NORTH CAROLINA COURT OF APPEALS REPORTS

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1. Retired 31 July 2007.
2. Appointed and sworn in 23 April 2007.
3. Sworn in 7 September 2007 after having served as interim District Attorney, District 14.

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	STANLEY PEELE	Hillsborough
	SAMUEL M. TATE	Morganton
	JOHN L. WHITLEY	Wilson

1. Appointed and sworn in 13 September 2007 to replace Phyllis Gorham who was appointed to Superior Court
2. Deceased 20 June 2007.
3. Retired 31 July 2007.

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KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DOUGLAS M. ROBINS, PLAINTIFF v. TOWN OF HILLSBOROUGH, DEFENDANT

No. COA05-165

(Filed 21 February 2006)

1. Zoning— moratorium and subsequent amendment to ordinance—site application pending—asphalt plant

The trial court erred by granting summary judgment in favor of defendant town based on the town's moratorium and subsequent amendment to the pertinent zoning ordinance while plaintiff's application for site plan approval with defendant to construct an asphalt plant within the town limits was pending, and the case is reversed and remanded, because: (1) plaintiff was entitled to rely upon the language of, and have his application considered under, the zoning ordinance in effect at the time he applied for the permit; and (2) to hold otherwise would allow compliance with regulations and permitting to become a moving target to ever changing revisions or amendments.

2. Zoning— moratorium and later permanent ban on asphalt plants—summary judgment—genuine issues of material fact—public purpose—equal protection—arbitrary and capricious standard

The trial court erred in a zoning case by granting summary judgment in favor of defendant town after the town repeatedly failed to act on plaintiff's application for site plan approval to construct an asphalt plant within the town limits, and defendant

issued a moratorium and later a permanent ban on asphalt plants within the town and its extraterritorial zoning jurisdiction, because genuine issues of material fact existed as to: (1) whether the public purpose defendant town sought to accomplish by a total ban on asphalt plants is legitimate; and (2) whether defendant's decision to place a total permanent ban on manufacturing and processing facilities involving petroleum products within all areas located in the city limits and its extraterritorial zoning jurisdiction denied equal protection and was arbitrary and capricious.

Judge JACKSON dissenting.

Appeal by plaintiff from order entered 29 October 2004 by Judge James C. Spencer, Jr., in Orange County Superior Court. Heard in the Court of Appeals 12 October 2005.

Smith, James, Rowlett & Cohen, LLP, by J. David James and Seth R. Cohen, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, for defendant-appellee.

TYSON, Judge.

Douglas M. Robins ("plaintiff") appeals from the trial court's order granting summary judgment in favor of the Town of Hillsborough ("defendant"). We reverse and remand.

I. Background

On 21 January 2003, plaintiff filed an application for site plan approval with defendant to construct an asphalt plant within the town limits of Hillsborough. Georgia-Pacific Corporation owned the property on which the facility was to be constructed. Plaintiff had entered into a contract to purchase the property prior to submitting his application for site plan review, and subsequently purchased the property. At the time plaintiff filed his application, an asphalt plant was a permitted use in a general industrial (GI) district subject to a site plan review. The property on which the asphalt plant was to be constructed was zoned GI. In reliance on the zoning ordinance in effect at the time of his application, plaintiff spent approximately $100,000.00 to engineer and submit a site plan to comply with the conditional use requirements set forth in the ordinance and to prepare for the required public hearings.

The Board of Adjustment held public hearings on 12 February 2003, 12 March 2003, and 9 April 2003 to review plaintiff's application. The Board received evidence in favor of and in opposition to plaintiff's site plan submission, but reached no decision. At the close of the 9 April 2003 hearing, the Board of Adjustment again continued and scheduled a fourth hearing on 30 April 2003.

On 22 April 2003, the Town of Hillsborough Board of Commissioners adopted "An Ordinance Amending the Town of Hillsborough Zoning Ordinance to Temporarily Suspend the Review, Consideration and Issuance of Permits and Applications for Manufacturing and Processing Operations Involving Petroleum Products" ("the moratorium"). The moratorium provides:

> Notwithstanding any provision in this Zoning Ordinance to the contrary, no manufacturing and processing facility involving petroleum products as one of the materials being manufactured and/or processed (including, but not limited to, refineries for gasoline and other fuels, liquefied gas refineries, *asphalt plants*, finished petroleum products plants, plants which manufacture asphalt paving mixtures and blocks, asphalt shingles and/or coating materials, and plants manufacturing or processing petroleum lubricating oils and greases) shall be permitted, and *no application for any permit or approval to operate such facility shall be accepted, processed, reviewed or considered by the Town. This section shall apply to all applications for a permit or approval, including any application which is pending as of the effective date hereof.*

(Emphasis supplied). The "moratorium" further provides it shall be effective immediately upon adoption and shall remain in effect until 31 December 2003 unless sooner terminated by the Board of Commissioners or extended by the Board for a period of not longer than six months. Defendant issued a notice cancelling the 30 April 2003 Board of Adjustment's scheduled and continued hearing to further review plaintiff's site plan application.

On 24 November 2003, the Board of Commissioners amended Section 3.3 of the zoning ordinance to totally prohibit "manufacturing and processing facilities involving the use of petroleum products, such as . . . asphalt plants . . . in the Town of Hillsborough and its extraterritorial zoning jurisdiction." The ordinance stated, "This section shall apply to all applications for a permit or approval, including any application which is pending as of the effective date hereof." The

ordinance's amendment became effective 1 March 2004. The Board of Commissioners also extended the "moratorium" in effect until the effective date of the permanent ban.

Plaintiff filed a complaint and petition for judicial review and writ of certiorari in Orange County Superior Court on 22 January 2004. Defendant filed a motion for summary judgment, which the trial court granted on 28 October 2004. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred in granting defendant's motion for summary judgment because: (1) plaintiff is entitled to rely upon the language of the zoning ordinance in effect at the time he applied for the permit; (2) defendant violated N.C. Gen. Stat. § 160A-364 (2003) by failing to give notice of a public hearing or hold a public hearing prior to its decision to extend the moratorium; and (3) defendant's decision to permanently prohibit asphalt plants was arbitrary and capricious.

III. Standard of Review

A. Review of a Board of Adjustment Decision

When reviewing decisions of town boards or local municipalities, the superior court's task is to:

> (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) *ensure that the decision is not arbitrary and capricious*.

Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust., 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999) (citing *Coastal Ready-Mix Concrete Co., Inc. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980)) (emphasis supplied). This Court's "task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review." *Id.* (citing *Appeal of Willis*, 129 N.C. App. 499, 502, 500 S.E.2d 723, 726 (1998)). We review questions of law *de novo*.

Harris v. Ray Johnson Constr. Co., 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000).

B. Summary Judgment

Summary judgment is proper if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." 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.*

IV. Plaintiff's Application for Site Plan Approval

[1] Plaintiff argues the trial court erred in granting summary judgment in favor of defendant because plaintiff is entitled to rely upon the language of the zoning ordinance in effect at the time he applied for the permit. We agree.

This Court addressed this issue in *Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 578 S.E.2d 688 (2003). In *Lambeth*, the petitioner applied to the Town of Kure Beach for a permit to widen his driveway to his corner lot residence from 19 feet to 24 feet on 15 March 2001. *Id.* at 350, 578 S.E.2d at 689. The zoning ordinance in effect at the time of the petitioner's application provided driveways across the town right-of-way were limited to 24 feet wide. *Id.* at 351, 578 S.E.2d at 689-90. Petitioner's permit was denied by the town's building inspector because the expansion would violate the ordinance as it had been applied to other landowners. *Id.* at 351, 578 S.E.2d at 690. An existing five foot wide concrete sidewalk extended from petition's house to the other street. *Id.* at 350, 578 S.E.2d at 689. On 19 June 2001, the town amended the ordinance to limit landowners to twenty-four feet of "impervious surface" across any town right-of-way. *Id.* at 351, 578 S.E.2d at 690. The trial court dismissed the petitioner's action and entered judgment in favor of the Town of Kure Beach. *Id.* at 351, 578 S.E.2d at 690.

This Court stated, "The amendment to the ordinance further restricts petitioner's use of his property. Petitioner was entitled to rely upon the language of the ordinance in effect at the time he applied for the permit." *Id.* at 352, 578 S.E.2d at 690 (citing *Northwestern Financial Group v. County of Gaston*, 329 N.C. 180, 405 S.E.2d 138 (1991)).

Similarly, in *Northwestern Financial Group* our Supreme Court considered:

> whether the plaintiff-developer which applied for a construction permit under a county ordinance that prescribed the procedures for obtaining a construction and operating permit of a mobile home park has a right to have its application reviewed under the terms of the ordinance in effect at the time the application for the permit was made.

329 N.C. at 181-82, 405 S.E.2d at 139. Gaston County adopted a mobile home park ordinance on 1 July 1986 and amended the ordinance in September 1987. *Id.* at 182, 405 S.E.2d at 139. The amended ordinance contained the following language: " '[t]he provisions of the Gaston County Mobile Home Park Ordinance Dated July 1, 1986, shall apply to those . . . plans . . . submitted to the Gaston County Division of Planning after July 1, 1986 and prior to the effective date of this ordinance.' " *Id.* The plaintiff submitted a plan for a mobile home park in June 1987 prior to the effective date of the amended ordinance. *Id.* Plaintiff submitted a revised plan shortly before the ordinance was amended. *Id.* at 183, 405 S.E.2d at 140. In response to repeated requests and demands from Gaston County, the plaintiff further revised and resubmitted plans several times after the 1987 amendment became effective. *Id.* at 183-86, 405 S.E.2d at 140-41. Gaston County refused to accept the fifth set of revised plans under the 1986 ordinance prior to the amendment. 329 N.C. at 185, 405 S.E.2d at 141. Our Supreme Court held, "Clearly, Northwestern established a right of review under the 1986 ordinance with the submission of plans both on 5 June 1987 (the first plan) and on 21 September 1987 (the second plan) unless that right was waived subsequent to those filings." *Id.* at 188, 405 S.E.2d at 143. The Court held Northwestern did not waive its right of review under the ordinance in effect when its plans were filed through either an abandonment of the first plans or a failure to act. *Id.* at 190, 405 S.E.2d at 144.

