and obvious do not create liability for a landowner.

Defendants argue that no duty was owed to plaintiff as the hazardous condition created by the ice was known to plaintiff, who, in fact, had knowledge of the hazard which was superior to defendants'. Plaintiff's own testimony demonstrates that she knew of the hazardous condition and, therefore, there exists no issue of genuine fact that defendant owed her no duty. Accordingly, summary judgment in defendant's favor was proper.

Affirmed.

Judges HUDSON and LEVINSON concur.

TOM J. KEITH, PLAINTIFF v. TOWN OF WHITE LAKE, DEFENDANT

No. COA05-408

(Filed 7 February 2006)

Zoning— town ordinance—procedures for amending ordinance

A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant town in a declaratory judgment action seeking to void the town's adoption of a zoning ordinance rezoning two tracts of land owned by plaintiff, because: (1) the Planning Board proposed the zoning changes and followed the appropriate procedures for amending the ordinance, including providing all property owners notice and conducting the public hearing; and (2) the ordinance does not require the Planning Board to file a petition before initiating recommen-

dations to the Board of Commissioners with respect to amendments to the zoning map or ordinance.

Appeal by plaintiff from judgment entered 24 January 2005 by Judge Ripley E. Rand in Bladen County Superior Court. Heard in the Court of Appeals 9 January 2006.

The Yarborough Law Firm, by Garris Neil Yarborough, for plaintiff-appellant.

Hester, Grady & Hester, P.L.L.C., by H. Clifton Hester, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff, Tom J. Keith, brought this action seeking a declaratory judgment voiding defendant Town's adoption of a zoning ordinance re-zoning two tracts of land owned by plaintiff. After the Town's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) was denied, both plaintiff and defendant Town moved for summary judgment. The motion was heard upon stipulated facts which, briefly summarized, showed the following: at a meeting on 20 February 2003, the Town's Planning Board (Planning Board) recommended that plaintiff's property located within the Town's extraterritorial zoning jurisdiction be re-zoned from R-2 (Recreational Residential Zone) and B (Business) to R-1 (Permanent Residential Zone) to be consistent with the Town's land use plan adopted on 12 September 2000. The Town Board of Commissioners (Board), at its 11 March 2003 meeting, set a public hearing on the matter for 1 April 2003. After proper notice, the Board conducted the public hearing on 1 April 2003 and subsequently voted unanimously to re-zone the property.

Section 8-2 of the Town's Zoning Ordinance provides:

(A) Any person or organization may petition the Board of Commissioners to amend this Ordinance. The petition, on a form approved by the Board of Commissioners, shall be filed with the Town Clerk and shall include, among the information deemed relevant by the Town Clerk:

(1) The name, address, and phone number of the applicant;

(2) A metes and bounds description and a scaled map of the land affected by the amendment if a change in zoning district classification is proposed; and

(3) A description of the proposed map change or a summary of the specific objective of any proposed change in the text of this Ordinance.

(B) Petitions for amendments shall be submitted to the Town Clerk three weeks prior to the date of the Planning Board meeting at which the petition will be reviewed.

The trial court granted the Town's motion for summary judgment, and plaintiff appeals, contending the re-zoning was void because the Town did not follow its own ordinance when it re-zoned his property. We affirm.

Because the facts have been stipulated, there are no genuine issues of material fact in dispute and the only question is whether the Town is entitled to judgment as a matter of law. *Town of Hertford v. Harris*, 169 N.C. App. 838, 839, 611 S.E.2d 194, 196 (2005). Interpretation of the zoning ordinance is a matter of law which we review *de novo*. *Ayers v. Bd. of Adjust. For Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994).

The General Assembly delegated to local governments the power to zone their territories. N.C. Gen. Stat. § 160A-381 (2005); *Summers v. City of Charlotte*, 149 N.C. App. 509, 517, 562 S.E.2d 18, 24, *disc. review denied*, 355 N.C. 758, 566 S.E.2d 482 (2002). Section 160A-381 permits the city to delegate to a board of adjustment to "determine and vary [the] application" of the zoning regulations "in accordance with general or specific rules therein contained." N.C. Gen. Stat. § 160A-381(b1). When construing municipal zoning ordinances, we apply the same rules of construction used to consider statutes, in order to "ascertain and effectuate the intention of the municipal legislative body." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 303-04, 554 S.E.2d 634, 638 (2001) (internal citation omitted). Moreover, "if the words of a statute are plain and unambiguous, the court need look no further." *Id.* at 304, 554 S.E.2d at 638.

The Town's ordinances establish procedures to plan for its development and growth, including the creation of the Planning Board. As the statute permits a board of adjustment or the town council to apply the zoning regulations it adopts, the Town has appropriately delegated to the Planning Board the authority to study and recommend "plans, goals and objectives relating to the growth, development and redevelopment of the Town's planning jurisdiction" and to

"[d]evelop and recommend . . . policies, ordinances, administrative procedures and other means for carrying out" these plans, as well as proposing "zoning text and map changes."

Plaintiff maintains that the Town is "an organization" which is required to petition the Board of Commissioners prior to amending the Ordinance pursuant to section 8-2. Plaintiff's reliance on section 8-2 is misplaced. Amendments to the zoning map are first governed by section 8-1, which articulates a review process by the Planning Board, and requires a public hearing, review and action by the Board of Commissioners. Here, the Planning Board proposed the zoning changes, and followed the appropriate procedures for amending the ordinance, including providing all property owners notice and conducting the public hearing. We do not interpret the ordinance as requiring the Planning Board to file a petition before initiating recommendations to the Board of Commissioners with respect to amendments to the zoning map or ordinance. Accordingly, we affirm the trial court's grant of summary judgment in favor of the Town.

Affirmed.

Judges McGEE and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 FEBRUARY 2006

ASAD v. ASAD No. 05-592	Wilson (98CVD2090)	Affirmed
BURROW FARMS v. CULLER No. 05-317	Stokes (02CVD312)	Appeal dismissed
CLARK v. SANGAR CLINIC, P.A. No. 05-705	Ind. Comm. (I.C. #333197)	Affirmed
GOBLE v. McKINNEY No. 05-78	Davidson (03CVD351)	Dismissed
HAIR v. MELVIN No. 05-572	Cumberland (03CVS4160)	Affirmed
HARDING v. LOWE'S FOODS STORES, INC. No. 05-675	Avery (04CVS83)	Affirmed
IN RE A.N.J. No. 05-465	New Hanover (03J483) (03J484) (03J485) (03J486)	Reversed and remanded
IN RE B.W. No. 05-760	Mecklenburg (04J1200)	Affirmed; remanded for correction of a clerical error
IN RE C.L. No. 05-379	Buncombe (03J296)	Affirmed
IN RE C.P. No. 05-734	Cabarrus (01J153)	Affirmed
IN RE D.L.C. No. 05-357	Robeson (04J06)	Affirmed
IN RE K.F.S. No. 05-518	Wayne (04J33)	Affirmed
IN RE M.B. No. 05-432	Yadkin (04J4)	Affirmed
IN RE M.S. No. 05-201	Catawba (03J313)	Dismissed
IN RE NANCE No. 05-728	Randolph (04E39)	Affirmed
IN RE R.J., I.J., T.M., J.M. No. 05-395	Mecklenburg (04J444) (04J445) (04J446) (04J447)	Affirmed

JOHNSON v. HONEYCUTT No. 05-295	Mitchell (02CVD237)	Affirmed
KRISPY KREME DOUGHNUT CORP. v. FAIRMONT SIGN CO. No. 05-998	Forsyth (05CVS446)	Affirmed in part; dismissed in part
LAMBETH v. N.C. FARM BUREAU MUT. INS. CO. No. 05-287	New Hanover (00CVS3709)	Affirmed
LINCOLN MED. CTR. v. N.C. INS. GUAR. ASS'N No. 05-231	Lincoln (04CVS134)	Affirmed
MORRILL v. MORRILL No. 05-691	Rowan (99CVD1394)	Affirmed
NORMAN HOME FURNISHINGS, INC. v. MAYO No. 05-751	Beaufort (04CVD170)	Affirmed
OSBORNE v. TATUM No. 05-628	Johnston (04CVS1652)	Affirmed
PENDLETON LAKE HOMEOWNERS ASS'N v. CARNELL No. 05-812	Wake (04CVD3195)	Affirmed
PIPKIN v. PIPKIN No. 05-539	Wake (98CVD7822)	Affirmed
SINK v. SPRINKLE No. 05-570	Forsyth (04SP1485)	Affirmed
STATE v. ALLEN No. 05-1089	Vance (94CRS664) (94CRS6713) (94CRS6714) (94CRS6715) (94CRS6716) (94CRS6717)	Affirmed
STATE v. BELL No. 05-268	Gaston (02CRS13488) (02CRS13493) (02CRS13494) (02CRS13495) (02CRS13496)	No prejudicial error
STATE v. BOWENS No. 05-828	Guilford (03CRS30811) (03CRS24196) (03CRS24198)	No error