"The design and construction of a [land development] project is specifically tailored to comply with the regulations in effect at the time of application for permits." *Woodlief v. Mecklenburg County*, 176 N.C. App. 205, 212, 625 S.E.2d 904, 909 (2006). Under our Supreme Court's decision in *Northwestern Financial Group* and this Court's decisions in *Lambeth* and *Woodlief*, plaintiff "was entitled to rely upon the language of the ordinance in effect at the time he applied for the permit." *Lambeth*, 157 N.C. App. at 352, 578 S.E.2d at 690. "To

hold otherwise would allow compliance with regulations and permitting to become a moving target to ever changing revisions or amendments." *Woodlief*, 176 N.C. App. at 212, 625 S.E.2d at 909. Defendant's motion for summary judgment should have been denied. The trial court erred in granting summary judgment in favor of defendant because plaintiff was entitled to rely upon the language of, and have his application considered under, the zoning ordinance in effect at the time he applied for his permit.

V. Plaintiff's Constitutional Rights

[2] Plaintiff also argues defendant's decision to permanently prohibit "manufacturing and processing facilities involving the use of petroleum products" was arbitrary and capricious and violated his state and federal constitutional rights. In addition to repeatedly failing to act on plaintiff's application, defendant issued a moratorium and later a permanent ban on asphalt plants within the Town of Hillsborough and its extraterritorial zoning jurisdiction. The ordinance states:

> [M]anufacturing and processing facilities involving the use of petroleum products, such as, but not limited to refineries for gasoline or other fuels, liquefied gas refineries, asphalt plants, finished petroleum product plants, plants which manufacture *asphalt paving* mixtures and blocks, asphalt shingles, and/or coating materials, and plants manufacturing or processing petroleum lubricating oils and greases are *expressly prohibited in the Town of Hillsborough* and its extraterritorial zoning jurisdiction.

(Emphasis supplied).

Section 19 of article I of the Constitution of North Carolina contains the "Law of the Land Clause" and provides: "No person shall be . . . deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. This clause is synonymous with the Fourteenth Amendment due process clause of the federal Constitution. *Woods v. City of Wilmington*, 125 N.C. App. 226, 230, 480 S.E.2d 429, 432 (1997); U.S. Const. amend. XIV., § 1 (". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . [.]"); *see also* U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

In *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 140 L. Ed. 2d, 1043, 1057 (1998), the United States Supreme Court stated:

> We have emphasized time and again that the touchstone of due process is protection of the individual against *arbitrary action of government*, . . . whether the fault lies in a denial of fundamental procedural fairness, . . . or in the *exercise of power without any reasonable justification in the service of a legitimate governmental objective* . . . [.]

(Internal citations and quotation marks omitted) (Emphasis supplied). " 'A State cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them.' " *Indemnity Co. v. Ingram, Comr. of Insurance*, 290 N.C. 457, 471, 226 S.E.2d 498, 507 (1976) (quoting *Roller v. Allen*, 245 N.C. 516, 525, 965 S.E.2d 851 (1957).

Zoning regulations promulgated under the police power of the sovereign restrict the use of private property to promote the public health, the public safety, the public morals or the public welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 71 L. Ed. 303, 310 (1926); *Zopfi v. City of Wilmington*, 273 N.C. 430, 433, 160 S.E.2d 325, 330 (1968). Zoning authority under the police power "is subject to the limitations imposed by the Constitution upon the legislative power forbidding *arbitrary and unduly discriminatory interference with the rights of property owners.*" *Zopfi*, 273 N.C. at 434, 160 S.E.2d at 330 (emphasis supplied).

> The courts will not invalidate zoning ordinances duly adopted by a municipality unless it clearly appears that in the adoption of such ordinances the action of the city officials 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'

Armstrong v. McInnis, 264 N.C. 616, 626-27, 142 S.E.2d 670, 677 (1965) (quoting *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938)).

Defendant held three hearings to review plaintiff's site plan application under a permitted use in the ordinance. Rather than making a decision on plaintiff's application, defendant repeatedly delayed a decision and while the hearing was pending *totally prohibited* "manufacturing processing facilities involving the use of petroleum products" within the town limits of Hillsborough and its extraterritorial zoning jurisdiction.

Courts in other jurisdictions require a municipality to demonstrate a much greater substantial relationship between the ordinance and the public welfare where a total prohibition of a lawful activity is involved rather than an ordinance which merely confines a use to a particular district. Applicable analysis is set forth by the Pennsylvania Supreme Court in *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 59, 228 A.2d 169, 179 (Penn., 1967) (citations omitted), and is particularly persuasive:

> The constitutionality of zoning ordinances which totally prohibit legitimate businesses such as quarrying from an entire community should be regarded with particular circumspection; for unlike the constitutionality of most restrictions on property rights imposed by other ordinances, the constitutionality of total prohibitions of legitimate businesses cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community. We believe this is true despite the possible existence outside the municipality of sites on which the prohibited activity may be conducted, since it is more probable than not that, as the operator of the prohibited business is forced to move further from the property he owns, his economic disadvantage will increase to the point of deprivation.

The Michigan Supreme Court similarly held, "On its face, an ordinance which *totally* excludes from a municipality a use recognized by the Constitution or other laws of this state as legitimate also carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use." *Kropf v. City of Sterling Heights*, 391 Mich. 139, 155-56, 215 N.W.2d 179, 185 (Mich., 1974).

In *Beaver Gasoline Co. v. Zoning Hearing Board*, 445 Pa. 571, 577, 285 A.2d 501, 504-05 (Penn., 1971), the Pennsylvania Supreme Court also held an applicant meets his burden of overcoming the presumption of the constitutionality of the ordinance by showing a total ban of a legitimate use. The court shifted the burden to the municipality to show the validity of the ordinance. *Id.* ("Thereafter, if the municipality is to sustain the validity of the ban, it must present evidence to establish the public purpose served by the regulation.").

Plaintiff demonstrated defendant enacted a total prohibition on manufacturing and processing facilities involving the use of petroleum products within the municipality and adjoining areas after he had submitted an application for a use permitted by the zoning or-

dinance subject to site plan review. The burden shifted to defendant to show the public purpose of the ordinance. *Id.* A genuine issue of material fact exists whether the public purpose defendant sought to accomplish by a total and permanent ban on asphalt plants is legitimate and whether defendant's decision to place a permanent ban on asphalt plants was not arbitrary and capricious. *Id.*; *Armstrong*, 264 N.C. at 626-27, 142 S.E.2d at 677-78. The burden of proof rests upon defendant. *Beaver Gasoline Co.*, 445 Pa. at 577, 285 A.2d at 504-05.

VI. Conclusion

The trial court erred in granting summary judgment in favor of defendant. Plaintiff is entitled to a decision on his application based upon the ordinance in effect at the time the application was filed. *Northwestern Financial Group*, 329 N.C. at 185, 405 S.E.2d at 141; *Woodlief*, 176 N.C. at 212, 625 S.E.2d at 909; *Lambeth*, 157 N.C. App. at 352, 578 S.E.2d at 690.

A genuine issue of material fact also exists whether the public purpose defendant sought to accomplish by a total ban on asphalt plants is legitimate, and whether defendant's decision to place a total permanent ban on manufacturing and processing facilities involving petroleum products within all areas located in the city limits and its extraterritorial zoning jurisdiction denied equal protection and was arbitrary and capricious. In light of our decision it is unnecessary to address plaintiff's second assignment of error regarding notice. The trial court's order is reversed and this cause is remanded for further proceedings.

Reversed and Remanded.

Judge JOHN concurs.

Judge JACKSON dissents in a separate opinion.

JACKSON, Judge, dissenting.

For the reasons stated below, I respectfully dissent from the majority opinion.

Generally, "[t]he adoption of a zoning ordinance does not confer upon citizens . . . any vested rights to have the ordinance remain forever in force, inviolate and unchanged." *McKinney v. City of High*

Point, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954). However, North Carolina recognizes two methods by which a landowner may establish vested rights in a zoning ordinance: (1) qualify pursuant to relevant statutes establishing such vested rights; or (2) qualify under the common law. *Browning-Ferris Industries v. Guilford County Bd. of Adj.*, 126 N.C. App. 168, 171, 484 S.E.2d 411, 414 (1997).

The relevant statute for establishing a vested right in this case is North Carolina General Statutes, section 160A-385.1(c) (2003), which provides: "[a] vested right shall be deemed established with respect to any property upon the valid approval, or conditional approval, of a site specific development plan . . . ." In the case *sub judice*, plaintiff never received approval of his site plan. Valid approval of a site plan is a prerequisite to the establishment of vested rights pursuant to North Carolina General Statutes, section 160A-385.1(c), and the absence of such approval is fatal to plaintiff's establishment of a statutory vested right.

Plaintiff concedes that he does not have a statutory vested right to approval of his site plan application, but argues that his rights did not vest statutorily due to defendant's refusal to issue a decision on his application. Plaintiff did not, however, allege in his complaint that defendant purposefully had delayed acting on his application and therefore that issue was not before the trial court. Generally, an issue not raised and argued before the trial court cannot be raised for the first time on appeal. N.C. R. App. P. Rule 10(b)(1) (2005); *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002).