STATE v. CARAWAY No. 05-945	Durham (04CRS40377) (04CRS40378)	Appeal dismissed
STATE v. CUPID No. 05-331	Forsyth (02CRS63698) (02CRS63923) (02CRS63924) (02CRS63926)	No error
STATE v. EDMONDSON No. 05-673	Lenoir (03CRS50299)	No error
STATE v. FINNEY No. 05-850	Buncombe (01CRS7899)	Remanded for resentencing
STATE v. GARNER No. 05-707	Halifax (04CRS51185) (04CRS52092)	Affirmed
STATE v. GREEN No. 05-409	Pitt (04CRS5571) (04CRS5572)	No error
STATE v. HEATH No. 05-227	Pitt (03CRS57879)	Habitual Impaired Driving—No error. Driving While License Revoked—No error. Providing Fictitious Information to an Officer—Vacated.
STATE v. HUFFMAN No. 05-349	Forsyth (03CRS50017)	No error
STATE v. LOCKLEAR No. 05-479	Robeson (00CRS644) (00CRS645) (00CRS646) (00CRS647)	No error
STATE v. MILLS No. 05-261	Nash (01CRS55474) (01CRS55487)	No error
STATE v. MOORE No. 05-419	Onslow (03CRS55735)	No error
STATE v. MORTON No. 05-257	Stanly (02CRS54051) (02CRS54052)	Affirmed
STATE v. NOUAIM No. 05-591	Wake (03CRS80277)	Affirmed

STATE v. PARKS No. 05-987	Wilson (04CRS50555)	No error
STATE v. PARSONS No. 05-94	Iredell (03CRS50634)	No error
STATE v. SEARCY No. 05-614	Rutherford (04CRS2408) (04CRS2409)	No error
STATE v. SHUE No. 05-244	Alamance (02CRS52625) (02CRS52626)	No error
STATE v. SMITH No. 05-700	Nash (04CRS52323) (04CRS52849) (04CRS52850) (04CRS52851)	No error
STATE v. STANCIL No. 05-541	Pitt (04CRS53349)	No error in part; dismissed in part
STATE v. WATSON No. 05-144	Forsyth (03CRS56808) (03CRS61917)	No error
STATE v. WILLIAMSON No. 05-290	Rowan (03CRS50259)	No error in defendant's trial; the Motion for Appropriate Relief is denied
STATE v. YOUNG No. 05-721	Buncombe (03CRS53624)	New trial
STEVENS v. STAFFORD No. 05-167	McDowell (04CVD177)	Dismissed
WALKER v. HAMER No. 05-556	Forsyth (00CVD3988)	Affirmed
WALLACE v. BECON CONSTR. CO. No. 05-316	Ind. Comm. (I.C. #815708)	Appeal dismissed
YULE v. YULE No. 05-406	Cabarrus (02CVD2442)	Appeal dismissed

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

Appellate rules violations—notice—Although plaintiff's brief in a breach of contract case violates N.C. R. App. P. 10 and 28 since the assignment of error in the record on appeal does not correspond to the question presented in plaintiff's brief, defendants had sufficient notice of the basis upon which the Court of Appeals might rule because: (1) plaintiff made only one assignment of error, and that assignment of error referenced the order of the trial court; (2) under these circumstances, defendants reasonably should have known that plaintiff's assignment of error contained a clerical error incorrectly citing summary judgment as the ground for dismissal; and (3) defendants were not prejudiced by plaintiff's error. **Welch Contr'g, Inc. v. N.C. Dep't of Transp., 45.**

Appellate rules violations—notice of errata submitted prior to oral argument—Although plaintiffs violated the Rules of Appellate Procedure by failing to reference their assignments of error in their brief as required by N.C. R. App. P. 28(b)(6), the Court of Appeals exercised is discretion under N.C. R. App. P. 2 to hear the appeal despite the violations because plaintiffs submitted a notice of errata prior to oral argument which amended the headings in their brief to comply with Rule 28(b)(6). **Bald Head Island, Ltd. v. Village of Bald Head Island, 543.**

Assignments of error—broad, vague, and unspecific—appeal dismissed—Assignments of error asserting that the trial court's rulings were "contrary to the caselaw of this jurisdiction" were too broad, did not identify the issues briefed on appeal, and resulted in dismissal of the appeal. **May v. Down E. Homes of Beulaville, Inc., 416.**

Assignments of error—failure to cite legal authority—Assignments of error which did not cite legal authority were dismissed. **In re Foreclosure of Cole, 653.**

Assignments of error—lack of enumerated findings—basis of assignment of error easily determined—Assignments of error were heard under Rule 2 of the Rules of Appellate Procedure despite the lack of enumerated findings or conclusions of law therein where the legal basis of the assignments of error could be determined easily. **Davis v. Columbus Cty. Schools, 95.**