Even if plaintiff's argument that defendant purposefully delayed making a decision on plaintiff's application for site plan approval, which was not included in his initial complaint, were considered, plaintiff could not prevail. The evidence in the record on appeal clearly demonstrates that the failure to reach a decision on plaintiff's application was the result of ongoing consideration of various, complicated issues regarding the project. Plaintiff's attorney did not object to the continuation of any of the Board of Adjustment meetings and even informed the Board, when the lateness of the hour was pointed out, that his cross- examination of the witness testifying at the time would be extensive. While this complicated review was proceeding, the Town of Hillsborough enacted the moratorium on the acceptance, review, or consideration of new or pending applications for approval of any manufacturing or processing facility involving petroleum products. This sequence of events necessarily ended the ongoing review of plaintiff's application.

In the alternative, plaintiff argues that he is entitled to a vested right pursuant to the common law. A common law vested right to develop or build exists

> when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations 'substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building,' *Town of Hillsborough v. Smith*, 276 N.C. at 55, 170 S.E.2d at 909; (2) the obligations and/or expenditures are incurred in good faith, *Id.*; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party, *Id.* . . . and (4) the amended ordinance is a detriment to the party.

Browning-Ferris, 126 N.C. App. at 171-72, 484 S.E.2d at 414. The landowner bears the burden of proving all four elements to establish a common law vested right. *Id.* at 172, 484 S.E.2d at 414.

In his complaint, plaintiff contends that, prior to the moratorium, he had expended substantial sums of money and had incurred contractual obligations related to the acquisition of the property for his plant. Plaintiff further contends that these expenditures and obligation were incurred in good faith and in reasonable reliance on the approval of his Erosion Control Plan by Orange County. The reliance on the approval of the Erosion Control Plan is not sufficient, however, to establish a common law vested right in plaintiff. The approval is not a building permit, as is required to establish common law vested rights, nor is it similar in nature to a building permit. Further, the approval was granted by a governmental agency completely distinct, separate, and beyond the control of the Town of Hillsborough and was merely one step in the process of evaluation and approval of a site plan. Plaintiff did not have a valid building permit, or any permit issued by defendant whatsoever, upon which he could reasonably rely prior to the enactment of the moratorium and permanent ban. Consequently, no common law vested right arose.

As defendant had neither a statutory vested right nor a common law vested right to the approval of his site plan application, I would overrule this assignment of error.

The majority contends this Court previously has addressed the issue presented in the instant case in *Lambeth v. Town of Kure*

Beach, 157 N.C. App. 349, 578 S.E.2d 688 (2003), and that our Supreme Court considered a similar issue in *Northwestern Financial Group v. County of Gaston*, 329 N.C. 180, 405 S.E.2d 138 (1991). In both cases the applicant was held to be entitled to rely on the provisions of the applicable ordinance as it existed at the time of the initial application. However, I believe both of these cases clearly are distinguishable from, and inapplicable to, the facts of the instant case.

In *Lambeth*, the issue addressed on appeal was whether the subsequent amendment of the town's zoning ordinance mooted the petitioner's appeal of the *denial of his permit* under its prior ordinance. This Court held that, because the subsequent amendment further restricted the petitioner's use of his property and did not give him the relief sought, the petitioner's claim and injury remained viable. 157 N.C. App. at 352, 578 S.E.2d at 690. Accordingly, on appeal from the denial of his permit, the "[p]etitioner was entitled to rely upon the language of the ordinance in effect at the time he applied for the permit." *Id.* This holding pertained only to the petitioner's reliance on the prior ordinance in his appeal from the *denial of his permit*.

In the instant case, no decision ever was rendered regarding plaintiff's application. Accordingly, plaintiff's appeal is not from a decision based upon the criteria contained in the ordinance as it existed at the time of his application. Had a decision been made on plaintiff's application pursuant to the existing ordinance, equity would dictate that review of that decision be made utilizing the same criteria upon which the decision in question was made. As this was not the situation in the case *sub judice*, I would hold that plaintiff was not entitled to rely on the language of the ordinance in effect at the time of his application.

In *Northwestern Financial*, a developer submitted plans for a mobile home park pursuant to the provisions of the Gaston County Mobile Home Park Ordinances then in effect. 329 N.C. at 182, 405 S.E.2d at 139. A revised version of the Mobile Home Park Ordinances took effect approximately three months after the developer submitted his original plans. *Id.* The revised ordinances specifically provided that the provisions of the prior ordinances would apply to plans submitted prior to the effective date of the revised ordinances. *Id.* The developer subsequently submitted several revised plans in response to deficiencies identified by the reviewing agencies—one prior to the effective date of the revised ordinances and two after that date. *Id.* at 182-83, 405 S.E.2d at 140.

The Planning Board voted to disapprove the developer's fourth set of plans, in part, on the ground that any proposed plans would have to be in accordance with the revised ordinances. *Id.* at 185, 405 S.E.2d at 141. The developer attempted to submit a fifth set of plans which the County refused to accept for consideration under the previous ordinance provisions. *Id.* The developer appealed the decision.

On appeal, the Supreme Court held that the developer had established its right to review of the plans under the prior ordinances by its submission of the plans prior to the effective date of the revised ordinances. *Id.* at 188, 405 S.E.2d at 143. In reaching this holding, the Supreme Court determined that the plans all had been reviewed under the prior ordinance and that, by its very terms, the subsequent ordinance did not apply to plans submitted prior to the effective date of the subsequent ordinance. *Id.* at 186-87, 405 S.E.2d 142. Accordingly, the developer was entitled to review of the plans under the provisions of the previous ordinances and, if the plans conformed to the requirements of those ordinances, the ordinance provided "for a permit by right upon compliance with the terms of the ordinance, and such permit may not be denied on the basis that it is a hazard to the public welfare." *Id.* at 191, 405 S.E.2d at 144.

In contrast with the specific facts in *Northwestern*, the provisions of the moratorium and permanent ban subsequently adopted in the case *sub judice* specifically provided that they applied to all applications pending at the time of, or filed after, the effective date of the moratorium and amended zoning ordinance. As the Supreme Court's holding in *Northwestern* is based on specific provisions of the amended ordinance providing that applications pending prior to the effective date of the amendment would be reviewed under the terms of the original ordinances—a fact not present in the instant case—I believe *Northwestern* is inapplicable to the case at bar. In addition, the applicable Town of Hillsborough Ordinance did not provide for a permit by right upon compliance with the terms of the ordinance notwithstanding the fact that the use might be a potential hazard to the public welfare.[1]

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1. For example, the Town of Hillsborough ordinance specifically addresses air pollution in Section 5.14 as follows:

> Any permitted principal use, Conditional use, or accessory use that emits any 'air contaminant', as defined in G.S. 143-213, shall comply with applicable State of North Carolina standards concerning air pollution, as set forth in Article 21B of Chapter 143 of the North Carolina General Statutes.

The majority next holds that plaintiff's due process rights were violated by defendant's adoption of the moratorium and subsequent amendment of the zoning ordinance to prohibit manufacturing or processing facilities involving petroleum products. The majority bases its position on the contention that when a municipality prohibits an otherwise lawful activity, the municipality must demonstrate a more substantial relationship between the prohibition and the public welfare than when such lawful activity is merely restricted to particular areas to establish the constitutionality of the prohibition. I do not believe that this issue is properly before this Court.

On appeal, plaintiff challenges the validity of the procedures followed in extending the moratorium and argues that defendant's decision to permanently prohibit manufacturing and processing facilities involving petroleum products was arbitrary and capricious *as applied to this case*. Plaintiff does not allege that either the moratorium or the amended ordinance were facially invalid. Rather, plaintiff argues that the procedure utilized in extending the moratorium violated due process and that the amended ordinance violated due process as applied. Accordingly, the validity of the provisions of the amended ordinance itself is not in question on appeal as it has not been challenged by plaintiff.

The majority's holding, premised upon the constitutionality of the ordinance itself, effectively creates an appeal for plaintiff. "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Further, an appellate court will not decide a constitutional question "unless it is properly presented . . . ." *State v. Muse*, 219 N.C. 226, 227, 13 S.E.2d 229, 229 (1941); *see also*, *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957); *Carillon Assisted Living, L.L.C. v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. ——, 623 S.E.2d 629 (2006).

With regard to the due process arguments actually raised by plaintiff in his brief, I would hold that none of plaintiff's due process rights were violated in either the extension of the moratorium or in the application of the amended ordinance to the facts of this case.

No Zoning Compliance Permit, or Building Permit shall be issued with respect to any development emitting an 'air contaminant' until the State Division of Environmental Management has certified to the Zoning Officer that the appropriate State permits have been received by the applicant (as provided in G.S. 143-215.108) or that the applicant will be eligible to receive such permits and that the development is otherwise in compliance with applicable air pollution control regulations.

Plaintiff argues that there were genuine issues of material fact regarding whether defendant complied with all statutory and due process requirements in extending the moratorium. Defendant contends that public notice and hearing, pursuant to North Carolina General Statutes, section 160A-364, were required for the valid extension of the moratorium. Defendant argues that no further notice or hearing was required as the original moratorium, the validity of which was never challenged by plaintiff, included a provision for the extension of the moratorium by the Hillsborough Town Board.

Pursuant to North Carolina General Statutes, section 160A-364, notice of public hearing was published on 9 April and 16 April 2003 regarding a special Joint Public Hearing of the Hillsborough Town Board and the Planning Board on 22 April 2003. In pertinent part, the notice provided:

> 2. Zoning Ordinance Amendment. Amendment to establish a development moratorium on the processing, review and approval of applications for permits and approvals, including site plans, for all manufacturing and processing facilities which involve petroleum products (including asphalt) on all properties under the Town's zoning jurisdiction. The Town is currently working on amending the regulations for such facilities and desires to suspend the current permitting and approval process while modified development regulations are being considered. *The proposed development moratorium will expire on December 31, 2003, unless (1) sooner terminated by the Town Board or (II)*[sic] *extended by the Town Board, for a period not longer than six months, prior to December 31, 2003.*

(emphasis added). At the 22 April hearing, interested parties on both sides were given the opportunity to speak regarding the proposed moratorium. Three possible courses of action were presented: (1) enact no moratorium; (2) enact a moratorium on new applications; or (3) enact a moratorium on pending and future applications. During the discussion, the Chairman of the Planning Board asked how the moratorium would end and was told that it would end automatically upon the adoption of new language or on 31 December 2003 unless the Town Board took action to extend it. No exception or argument was made regarding this statement by anyone, including plaintiff. The third option was selected by unanimous vote of the Town Board. The enacted ordinance contained the exact language regarding the expiration of the ordinance that was included in the notice of hearing

which was published in accordance with North Carolina General Statutes, section 160A-364.

North Carolina General Statutes, section 160A-364 provides, in relevant part, "[b]efore adopting or amending any ordinance authorized by this Article, the city council shall hold a public hearing on it." The portion of the ordinance at issue in the instant case states:

> This Ordinance shall be effective immediately upon adoption, and shall remain in effect until 11:59:59 p.m. on December 31, 2003 unless sooner terminated by the Board of Commissioners, or unless extended for a period of not longer than six months by the Board of Commissioners acting prior to expiration.

Plaintiff argues that the requirements of section 160A-364 must be strictly construed based upon this Court's holding in *Sandy Mush Props, Inc. v. Rutherford Cty.*, 164 N.C. App. 162, 595 S.E.2d 233 (2004). In *Sandy Mush*, we held that the failure of the county to run two advertisements noticing a public hearing during which a proposed temporary moratorium was to be discussed, as required pursuant to North Carolina General Statutes, section 153A-323 (a statute applicable to county governments which is analogous to section 160A-364 which applies to municipal governments) resulted in the subsequently enacted temporary moratorium being invalid. *Id.* at 168, 595 S.E.2d at 237. The temporary moratorium was held invalid as a result of the failure to run the two required advertisements despite the fact that the plaintiff in the case had actual notice of the hearing and had the opportunity to, and did in fact, speak at the hearing in opposition to the temporary moratorium.

I agree with plaintiff that the requirements of section 160A-364 must be strictly construed. Section 160A-364 requires the holding of a public hearing prior to the adoption or modification of any ordinance, and that notice of that hearing be given once a week for two successive weeks prior to the hearing in a newspaper of general distribution in the area. N.C. Gen. Stat. § 160A-364. Plaintiff does not argue that the adoption of the ordinance originally enacting the temporary moratorium did not comply with the requirements of section 160A-364. Therefore, the validity of the temporary moratorium is not at issue.

Instead, plaintiff argues that the extension of the temporary moratorium modified the original ordinance and, therefore, additional notice and a second public hearing, as provided in section

160A-364, were required. However, the provisions of the original ordinance explicitly authorized an extension, of no more than six months, of the temporary moratorium by action of the Board of Commissioners. The exact language of this provision as adopted was included in the public notice of the hearing regarding the adoption of the temporary moratorium. Further, that provision was discussed at the public hearing without objection or comment by any party.

The provisions of the temporary moratorium ordinance specifically authorized the extension of the temporary moratorium by the Board of Commissioners. I find no authority which prohibits the inclusion of a pre-approved extension in a duly enacted ordinance. The extension of the temporary moratorium for two months on 1 December 2003 by the Board of Commissioners was, therefore, authorized pursuant to the terms of the ordinance. Accordingly, as section 160A-364 applies only to *adoption* or *modification* of ordinances, and that section must be strictly construed, I would hold that the extension of the temporary moratorium was not subject to the requirements of section 160A-364 as it did not modify the original ordinance.

Plaintiff also argues that the amendment to defendant's zoning ordinance banning manufacturing and processing facilities involving the use of petroleum products violated the Law of the Land Clause of Article I, section 19 of the North Carolina Constitution. The Law of the Land Clause of the North Carolina Constitution, N.C. Const. art. I, § 19, " 'is synonymous with due process of law as used in the Fourteenth Amendment to the Federal Constitution.' " *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quoting *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976)) (internal quotation marks omitted). "No process is due a person who is deprived of an interest by official action unless that interest is protected by law, *i.e.*, unless it is an interest in life, liberty or property." *Henry v. Edmisten*, 315 N.C. 474, 480, 340 S.E.2d 720, 725 (1986). As previously stated, I do not believe plaintiff had a vested right in the approval of his site plan application, and accordingly I would hold no process was due plaintiff regarding that application.

Assuming *arguendo* that plaintiff had a vested right in approval of his application, the evidence does not support a finding that defendant acted arbitrarily and capriciously in failing to make a decision on plaintiff's application. A municipal board of adjustment "has a duty to safeguard the health and safety of the entire community." *Signorelli v. Town of Highlands*, 93 N.C. App. 704, 710, 379 S.E.2d 55, 59 (1989).

It undoubtably would be a breach of this duty to approve plaintiff's application when there was evidence to support either approval or disapproval of the application and all evidence had yet to be received. Accordingly, I believe that defendant could not have approved plaintiff's application based on the evidence presented prior to the adoption of the moratorium without breaching its duty to the community. Therefore, the failure to render a decision on the application was neither arbitrary nor capricious.

I would affirm the order of the trial court.

JO ANN OUTLAW KORNEGAY, PLAINTIFF v. BONNIE R. ROBINSON, ADMINISTRATRIX OF THE ESTATE OF BYARD G. KORNEGAY, JIMMY B. KORNEGAY, BYARD G. KORNEGAY, JR., GERALD CLAY KORNEGAY, RICKY THOMAS KORNEGAY, LINDA KAY K. LANE, AND MARY HAZEL K. MANUEL, DEFENDANTS

No. COA05-131

(Filed 21 February 2006)

1. Husband and Wife— invalidation of prenuptial agreement—unconscionability

The trial court did not err by granting summary judgment in favor of defendant in plaintiff wife's declaratory judgment action against decedent's estate seeking to invalidate a prenuptial agreement on the basis that the agreement was void under N.C.G.S. § 52B-7(a)(2) as unconscionable, because: (1) such an agreement between individuals with prior marriages and offspring from those unions, recognizing that both parties had children from previous marriages and possessed separate property obtained through inheritance and other means, is not so oppressive that no reasonable person would make such terms on the one hand, and no honest and fair person would accept them on the other; and (2) as a matter of law, the terms of the agreement are not substantively unconscionable.

2. Husband and Wife— invalidation of prenuptial agreement—voluntariness—full disclosure

The trial court erred by granting summary judgment in favor of defendant in plaintiff wife's declaratory judgment action against decedent's estate seeking to invalidate a prenuptial agree-

ment based on the fact that the agreement was void under N.C.G.S. § 52B-7(a)(1) as not voluntary, because taken in the light most favorable to plaintiff, material issues of fact exist as to whether the execution of the agreement was voluntary including: (1) plaintiff, who possessed only a high school education, was presented at the office of decedent's attorney with a premarital agreement which waived all spousal rights, including all rights to decedent's estate, while en route to the wedding; and (2) plaintiff averred that she understood the document to apply in the event of divorce, that the agreement was not explained to her, that she signed the document within ten minutes of its presentation without reading it, that decedent did not disclose his full assets and plaintiff was not aware of the extent of his holdings at the time she signed the agreement, and that she was not represented by independent legal counsel.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff from an order entered 25 October 2004 by Judge Thomas D. Haigwood in Duplin County Superior Court. Heard in the Court of Appeals 14 September 2005.

Warren, Kerr, Walston, Taylor & Smith, LLP, by John Turner Walston and Henry C. Smith, for plaintiff-appellant.

J. Garrett Ludlum for defendant-appellee Bonnie R. Robinson, Administratrix of the Estate of Byard G. Kornegay.

Harris, Creech, Ward and Blackerby, P.A., by Thomas M. Ward and Charles E. Simpson, Jr., for defendant-appellees Byard G. Kornegay, Jr., Gerald Clay Kornegay, and Linda Kay K. Lane.

Burrows & Hall, by Richard L. Burrows; J. Gates Harris for defendant-appellees Ricky Thomas Kornegay and Mary Hazel K. Manuel.

Turner Law Offices, by W. Carroll Turner, for defendant-appellee Jimmy B. Kornegay.

HUNTER, Judge.

Jo Ann Outlaw Kornegay ("plaintiff") appeals from an order of summary judgment entered 25 October 2004. For the reasons stated herein, we reverse the trial court's order of summary judgment.

Plaintiff presented evidence tending to show that after a four-year relationship, Byard Kornegay ("decedent") asked plaintiff to marry him in early October 1990. Plaintiff, who had a high school education, was a yarn inspector in a textile mill. At the time of the marriage, plaintiff had a net worth of approximately $50,000.00. Decedent was a farmer and businessman with extensive real estate holdings and a net worth in excess of $500,000.00 at the time of the marriage. Both plaintiff and decedent had children from previous marriages.