Assignments of error—legal issues not corresponding—Assignments of error were dismissed where plaintiffs' questions and legal issues did not correspond to the assignments of error. **In re Foreclosure of Cole, 653.**

Cross-assignments of error—not required when no findings required from trial court—There is an exception to the requirement of cross-assignments of error where the trial court is not required to make findings of fact in its order, such as the entry of summary judgment or an order granting a motion to dismiss. The Court of Appeals will not limit the scope of its review merely because the trial court specified the grounds for its decision. **Atlantic Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc., 339.**

Failure to appeal from dispositional order—writ of certiorari futile—Respondent father's appeal from an order entered 1 December 2004 adjudicating his daughter to be a neglected and abused child is dismissed, because: (1) respondent failed to appeal from the district court's final dispositional order entered on the same date; and (2) respondent's request for the Court of Appeals to deem this appeal to be a petition for writ of certiorari would be futile based on

APPEAL AND ERROR—Continued

Preservation of issues—failure to argue—Although respondent mother assigns error to the trial court's conclusion of law number 11 in a termination of parental rights case, this assignment of error is deemed abandoned because respondent failed to set forth any reason or argument in support of this assignment of error as required by N.C. R. App. P. Rule 28(b)(6). **In re S.W., 719.**

Preservation of issues—failure to argue—The assignments of error that defendant failed to argue in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Williams, 640.**

Preservation of issues—failure to argue—failure to cite authority—Although respondent mother contends that the trial court erred by determining that it was in the best interests of the minor child to terminate respondent's parental rights, this assignment of error is abandoned under N.C. R. App. P. 28(b)(6) because respondent did not provide any discernible argument or citation of authority for such a claim. **In re C.D.A.W., 680.**

Preservation of issues—failure to contest admission of orders—failure to appeal from orders—Although respondent mother contends the trial court erred by relying on prior orders in other files to conclude that grounds existed to terminate her parental rights even though the orders were obtained when she was a minor and no guardian ad litem had been appointed for respondent, this assignment of error is dismissed, because: (1) respondent did not contest the admission of these orders in the instant proceeding as required by N.C. R. App. P. Rule 10; (2) respondent never appealed the orders she now contests, even though she was represented by counsel in all those proceedings; and (3) the Court of Appeals declined to review these orders under N.C. R. App. P. Rule 2. **In re E.T.S., 32.**

Preservation of issues—failure to object—Although plaintiff contends the trial court erred in a negligence case arising out of an automobile accident by failing to include certain instructions in its charge to the jury, plaintiff has waived his right to contest the propriety of the court's instructions because the record reveals that plaintiff did not object to the alleged omissions either during the charge conference or following the court's charge to the jury. **Croom v. Humphrey, 765.**

Preservation of issues—guilty plea—writ of certiorari—motion for appropriate relief—Although defendant does not have a statutory right to appeal since he pleaded guilty at trial and now contends the trial court erred in a multiple taking indecent liberties with a child sentencing proceeding by determining without a jury that defendant had ten prior record level points, the court can address this issue because: (1) defendant has a petition for writ of certiorari pending before the Court of Appeals; and (2) defendant addressed this issue in his motion for appropriate relief. **State v. Hadden, 492.**

Record on appeal—prior court order not included—collateral estoppel not considered—An assignment of error concerning collateral estoppel was not considered where the prior court order was not included in the record. **County of Jackson v. Nichols, 196.**

Scope of review—de novo—error of law—The trial court did not err by applying a de novo scope of review to the State Personnel Commission's (SPC) deci-

EVIDENCE—Continued

ness's testimony even though defendant contends it was in violation of *Crawford v. Washington*, 541 U.S. 36 (2004), because: (1) if the statement is offered for reasons other than the truth of the matter asserted, the statement is not hearsay and is not covered by *Crawford*; and (2) the statements were not admitted for the truth of the matter asserted, but for purposes of explaining why the witness chose to run (in fear for his life), why he sought law enforcement assistance before returning to the apartment, and why he chose not to confront defendant single-handedly. **State v. Byers, 280.**

Impeaching witness—prior inconsistent statement—There was no plain error in a prosecution for robbery and other offenses in the State's introduction of extrinsic evidence to impeach a defense witness who denied making a prior inconsistent statement. Whether the prior statement was made is a collateral matter and the testimony should not have been allowed; however, defendant did not meet his burden of showing that the jury would probably have reached a different result if the testimony had been excluded. **State v. Reid, 613.**