Plaintiff moved into decedent's home in early October 1990. On 11 October 1990, plaintiff and decedent traveled to South Carolina to obtain a marriage license. After moving into decedent's home, and before obtaining the marriage license, plaintiff learned that decedent wished for her to sign a prenuptial agreement. On 12 October 1990, plaintiff and decedent went to the offices of decedent's attorney, Robert T. Rice ("Rice"). Rice presented plaintiff with the prenuptial agreement. Plaintiff, in her affidavit, stated that the contents of the agreement were not reviewed or explained to her, and that she was not given the opportunity to review the agreement with her own attorney. Plaintiff did not read or request substantive changes to the document, and relied upon her understanding that the prenuptial agreement would only apply in the event of a divorce. Plaintiff signed the prenuptial agreement after approximately ten minutes, and plaintiff and decedent left Rice's office and were married in South Carolina that same day.

On 16 May 2004, decedent passed away. Plaintiff believed that decedent had executed a will with substantial provisions in her favor in 1991; however a will executed 1 March 1991 made no provisions for plaintiff. The prenuptial agreement signed by plaintiff 12 October 1990 included a provision waiving all plaintiff's rights as a spouse, including the right to claim a spousal share of decedent's estate.

Plaintiff brought an action for a declaratory judgment against decedent's estate to invalidate the prenuptial agreement on 9 July 2004. The trial court entered an order of summary judgment dismissing plaintiff's action. Plaintiff appeals.

Plaintiff contends that the trial court erred in granting summary judgment enforcing the prenuptial agreement, as there were material issues of fact as to whether the agreement was executed voluntarily, and as to whether the agreement was unconscionable. Although we do not find the agreement to be unconscionable, we find, when taken

in the light most favorable to plaintiff, that material issues of fact exist as to the voluntariness of the agreement.

We first note the appropriate standard of review. Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). "All such evidence must be considered in the light most favorable to the non-moving party." *In re Will of Priddy*, 171 N.C. App. 395, 396-97, 614 S.E.2d 454, 456 (2005). "If findings of fact are necessary to resolve an issue of material fact, summary judgment is improper." *Prior v. Pruett*, 143 N.C. App. 612, 617, 550 S.E.2d 166, 170 (2001).

I

The Uniform Premarital Agreement Act, N.C. Gen. Stat. § 52B-7 (2005), specifically governs the enforcement of premarital agreements in North Carolina. The statute provides that a premarital agreement is unenforceable if the party against whom enforcement is sought proves one of two circumstances. The statute states:

> (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> (1) That party did not execute the agreement voluntarily; or
>
> (2) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Id.

[1] Plaintiff first contends that the agreement was void under section 52B-7(a)(2), as the agreement was unconscionable. We disagree.

In *King v. King*, 114 N.C. App. 454, 442 S.E.2d 154 (1994), this Court stated, "[a] conclusion that the contract is unconscionable requires a determination that the agreement is both substantively and procedurally unconscionable." *Id.* at 458, 442 S.E.2d at 157. " 'Substantive unconscionability . . . involves the harsh, oppressive, and "one-sided terms of a contract," ' i.e., inequality of the bargain." *Id.* (citation omitted). "The inequality of the bargain, however, must be 'so manifest as to shock the judgment of a person of common sense, and . . . the terms . . . so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.' " *Id.* (citation omitted).

Here, the terms of the agreement do not reveal so inequitable a bargain as to " 'shock the judgment of a person of common sense[.]' " *Id.* (citation omitted). The agreement, the terms of which applied equally to both parties, recognized that both parties had children from previous marriages and possessed separate property obtained through inheritance and other means. The agreement then waived all marital rights, including intestacy rights, but permitted each party to make specific devises, bequests, and legacies to the other, as specifically permitted by N.C. Gen. Stat. § 52B-4(a)(3) (2005). Such an agreement between individuals with prior marriages and offspring from those unions is not " 'so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.' " *King* at 458, 442 S.E.2d at 157 (citation omitted). As a matter of law, the terms of the agreement are not substantively unconscionable. As we find no substantive unconscionability as a matter of law, we need not address plaintiff's contentions that material issues of fact exist as to procedural unconscionability.

II

[2] Plaintiff next contends that the agreement was void under section 52B-7(a)(1), as the agreement was not voluntary. We agree.

As discussed *supra*, the statute states that a "marital agreement is not enforceable if the party against whom enforcement is sought proves that [the] party did not execute the agreement voluntarily[.]" N.C. Gen. Stat. § 52B-7(1)(a). The statute does not define the term voluntary, and a review of our existing case law reveals that few cases have applied the statute since its enactment in 1987.[1] However,

1. We note that this Court reversed an award of summary judgment as to enforcement of a premarital agreement under the statute in the case of *Atassi v. Atassi*, 117

in *Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 610 (1989), a case concerning the voluntary nature of a premarital agreement entered into before the effective date of the statute, this Court found that such agreements are unenforceable if procured by undue influence, duress, coercion, or fraud, and further found that due to the confidential nature of the relationship, "there must be full disclosure between the parties as to their respective financial status." *Id.* at 525, 386 S.E.2d at 615.

The issue of financial disclosure was more specifically addressed in the case of *Tiryakian v. Tiryakian*, 91 N.C. App. 128, 370 S.E.2d 852 (1988), which also concerned a premarital agreement signed before the effective date of the statute. In *Tiryakian*, the bride was asked to meet the groom on the day before the wedding at his attorney's office to execute a legal document. *Id.* at 131, 370 S.E.2d at 853. The bride was given several copies of the premarital agreement in the parking lot of the attorney's office, and conflicting evidence was offered as to what was disclosed at that time. *Id.* The groom stated that the terms of the agreement were discussed and the bride was aware of its contents, while the bride contended that no specifics were discussed and that she was told, and believed, that the documents were to protect the groom's interest in his grandmother's estate. *Id.* The bride did not read the agreement or consult with an attorney, but instead rushed to her bank, had her signature notarized, and promptly returned the documents. The couple were married the next day. *Id.*

The Court in *Tiryakian* recognized the confidential relationship of persons about to marry, and the corresponding "affirmative duty on the part of each perspective spouse to fully disclose his or her financial status." *Id.* at 132, 370 S.E.2d at 854. Although the agreement was entered into prior to the effective date of section 52B-7, *Tiryakian* noted that the Uniform Premarital Agreement Act echoed these requirements for full disclosure of financial status. *Id.* at 133, 370 S.E.2d at 854. *Tiryakian* also noted that the fact that a prenuptial agreement was drawn up by one party's attorney and not throughly explained to the other party, who was unrepresented by counsel, might influence a court's disapproval of such an agreement. *Id.* The Court concluded that the lack of full disclosure, coupled with the

N.C. App. 506, 513, 451 S.E.2d 371, 376 (1995), on the grounds that material issues of fact existed as to whether the agreement was signed under duress after the marriage date, the plaintiff had adequate knowledge of the defendant's property or financial obligations, and the agreement was unconscionable. However the case did not specifically define the term voluntary in the context of the statute.

fact that the agreement was drafted by the groom's attorney, and was signed by the bride without knowledge of its contents and without consultation of independent legal advice, voided the premarital agreement. *Id.* at 133, 370 S.E.2d at 854-55.

Here, plaintiff, who possesses only a high school education, was presented at decedent's attorney's office with a premarital agreement which waived all spousal rights, including all rights to decedent's estate, while en route to the wedding. Plaintiff avers that she understood the document to apply in the event of divorce, that the agreement was not explained to her, and that she signed the document within ten minutes of its presentation without reading it. Plaintiff further avers that decedent did not disclose his full assets and that she was unaware of the extent of his holdings at the time she signed the agreement. Finally, plaintiff avers that she was not represented by independent legal counsel. In light of *Tiryakian*, when taken in the light most favorable to plaintiff, material issues of fact exist as to whether the execution of the agreement was voluntary. Summary judgment was therefore improperly granted by the trial court.

Defendants, however, contend that the case of *Howell v. Landry* should control. We find *Howell* distinguishable. *Howell*, as discussed *supra*, also concerned an agreement entered into prior to the effective date of the Uniform Premarital Agreement Act, but raised claims of undue influence and duress in the execution of a premarital agreement, rather than the issue of financial disclosure. *Howell*, 96 N.C. App. at 526, 386 S.E.2d at 616. The bride, who held an active role in the groom's business prior to the wedding, had discussed the possibility of a premarital agreement with the groom, and had agreed to review such an agreement. *Id.* at 519, 386 S.E.2d at 612. The bride and groom planned to fly to Las Vegas to be married. The night before leaving, the groom presented the bride with an agreement which had been prepared by his attorney. *Id.* at 520, 386 S.E.2d at 612. The bride expressed interest in having her own attorney review the document, but agreed to sign it after making some adjustments to the terms, both as she wished to marry and due to her own financial involvement in the groom's business. *Id.* at 520, 386 S.E.2d at 612-13. The Court in *Howell* held that the brevity of time before the marriage alone was insufficient to establish duress, and noted the bride's awareness of the need for independent legal counsel and decision to nevertheless sign the agreement, as well as the bride's adjustments to the agreement, in determining that there was no undue influence or duress. *Id.* at 528-29, 386 S.E.2d at 618.

Howell's facts are distinguishable from the instant case, however, where issues of fact exist as to plaintiff's knowledge of the need for an attorney, the contents of the writing, and the extent of decedent's disclosure of his assets, rather than claims of undue influence and duress.

The trial court, therefore, improperly granted summary judgment as material issues of fact exist as to whether full disclosure was made to plaintiff prior to entering the agreement between confidential parties.