Laboratory report—admission without lab tech—right to confront witnesses—Laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial business records (and thus admissible without the technician) only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents is objective and does not involve opinions or conclusions drawn by the analyst. The record in this case did not contain enough information about the procedures involved in identifying cocaine to allow a determination of whether that portion of the test meets the criteria. However, there was no prejudice because defendant did not challenge the identity of the substance at trial, but portrayed himself instead as a homeless person making a delivery. **State v. Cao, 434.**

Larceny prosecution—defendant arrested for failing to appear—admissible—An officer's testimony that defendant had been arrested for failing to appear was admissible in a prosecution for armed robbery and other crimes because it was offered to show how the police came to question defendant about the robbery. **State v. Matthews, 550.**

Lay opinion—identification of substance as methamphetamine—The trial court did not abuse its discretion in a second-degree murder, possession with intent to sell and deliver methamphetamine, and sale and delivery of methamphetamine case by allowing lay witness testimony that the substance given by defendant to an individual who died was methamphetamine because the testimony was admissible under N.C.G.S. § 8C-1, Rule 701 since it was rationally based on the witness's six years of experience with methamphetamine and her perceptions while smoking the substance, and the witness's uncertainty as to the precise weight and cost of an "eightball" was irrelevant. **State v. Yelton, 349.**

Medical records—proper administration of justice—The trial court did not abuse its discretion in a prosecution for second-degree murder, driving while impaired and other offenses by admitting defendant's medical records. **State v. Westbrook, 128.**

Other crimes—defendant as fugitive in this crime—captured with weapons—Evidence that defendant was a fugitive and had guns in his possession when he was arrested was properly admitted where there were no warrants out

MOTOR VEHICLES—Continued

Driving while impaired—instructions—redacted version—vehicle—The trial court did not err in a driving while impaired case by submitting a redacted version of the statutory definition under N.C.G.S. § 20-4.01(49) of the term "vehicle" as part of the court's instructions to the jury which excluded the exceptions for mobility impairment and electric personal assistive mobility devices because there was no evidence presented at trial that defendant suffered from a mobility impairment or was using a scooter for mobility enhancement, and defendant's scooter does not fall within the definition of "electric personal assistive mobility device" found in N.C.G.S. § 20-4.01(7a). **State v. Crow, 119.**

Driving while impaired—motorized scooter—vehicle—The motorized scooter with two wheels arranged in tandem that defendant was riding constituted a vehicle within the meaning of N.C.G.S. § 20-138.1 so as to support submission to the jury of a charge of driving while impaired. **State v. Crow, 119.**

Passing vehicle—crossing centerline at curve—The trial court did not err in a negligence case arising out of an automobile accident by denying plaintiff's motion for a directed verdict and subsequent motion for judgment notwithstanding the verdict regarding whether defendant driver's attempt to pass decedent violated N.C.G.S. § 20-150(d) which prohibits motorists from crossing the centerline of a highway at a curve when defendant began crossing the center markings while his truck was emerging from a curve in the highway, the road was marked with a broken yellow line adjacent to the lane in which defendant was traveling, and there was a solid yellow line adjacent to the opposite lane. **Croom v. Humphrey, 765.**

Summary judgment—no sworn statements—affidavit giving expert opinion—speed of vehicle at time of accident—The trial court did not err in a negligence case by concluding that there was no genuine issue of fact raised by the pleadings, discovery, and a professional engineer's affidavit, because: (1) the pleadings and discovery contained no sworn statements, but merely predicted statements of third parties which cannot be relied upon in ruling on a motion for summary judgment; and (2) the engineer's affidavit giving an expert opinion as to the speed of the vehicle at the time of the accident was inadmissible under the current law of this state since one who did not see the vehicle in motion will not be permitted to give an opinion as to its speed. **Van Reypen Assocs. v. Teeter, 535.**

NEGLIGENCE

Motion for new trial—abuse of discretion standard—The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by denying plaintiff's motion for a new trial. **Croom v. Humphrey, 765.**

Summary judgment—affidavit of named party—facts not peculiarly within knowledge—The trial court did not err in a negligence case by granting summary judgment in favor of defendants on the basis of the affidavit of defendant individual, because: (1) even though defendant was an interested person as a named party to the action, the affidavit was not inherently suspect and the facts contained in the affidavit were not peculiarly within his knowledge; (2) nothing was presented in opposition to the motion which called into question defendant's credibility or the facts as they were presented in his affidavit; and (3) a mere failure to include the affidavits of persons with knowledge as to facts of contention

SENTENCING—Continued

Out-of-state convictions—similarity to N.C. offenses—question of law— The issue of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court, and the court here did not err by not requiring that the issue be proven to the jury beyond a reasonable doubt. **State v. Hanton, 250.**