III

We briefly address each of the concerns raised by the dissent. The dissent contends that as plaintiff admitted she "voluntarily" signed the agreement, that is signed without duress or undue influence, no material issue of fact exists. However, as discussed *supra*, full disclosure of assets is a necessary consideration in determining the voluntary nature of a prenuptial agreement. *Tiryakian* at 132-33, 370 S.E.2d at 854. Although the principles of construction applicable to contracts also apply to premarital agreements, *see Turner v. Turner*, 242 N.C. 533, 539, 89 S.E.2d 245, 249 (1955), our prior case law has made clear that this refers to the substance of separation agreements, and that further inquiry as to procedural fairness in the execution of the agreement is required for agreements formed in a confidential relationship. *See Howell* at 525, 386 S.E.2d at 615 (stating "when 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.")

The dissent further contends that *Tiryakian* is distinguishable because it addressed a prenuptial agreement in the context of equitable distribution, and was not raised from a grant of summary judgment. Although *Tiryakian* arrived before this Court in a different procedural posture than the instant case, the statements of law as the nature of the confidential relationship of persons about to marry, and the corresponding duties of disclosure which are determinative in this case nonetheless are binding. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating "a subsequent panel of the same court is bound by that precedent").

The dissent also appears to suggest that summary judgment was properly granted because plaintiff failed to challenge the prenuptial agreement during the course of the marriage. Our statute govern-

ing premarital agreements states, however, that "[any] statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement." N.C. Gen. Stat. § 52B-8 (2005). Here, plaintiff filed her action for declaratory judgment within two months of decedent's death.

The dissent contends that plaintiff bears the burden to prove that the trial court erred and has failed in this case to show error in the trial court's judgment. However, as discussed *supra*, our standard of review as to summary judgment makes clear that, "[i]f findings of fact are necessary to resolve an issue of material fact, summary judgment is improper." *Prior*, 143 N.C. App. at 617, 550 S.E.2d at 170. Plaintiff's affidavit as to her lack of knowledge of the extent of both decedent's land holdings and business enterprises, when considered in the light most favorable to plaintiff as the non-movant, is sufficient to create a material issue of fact as to whether full disclosure was made prior to the signing of the agreement. Plaintiff has therefore shown error in the trial court's grant of summary judgment.

As material issues of fact exist as to whether plaintiff entered the agreement voluntarily, summary judgment was improperly granted.

Reversed.

Judge TYSON concurring in part and dissenting in part in a separate opinion.

Judge STEELMAN concurs.

TYSON, Judge concurring in part and dissenting in part.

I concur with that portion of the majority's opinion, which correctly holds "the terms of the agreement are not substantively unconscionable."

The majority's opinion then reverses the trial court's grant of summary judgment in defendants' favor and holds "material issues of fact exist as to whether plaintiff entered the agreement voluntarily." In reaching this conclusion, the majority cites *Tiryakian v. Tiryakian*, and states "[t]he Court in *Tiryakian* recognized the confidential relationship of persons about to marry, and the corresponding 'affirmative duty on the part of each perspective spouse to fully disclose his or her financial status.' " 91 N.C. App. 128, 132, 370 S.E.2d

852, 854 (1988). While I completely agree with this statement, I disagree with the majority's application of this rule to the facts before us to reverse the trial court's judgment.

Plaintiff argues her husband failed to materially disclose all of his financial assets prior to her signing the premarital agreement. The majority's opinion holds, "summary judgment was therefore improperly granted by the trial court." I respectfully dissent from that portion of the majority's opinion that reverses the trial court's judgment.

I. Standard of Review

> 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.*

County of Jackson v. Nichols, 175 N.C. App. 196, 199, 623 S.E.2d 277, 279 (2005) (internal quotations and citations omitted) (emphasis supplied). Defendants showed, through the plain language of the agreement and plaintiff's deposition testimony, that plaintiff "voluntarily" executed the agreement when viewing the facts in a light most favorable to her. Plaintiff failed to meet her burden "to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [s]he can at least establish a *prima facie* case at trial." *Id.* The trial court's judgment should be affirmed in its entirety.

II. Voluntariness

On appeal, the presumption remains that the trial court's judgment is correct until overcome by the appellant. *Id.* The burden rests upon the appellant to prove the trial court erred. Plaintiff has failed to establish a *prima facie* case at trial or to show any error in the trial court's judgment. *Id.*

In *Howell v. Landry*, this Court stated, "[p]remarital agreements, like postmarital agreements, are generally formed within a confiden-

tial relationship. Accordingly, transactions between such parties . . . must be free of fraud, undue influence and duress, and furthermore must also be fair and reasonable." 96 N.C. App. 516, 524, 386 S.E.2d 610, 615 (1989) (citations omitted), *disc. rev. denied*, 326 N.C. 482, 392 S.E.2d 90 (1990).

Here, the contract states, and plaintiff admitted she: (1) "voluntarily" signed the premarital agreement on 12 October 1990; (2) that it was "fair and equitable;" and (3) not the result of any "duress or undue influence." Plaintiff signed the agreement before a notary public. The agreement was recorded in the Duplin County Register of Deeds a week later on 19 October 1990. Plaintiff waited until after her husband's voice was silenced by his death to bring forward her unsubstantiated oral claims to impeach the written agreement she signed.

During plaintiff's deposition, defendants' attorney asked plaintiff whether she "voluntarily sign[ed] the premarital agreement." She answered, "[y]es, sir." Plaintiff was also asked whether she had ever read the premarital agreement. Plaintiff answered, "I'm sure sometime over the years I probably looked at it." When asked, "[y]ou did read the premarital agreement sometime [after you signed it]", she answered, "[y]ears later, yes." Even though plaintiff: (1) admits she voluntarily signed the premarital agreement; (2) read the agreement; (3) retained all property and assets she owned prior to the marriage; and (4) received liquid assets exceeding three hundred thousand dollars ($300,000.00) from her husband, she now orally contests the validity of the written agreement after her husband's death.

Defendants' attorney had plaintiff read that portion of the agreement, which states, "[e]ach party acknowledged that the agreement is fair and equitable." Defendants' attorney then asked plaintiff, "[i]s the fact that you didn't read it your only reason for claiming that it was not fair and equitable?" Plaintiff responded, "[i]t's unfair, yes." This is insufficient evidence or grounds to reverse the trial court's judgment.

In her sworn affidavit, plaintiff admitted she was familiar with a substantial portion of her future husband's assets prior to the marriage. She testified:

> At the time I married Byard Kornegay, I knew that he owned the farm upon which we lived and that there were four hog houses on the farm (which had been recently constructed) and knew that he

had some other farm land. At that time I also knew that he farmed land around Scott's Store, but did not know if he owned or leased that property.

In her deposition, plaintiff also acknowledged and testified she was familiar with how to use the Register of Deeds office and the tax supervisor's office and had researched property information prior to and during the marriage.

Plaintiff now contends she did not "voluntarily" sign the premarital agreement "due to totality of the circumstances existing at the time of execution of the Agreement." Plaintiff argues her lack of legal counsel and lack of an opportunity to obtain legal counsel "are important elements in the circumstances surrounding her execution of the Agreement." Plaintiff acknowledged in her deposition she never requested: (1) additional time to read the agreement; or (2) another attorney to be present to explain the agreement before she signed it. This case fits squarely within the facts and holding of *Howell*. 96 N.C. App. at 524, 386 S.E.2d at 615.

This Court has held contract rules apply to premarital agreements.

> "[A]bsent fraud or oppression . . . parties to a contract have an affirmative duty to read and understand a written contract before signing it." *Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 N.C. App. 120, 126, 582 S.E.2d 375, 380 (2003). And, when "interpreting contract language, the *presumption is that the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.*" *Stewart v. Stewart*, 141 N.C. App. 236, 240, 541 S.E.2d 209, 212 (2000) (discussing *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)).

Roberts v. Roberts, 173 N.C. App. 354, 357, 618 S.E.2d 761, 764 (2005). (emphasis supplied).

Plaintiff's argument that her execution was not voluntary because she did not read the agreement is without merit. Plaintiff had "an affirmative duty to read and understand [the premarital agreement] before signing it." *Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 N.C. App. at 126, 582 S.E.2d at 380. Plaintiff provided no evidence she was prevented from reading the agreement or that she sought separate counsel prior to signing the agreement. *Howell*, 96 N.C. App. at 524, 386 S.E.2d at 615. Plaintiff

admitted both in the agreement and at her deposition that she "voluntarily" signed the agreement.

The *Tiryakian* case, relied upon by the majority, decided prior to the enactment of N.C. Gen. Stat. § 52B, the Uniform Premarital Agreement Act, is readily distinguishable from the facts here. 91 N.C. App. at 130, 370 S.E.2d at 853. *Tiryakian* addressed a prenuptial agreement within the context of an equitable distribution. *Id.* Both parties to the agreement were alive at the time of trial and testified to the circumstances surrounding the execution of the premarital agreement. Also, *Tiryakian* was not before this Court on a ruling for a motion for summary judgment, but rather the husband appealed that portion of the trial court's order that voided the premarital agreement. *Id.*

Here, plaintiff and defendant were both previously married and had children by those marriages. Defendant had six children. Both plaintiff and defendant owned substantial real property assets prior to the marriage that remained non-marital property under the agreement. Plaintiff asserts no inequality in education or business experience between her and her husband. Plaintiff did not assert she made any disclosures to defendant of her pre-marital assets to any greater extent than her knowledge of defendant's assets on the date of the agreement.

In the agreement, plaintiff acknowledged:

> Each of the parties waives, releases, and relinquishes any right or claim that he or she now has or may acquire, pursuant to the provisions of Chapter 29 of the North Carolina General Statutes, ["Intestate Succession," including "Share of Surviving Spouse"] as such sections now exist or may hereafter be amended, to take such property of the other party through intestate succession or pursuant to any present or future laws of any State of the United States to elect to take any of such property of the other party in contravention of the terms of any last will of the other, including any last will not executed or which may be executed hereafter, or any disposition of such property made by the other during his or her lifetime or otherwise. Further, each of the parties shall refrain from any action or proceeding that may tend to void or nullify to any extent or in any particular the terms of any such last will of the other.