Prior record level—driving while impaired convictions—The trial court did not err by counting all five of defendant's prior driving while impaired convictions when determining his prior record level under N.C.G.S. § 15A-1340.14 for purposes of sentencing even though defendant contends that three of the driving while impaired convictions were also elements of the two habitual impaired driving convictions, because: (1) although prior convictions of driving while impaired are elements of the offense of habitual impaired driving, the statute does not impose punishment for these previous crimes but instead imposes an enhanced punishment for the latest offense; and (2) on each occasion that defendant was sentenced as a felon, it was based on the new instance of DWI being considered a more serious violation in light of defendant's recidivist record. **State v. Hyden, 576.**

Prior record level—preponderance of evidence—similarity of out-of-state convictions—presumption of regularity for prior convictions—The trial court did not err in a multiple taking indecent liberties with a child sentencing proceeding by determining without a jury and by a preponderance of the evidence that defendant had ten prior record level points, because: (1) defendant's prior North Carolina convictions for assault inflicting serious injury and larceny merited one point each since that determination is a fact of a prior conviction; (2) four of defendant's out-of-state convictions were substantially similar to offenses under North Carolina law and these determinations did not offend defendant's Sixth Amendment right to a jury trial; and (3) prior convictions are entitled to a presumption of regularity when challenged under N.C.G.S. § 15A-980 and the burden of overcoming the presumption properly rests with defendant. **State v. Hadden, 492.**

Prior record level—prior convictions—purchase or possession of beer or wine by underage individual—The trial court did not err in a double second-degree kidnapping sentencing hearing by utilizing defendant's prior conviction in 1987 for purchase or possession of beer or wine by an eighteen-year-old underage individual even though defendant contends it is not classified as a Class A1 or Class 1 misdemeanor, because: (1) N.C.G.S. § 15A-1340.14(c) provides that in determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed; and (2) as it is undisputed that defendant was eighteen years old in 1987 at the time of the misdemeanor offense, the classification of that offense for prior record level calculation purposes was a Class 1 misdemeanor. **State v. Frady, 393.**

Prior record level—prior convictions where courts files destroyed—The trial court did not err in a double second-degree kidnapping sentencing hearing by denying defendant's motion to suppress the use of two prior convictions for which the court files had been destroyed to calculate his prior record level even though defendant contends there was no proof of a knowing and voluntary waiver of his right to counsel because defendant failed to carry his burden of proof

SENTENCING—Continued

to show by a preponderance of evidence that the convictions were obtained in violation of his right to counsel. **State v. Frady, 393.**

Prior record points—evidence sufficient—The trial court's findings regarding defendant's prior record points were supported by the evidence where the State presented only a worksheet, but defense counsel's acknowledgment that defendant had been on probation can reasonably be construed as an admission that defendant had been convicted of at least one of the charges. All that is required for defendant's record level (II) is one conviction; moreover, defendant has not asserted that any of the prior convictions listed on the worksheet do not exist. **State v. Boyce, 663.**

STATUTES OF LIMITATION AND REPOSE

Contract claim by subcontractor—accrual—A contract claim by a subcontractor accrued when plaintiff became aware of its injury and was barred by the statute of limitations. Plaintiff's policy argument for changing the accrual date to substantial completion is better addressed to the General Assembly. **ABL Plumbing & Heating Corp. v. Bladen Cty. Bd. of Educ., 164.**

Installment contracts—period begins running from time each individual installment due—The trial court erred in a breach of lease agreement case by granting summary judgment in favor of defendant lessees based on the running of the statute of limitations where the lease agreement was modified by a bankruptcy confirmation order, defendants thereafter failed to meet their obligation to make twenty consecutive monthly payments of $530.00 beginning August 1998 and one payment of $289.65 in April 2000, and plaintiff filed the complaint on 13 October 2001, because: (1) the lease in this case is governed by the Uniform Commercial Code and is subject to a four-year statute of limitations, and the statute of limitations for filing this action began to run on 30 June 1998; (2) the general rule regarding the running of the statute of limitations for installment contracts is that the limitations period begins running from the time each individual installment becomes due; and (3) plaintiff is barred from recovering only those installment payments due prior to 14 October 1997, four years preceding the 13 October 2001 date on which it filed suit. **Finova Capital Corp. v. Beach Pharm. II, Ltd., 184.**

TERMINATION OF PARENTAL RIGHTS

Amendment to petition—independent sufficient grounds—Although respondent mother contends the trial court erred by allowing a DSS motion to amend the pleadings to assert N.C.G.S. §§ 7B-1111(a)(2) (reasonable progress) and 7B-1111(a)(3) (support), the Court of Appeals does not need to address whether the trial court abused its discretion in permitting these amendments to the petition to terminate parental rights because the conclusion that respondent mother neglected the minor child is independently sufficient grounds to terminate parental rights. **In re C.D.A.W., 680.**