Plaintiff breached the agreement when she filed the underlying action in this case. Plaintiff signed the agreement over fifteen years ago. She

failed to challenge the voluntariness of her execution of the agreement until after her husband's death. She now seeks to take an additional one third of decedent's estate away from his six children from a prior marriage, after enjoying the benefits of the marriage and receiving over three hundred thousand dollars ($300,000.00) of decedent's personal property, while also retaining all her premarital property. Plaintiff's assertions that the agreement is "unfair" does not create a genuine issue of material fact that her execution of the agreement was not voluntary. We all agree that the agreement is not "substantively unconscionable." Plaintiff's chief complaint of "unfair" appears to be based upon the current value of her husband's assets, from which she has received and enjoyed the income over the fifteen years of their marriage, and not her knowledge of the nature and extent of the decedent's assets on the date of the agreement. The value of decedent's assets on the date the contract was signed controls. Plaintiff's bootstrapped claim that her execution of the agreement was not voluntary does not create any genuine issue of material fact to overcome the plain language in the agreement and her sworn admissions during her deposition. The trial court's judgment should be affirmed in its entirety.

III. Conclusion

Based upon the plain language of the agreement, and plaintiff's sworn testimony at her deposition, plaintiff failed to carry her burden to show genuine issues of material fact are present to warrant a reversal of the trial court's grant of summary judgment in favor of defendants.

The result reached by the majority opinion is especially damaging in light of its disregard of the sanctity of a solemn written agreement, probated before a notary public, promptly recorded in the public land records of the county, and unchallenged for over fifteen years. The ruling is a wholesale disregard of the bargained for and settled expectations of parties of equal bargaining power in preference to wholly unsupported parol averments in direct contradiction to the terms of the written agreement. No regard is shown for the plaintiff's and decedent's clearly stated bargain, long after the decedent is no longer able to explain or defend the circumstances surrounding the execution of the agreement. This result will only cause great uncertainty into the finality and enforceability of an admittedly voluntary agreement entered into lawfully.

The six children of the decedent are forced to suffer further delays and great expense to quiet title to the real property inherited

from their father, while plaintiff continues to enjoy all the benefits she retained under the agreement and the assets she received during her marriage to the decedent. The fact that the decedent's assets grew during the marriage does not make the agreement unconscionable or unfair. It can be presumed that the value of plaintiff's retained premarital assets also increased, and the record shows plaintiff acquired virtually all of the decedent's personal and intangible assets during the marriage.

I vote to concur that the agreement was not unconscionable and affirm the trial court's judgment in its entirety. I respectfully dissent from any holding that plaintiff did not voluntarily execute the agreement.

THE BOB TIMBERLAKE COLLECTION, INC., PLAINTIFF v. MARSHALL EDWARDS, DEFENDANT

No. COA04-1434

(Filed 21 February 2006)

1. Appeal and Error— appealability—allowance of motion to dismiss—counterclaims—substantial right—identical issues of fact—possibility of inconsistent verdicts

Although defendant's appeal from the grant of a motion to dismiss his counterclaims is generally an appeal from an interlocutory order, defendant would be deprived of a substantial right if an immediate appeal is not allowed. Defendant showed that plaintiff's claims of breach of a stock purchase agreement, default on a promissory note, negligent misrepresentation, and defendant's counterclaims of fraud, negligent misrepresentation, securities fraud, unfair and deceptive trade practices, breach of a stock purchase agreement, and breach of a January 2002 agreement involve identical issues of fact with the possibility of inconsistent verdicts resulting from the same factual issues.

2. Fraud— failure to allege elements with particularity

Defendant failed to state a counterclaim for fraud in plaintiff's action for breach of a stock purchase agreement because he failed to plead with particularity the elements of fraud where he alleged that representatives of plaintiff gave him false information concerning the corporation, but defendant did not identify

which representatives gave him false information or specifically allege where or when he received the information.

3. Fraud— negligent misrepresentation—insufficient allegations

Defendant failed to state a counterclaim for negligent misrepresentation in plaintiff's action for breach of a stock purchase agreement where defendant failed to allege that plaintiff or its representatives owed any duty to defendant or breached any duty owed, and there was no allegation that information provided to defendant was prepared without reasonable care or that any supposed breach was a proximate cause of injury to defendant.

4. Securities— fraud—insufficient allegations

Defendant failed to state a counterclaim for fraud under the North Carolina Securities Act in plaintiff's action for breach of a stock purchase agreement where defendant did not allege that the shares he purchased were securities under the Act, did not allege that plaintiff sold such a security by means of any untrue statement of a material fact or any omission to state a material fact other than a conclusory allegation that representatives of plaintiff provided him with false information, and did not allege that he did not know and in the exercise of reasonable care could not have known of any untruth or omission. N.C.G.S. § 78A-8(2) and 78A-56(a)(2).

5. Unfair Trade Practices— insufficient allegations

Defendant failed to state a counterclaim for an unfair or deceptive trade practice in plaintiff's action for breach of a stock purchase agreement where defendant did not allege what conduct of plaintiff constituted an unfair and deceptive trade practice or that any specific conduct by plaintiff caused injury to defendant. If this counterclaim relates to plaintiff's alleged breach of the stock purchase agreement or alleged breach of a subsequent agreement that plaintiff would defer payment of the final installment due under the stock purchase agreement, defendant made no allegation of any substantial aggravating circumstances attending the breach of contract.

6. Contracts— representations and warranties—contractual limitations period

Defendant's counterclaim for breach of the representations and warranties section of a stock purchase agreement based

upon alleged inaccurate financial information was barred by a two-year limitation in the agreement for representations and warranties where defendant did not allege that he gave notice to plaintiff within the two-year limitation period of any breach or nonconformity of any representation or warranty.

7. Contracts— unilateral offer—absence of acceptance and consideration

The purchaser of corporate shares did not have a contract with the seller to delay indefinitely the third payment due pursuant to the stock purchase agreement where the seller wrote a letter to the purchaser proposing to delay the third payment if the buyer made the second payment due under the agreement, the purchaser never responded to the letter or made the second payment, the purchaser thus never accepted the terms of the seller's unilateral offer, and there was no consideration to support a valid agreement.

8. Pleadings— counterclaims—denial of motion for leave to amend

The trial court did not abuse its discretion by denying defendant's motion for leave to amend his counterclaims, because: (1) the trial court specifically reviewed N.C.G.S. § 1A-1, Rule 15 in open court after hearing defense counsel's argument, and defendant would have been able to amend his counterclaims without leave of court at any point prior to the responsive pleading being filed; (2) it was only after having been served plaintiff's responsive pleading and having notice of plaintiff's motion to dismiss that defendant moved orally to amend his pleadings at the hearing; and (3) such an undue delay of time in making a motion to amend is a valid reason for denying such motion.

Appeal by defendant from orders entered 24 May and 17 June 2004 by Judge Steve A. Balog in Davidson County Superior Court. Heard in the Court of Appeals 15 June 2005.

Allman, Spry, Leggett & Crumpler, P.A., by W. Rickert Hinnant, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Robert J. King, III, and Katherine A. Murphy, for defendant-appellant.

BRYANT, Judge.

Marshall Edwards (Edwards-defendant) appeals from orders entered 24 May and 17 June 2004 by which the trial court (1) granted The Bob Timberlake Collection, Inc.'s (BTI-plaintiff) motion to dismiss defendant's counterclaims and (2) denied defendant's motion for leave to amend his counterclaims.

The dispute between BTI and Edwards arose out of the sale of Riverwood, Inc. (Riverwood) in 2001. Pursuant to a stock purchase agreement, Edwards purchased 90% of the stock in Riverwood in exchange for which he agreed to pay BTI $800,000.00 in three payments. Edwards made the first payment of $250,000.00 at closing on 30 April 2001, and the remaining payments of $250,000.00 and $300,000.00 were to be secured by promissory notes.

After entering into the stock purchase agreement, Edwards claimed that prior to his purchase, BTI made inaccurate statements to him regarding the following as to Riverwood's: "established" sales force; general ledger trial balance; and general ledger reflecting ownership of certain equipment that was actually owned by third parties. Edwards raised his concerns with the chief operating officer of BTI, Daniel Timberlake (Timberlake). In response to Edwards' concerns, Timberlake wrote Edwards a letter dated 18 January 2002 that stated if Edwards made the second payment due under the terms of the stock purchase agreement, the third payment of $300,000.00, originally "due and payable on or before" 15 February 2002, would be delayed indefinitely. Edwards did not respond to the 18 January 2002 letter. He did not make the second $250,000.00 payment, or the third $300,000.00 payment, or sign a new promissory note.

As of October 2002, Edwards had paid a total of $5,250.00 in interest payments under the terms of the promissory note. However Edwards did not make further payments toward the principal balance owed despite BTI's demand to do so. On 2 July 2003, BTI filed a complaint alleging breach of the stock purchase agreement, default of promissory note, and misrepresentation. On 5 September 2003, Edwards filed an answer and counterclaims which included claims for fraud, negligent misrepresentation, securities fraud, unfair and deceptive trade practices, breach of the stock purchase agreement and breach of a January 2002 agreement. BTI answered Edwards' counterclaims on 29 September 2003 and filed a motion to dismiss Edward's counterclaims. On 10 May 2004, the trial court heard BTI's motion to dismiss. Edwards's oral motion for leave to amend his

counterclaims was denied in open court. In an order signed 17 May 2004, the trial court granted BTI's motion to dismiss Edward's counterclaims with prejudice for failure "to state proper claims for which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." Edwards subsequently filed a motion requesting the trial court to reconsider its denial of his motion to amend, which was also denied. Edwards appeals.