Assignment of error—only one of three grounds for termination—Only one of the grounds in N.C.G.S. § 7B-1111(a) is necessary to terminate parental rights. Whether there was sufficient evidence to support one of those grounds in this case was not addressed where respondent did not assign error to the other two grounds cited by the trial court. **In re J.A.A. & S.A.A., 66.**

TERMINATION OF PARENTAL RIGHTS—Continued

Best interests of child—abuse of discretion standard—The trial court did not abuse its discretion by concluding that it was in the best interests of the child to terminate respondent mother's parental rights, because: (1) the findings revealed that the child has been living continuously with petitioner since December 1999, and also with petitioner's husband and his son since their marriage in July 2001; (2) the child considers petitioner's stepson her big brother; and (3) respondent's personal situation has not improved or stabilized to a significant degree since the child was placed in the care of petitioner in 1999, even though respondent has been aware of petitioner's intent to adopt the minor child since mid 2002. **In re E.T.S., 32.**

Denial of motion for continuance—mental impairment—chemical dependency—desire to enter drug treatment facility—The trial court did not abuse its discretion in a termination of parental rights case by denying respondent mother's motion for continuance based on her mental impairment, chemical dependency, and desire to enter a drug treatment facility, because: (1) DSS previously offered respondent assistance to enter a reputable drug treatment facility, and respondent twice failed to attend; and (2) DSS tried repeatedly and unsuccessfully for a period of 18 months to get respondent to engage in drug rehabilitation. **In re C.D.A.W., 680.**

Factors—successful adaptation of minor child to foster home—desire of foster parents to adopt minor child—The trial court did not abuse its discretion in a termination of parental rights case by basing disposition in whole or in part upon the successful adaptation of the minor child to the foster home and the desire of the foster parents to adopt the minor child, because: (1) although a finding by a trial court that children being settled in a foster home alone does not support a termination of parental rights, it is appropriate for the court to assess how the child is adjusting to its new home environment; and (2) a full review of the trial court order illustrated that more than one factor predominated in the court's ultimate conclusion to terminate respondent's parental rights. **In re C.D.A.W., 680.**

Failure to appoint guardian ad litem for parent—mental illness—The trial court erred in a termination of parental rights case by failing to hold a hearing to determine respondent mother's entitlement under N.C.G.S. § 7B-1111(a)(6) to the appointment of a guardian ad litem at the hearing where the minor child was adjudicated neglected, and the case is remanded for appointment of a guardian ad litem for respondent and a new hearing. Although the trial court did not terminate respondent's parental rights by specifically relying on dependency, the mother's mental health issues were present throughout the permanency planning reviews and were so intertwined with the child's neglect as to obviate consideration of the termination order without concurrent consideration of the mental issues that were present. **In re L.W., 387.**

Failure to appoint guardian ad litem for parent—mental illness—chemical dependency—The trial court did not err in a termination of parental rights case by failing to appoint a guardian ad litem for respondent mother based on evidence of both her mental illness and chemical dependency, because: (1) there was no petition or adjudication for dependency, and consequently, none of the grounds for terminating respondent's parental rights involved use of N.C.G.S. §§ 7B-1111(a)(6), 7B-101(9), or 7B-1101; and (2) the DSS motion did not track the language of N.C.G.S. § 7B-1111(a)(6). **In re C.D.A.W., 680.**

TERMINATION OF PARENTAL RIGHTS—Continued

Failure to comply with reunification plan—willful abandonment of child for at least six consecutive months—The trial court did not err in a termination of parental rights case by determining that respondent mother failed to successfully comply with the reunification plan including willfully abandoning her minor child for at least six consecutive months. **In re C.D.A.W., 680.**

Failure to enter order within thirty days of hearing—The trial court erred by failing to enter the order terminating respondent father's parental rights within thirty days from the date of the hearing as required by N.C.G.S. § 7B-1110, and the order is vacated and the cause is remanded for a new hearing. **In re O.S.W., 414.**

Grounds—neglect—sufficiency of evidence—The trial court did not err by concluding that grounds existed to terminate respondent mother's parental rights based on neglect when the court's findings demonstrated that respondent failed to maintain stable housing, was unemployed at the time of the termination hearing, failed to comply with the child support order effective 1 June 2001 by missing numerous payments or by submitting incomplete payments, had on more than one occasion left her minor child with others to be cared for, including the incident initiating the minor child's removal from respondent's custody, failed to provide proper medication to the child, had attempted suicide, had not cooperated with social workers, did not follow through with mental health counseling, did not complete parenting classes, had only visited or contacted the minor child on a sporadic basis between December 1999 and Easter 2001, made no phone calls and sent no letters or cards between these visits, and had not visited the child at all from Easter 2001 until the hearing in April and May 2004 but made only a couple of phone calls. **In re E.T.S., 32.**

Guardian ad litem for parent—incapacity to provide care not alleged—The trial court did not err by not appointing a guardian ad litem under N.C.G.S. § 7B-1111(a)(6) for the parent in a termination of parental rights proceeding where incapability to provide proper care for the children was not alleged and respondent did not request a guardian ad litem. **In re J.A.A. & S.A.A., 66.**

Judicial notice of records, court orders, and summaries—failure to show prejudice—Although the trial court erred in a termination of parental rights case by failing to rule on either petitioner's request or respondent mother's objection to petitioner's request for the trial court to take judicial notice of the records, court orders, and summaries entered in the case, this assignment of error is overruled because respondent failed to illustrate how she was prejudiced when all of the findings relating to and supporting the conclusion respondent neglected the minor child remain unchallenged. **In re C.D.A.W., 680.**

Motion to dismiss petition—untimely termination hearing—untimely entry of written termination order—failure to show prejudice—The trial court did not err by denying respondent mother's motion to dismiss the termination of parental rights petition based on the untimeliness of the termination hearing and the trial court's entry of the written termination order because respondent failed to show prejudice resulting from either of the statutory infractions under N.C.G.S. § 7B-1109(a) and (e). **In re S.W., 719.**

Relative available for custody—termination not an abuse of discretion—The trial court did not abuse its discretion by terminating parental rights when a

WORKERS' COMPENSATION—Continued

dependent of decedent employee notwithstanding the minor's technical exclusion from the definition of child under N.C.G.S. § 97-2(12), and the full Commission's opinion and award is vacated, because: (1) the full Commission stated in its opinion and award that notwithstanding the minor's technical exclusion from the definition of child under N.C.G.S. § 97-2(12), it found the minor to be a dependent child under N.C.G.S. § 97-38(3); (2) the order encompassed the bargained-for agreement of the parties and should have been followed in the absence of one of the grounds set forth in N.C.G.S. § 1A-1, Rule 60(b); and (3) the Commission never invoked Rule 60(b) and made findings to support relief from the order. **Nicholson v. Edwards Wood Prods., 773.**

Injury by accident—arm grabbed by fellow teacher—There was sufficient evidence to support a finding and conclusion that a teacher whose arm was grabbed by another teacher suffered an injury by accident which exacerbated her pre-existing condition. **Davis v. Columbus Cty. Schools, 95.**

Injury by accident—giving CPR—exhaustion and aneurysm rupture—There was evidence supporting the Industrial Commission's finding in a workers' compensation case that a deputy sheriff suffered an aneurysm rupture after giving CPR and that this was a compensable injury by accident. Although there was testimony that deputies rarely perform CPR, it is the extent and nature of the exertion that determines whether the resulting injury was an injury by accident, and plaintiff did not need to show that the overexertion occurred while he was engaged in some unusual activity. **Ferreyra v. Cumberland Cty., 581.**

Medical benefits—aggravation of existing condition—Medical benefits were properly awarded where there was no error in concluding that plaintiff's accident aggravated her pre-existing shoulder condition. **Davis v. Columbus Cty. Schools, 95.**

Most advanced specialty doctrine—not recognized—There was ample support in the record in a workers' compensation case for the Industrial Commission's findings and conclusions that plaintiff's job was not the cause or an exacerbating condition of his underlying rheumatoid arthritis. The "most advanced speciality doctrine," advocated by plaintiff, was not recognized. **Armstrong v. W.R. Grace & Co., 528.**

Side effects of medication—dry mouth—insufficient evidence of actual causation—There was competent evidence to support the Industrial Commission's finding and conclusion that plaintiff's restorative dental treatment was not compensable where, although "dry mouth" was a potential side effect of several of plaintiff's medications, there was no testimony as to what actually caused plaintiff's dental condition. **Clark v. Sanger Clinic, 76.**

Side effects of medication—esophageal reflux—insufficient evidence of actual causation—The Industrial Commission did not err by not finding compensable treatment of plaintiff's esophageal reflux, constipation, and nausea. While there was testimony that many of plaintiff's medications have those conditions as side effects, there was no testimony as to actual cause. **Clark v. Sanger Clinic, 76.**

Unauthorized medical expenses—retroactively sanctioned by treating physician—further treatment not covered—Expenses for osteopathic treat-

WORD AND PHRASE INDEX