On appeal defendant raises two substantive issues whether the trial court erred by: (I) granting plaintiff's motion to dismiss defendant's counterclaims and (II) denying defendant's motion for leave to amend his counterclaims.

[1] As a preliminary matter we must determine whether the appeal is from an interlocutory order and therefore is subject to dismissal. An order or judgment 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. *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) (citation omitted). There is generally no right to appeal an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citation omitted). The purpose of 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.' " *Id.* (quoting *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. rev. denied*, 315 N.C. 183, 337 S.E.2d 856 (1985)).

However, a party may immediately appeal an interlocutory order or judgment in two ways. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. *Id.* Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. *Id.*

In *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), the North Carolina Supreme Court held that the right to avoid a trial is generally not a substantial right, but the right to avoid two trials on the same issue may be a substantial right. *Id.* at 608, 290 S.E.2d at 596. The Court stated that "the possibility of undergoing a second trial affects a substantial right only when the same issues are present in

both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Id.* In *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 437 S.E.2d 674 (1993), this Court stated:

> A substantial right . . . is considered affected if 'there are overlapping factual issues between the claim determined and any claims which have not yet been determined' because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues.

Id. at 24, 437 S.E.2d at 677 (citation omitted). There is a two-part test requiring a party to show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists. *Moose v. Nissan of Statesville, Inc.*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 697 (1994).

Defendant, while acknowledging the appeal is from an interlocutory order, nevertheless asserts the appeal should be heard because the trial court's ruling affects a substantial right. Defendant contends the claims asserted by both parties involve identical issues of fact and that defendant would be prejudiced if these factual issues are not heard by the same jury. Defendant argues he is entitled to an immediate appeal because the trial court's order exposes him to the possibility of inconsistent verdicts upon "overlapping factual issues." After carefully reviewing the pleadings and the procedural development of this case, we agree.

Although BTI's claims remain viable and therefore not a final determination of the rights of the parties, we hold defendant would be deprived of a substantial right if an immediate appeal is not allowed. Defendant shows that plaintiff's claims of breach of a stock purchase agreement, default on a promissory note and negligent misrepresentation and his counterclaims of fraud, negligent misrepresentation, securities fraud, unfair and deceptive trade practices, breach of a stock purchase agreement and breach of a January 2002 agreement involve identical issues of fact. Defendant's defense of fraud would be presented in plaintiff's trial on the breach of contract claim and defendant's trial on fraud in the inducement. Therefore, there exists the possibility of inconsistent verdicts resulting from the same factual issues. Accordingly, the trial court's dismissal of defendant's counterclaims affects a substantial right which would prejudice defendant if we did not hear this appeal. Therefore, we will reach the merits of defendant's appeal.

I

Defendant first argues the trial court erred by granting plaintiff's motion to dismiss defendant's counterclaims for failure to state a claim upon which relief may be granted. We disagree.

The question for this Court on a motion to dismiss pursuant to Rule 12(b)(6) is whether as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

Fraud

[2] Rule 9(b) of the North Carolina Rules of Civil Procedure requires that "in all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2005). "The well-recognized elements of fraud are 1) a false representation or concealment of a material fact, 2) reasonably calculated to deceive, 3) made with intent to deceive, 4) which does in fact deceive, and which 5) results in damage to the injured party. A complaint charging fraud must allege these elements with particularity." *Hunter v. Spaulding*, 97 N.C. App. 372, 377, 388 S.E.2d 630, 634 (1990) (internal citations omitted). "[I]n pleading actual fraud, the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). Dismissal of a claim for failure to plead with particularity is proper where there are "no facts whatsoever setting forth the time, place, or specific individuals who purportedly made the misrepresentations." *Coley v. North Carolina Nat'l Bank*, 41 N.C. App. 121, 125, 254 S.E.2d 217, 220 (1979).

Here, defendant pleaded fraud in vague and general terms, alleging that **representatives** of BTI gave him information concerning Riverwood. However, defendant did not identify which representatives gave him false information, nor did he specifically allege where or when he received the information. Defendant failed to sufficiently plead the substantive elements of fraud with the required particularity. *See Coley* at 125-26, 254 S.E.2d at 219. Accordingly, we affirm the trial court's dismissal of Edwards' fraud claim.

Negligent Misrepresentation

[3] Our Supreme Court has held that "the tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988). Plaintiff's claim could properly be dismissed by the trial court pursuant to Rule 12(b)(6) if no law exists to support the claim, if the complaint fails to allege sufficient facts to assert a viable claim, or if the complaint alleges facts that will necessarily defeat the claim. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 61, 554 S.E.2d 840, 847 (2001) (citation omitted). With respect to negligent misrepresentation, "whether liability accrues is highly fact-dependent, with the question of whether a duty is owed a particular plaintiff being of paramount importance." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, L.L.P.*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999).

Here, the trial court properly dismissed the negligent misrepresentation claim for failure to allege all the required facts and because the complaint includes facts that necessarily defeat the claim. In his counterclaim for negligent misrepresentation, Edwards pleads a legal conclusion that "such misrepresentations were made negligently," that "Timberlake, Inc. had a financial interest in such misrepresentations," that "Edwards relied upon Timberlake, Inc.'s negligent misrepresentations," that "such reliance was reasonable," and that "Edwards has been damaged by Timberlake's negligent misrepresentations in an amount to be established at trial." However, Edwards failed to allege BTI or its "representatives" owed any duty to Edwards or breached any duty owed. Further, there was no allegation that the information provided was prepared without reasonable care, or that any supposed breach was a proximate cause of the injury. Edwards has failed to allege sufficient facts which, if taken as true would state a claim for negligent misrepresentation. We affirm the trial court's dismissal of Edwards' claim of misrepresentation.

Securities Fraud

[4] Edwards' counterclaim for securities fraud does not allege a specific violation of the North Carolina Securities Act (Act) other than a conclusory statement that "the above-described conduct constitutes a violation of the North Carolina Securities Act, N.C.G.S. § 78A-1, et seq." From the face of the counterclaim, it is presumed Edwards intended to assign liability for a violation of N.C.G.S.

§ 78A-8(2) and N.C.G.S. § 78A-56(a)(2) which imposes civil liability upon any person who:

> Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of the untruth or omission . . .

N.C. Gen. Stat. § 78A-56 (a)(2) (2005). Defendant has not made any of the allegations required to sustain a claim for relief under the Act. Specifically, Edwards does not allege the stock he purchased was a "security" by virtue of the terms of the Act, nor is it specifically alleged that BTI sold such a security "by means of any untrue statement of a material fact or any omission to state a material fact," other than Edwards conclusory allegation that "representatives" of BTI provided him with false information. Edwards further fails to allege he did not know, and in the exercise of reasonable care, could not have known of the untruth or omission. Edwards merely offers conclusions of law and attempts to allege the elements of a claim for securities fraud only in general terms, but has not pled facts sufficient to state a claim for securities fraud. Accordingly, we affirm the trial court's dismissal of Edwards' securities fraud claim.

Unfair and Deceptive Trade Practices Act

[5] To establish a claim for unfair and deceptive trade practices, Edwards must show: (1) that plaintiff committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to defendant. *See Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995). An act or practice is unfair if it "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). An act or practice is deceptive if it "has the capacity or tendency to deceive." *Id.*

Edwards makes no allegation BTI has done anything immoral, oppressive, unscrupulous or substantially injurious to consumers. Edwards alleges BTI's conduct "constitutes unfair and deceptive trade practices," that "such conduct was in and effected [sic] com-

merce," and that Edwards is therefore entitled to recover damages as a result of BTI's alleged conduct. Edwards does not state what alleged conduct of BTI constitutes unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 (Chapter 75). Edwards' claim may relate to either (1) the alleged breach of the Stock Purchase Agreement, or (2) the alleged breach of the "agreement" that plaintiff would defer payment of the final installment payment under the Agreement.

A mere breach of contract, even if intentional, is not an unfair or deceptive act under Chapter 75. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989); *see also Skinner v. E. F. Hutton & Co., Inc.*, 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985) (securities transactions are beyond the scope of Chapter 75 in that such transactions are already subject to pervasive and intricate regulation under the North Carolina Securities Act). "It is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract . . . and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) (citations omitted). To recover for unfair and deceptive trade practices, a party must show substantial aggravating circumstances attending the breach of contract. *Id.* It is "unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations." *Southeastern Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330, 572 S.E.2d 200, 206 (2002) (citations and quotations omitted).

Edwards' counterclaim for Unfair and Deceptive Trade Practices states "Edwards is entitled to recover compensatory damages as a result of Timberlake, Inc.'s conduct," but fails to allege any specific conduct by BTI that proximately caused injury to Edwards. Edwards' failure to allege a necessary element defeats his claim for unfair and deceptive trade practices. *See Walker v. Sloan*, 137 N.C. App. 387, 399, 529 S.E.2d 236, 246 (2000) (no recovery where the complaint fails to demonstrate that the act of deception proximately resulted in some adverse impact or actual injury to the plaintiff). We affirm the trial court's dismissal of Edwards' unfair and deceptive trade practices claim.

Breach of Contract

[6] In his counterclaim for breach of contract, Edwards states "by providing inaccurate financial information to Edwards, Timberlake, Inc. breached Article 11, [Section] E of the Agreement. Such breach has damaged Edwards in an amount to be established at trial."

The elements of a claim for breach of contract are (1) the existence of a valid contract and (2) breach of the terms of that contract. *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 792, 561 S.E.2d 905, 909 (2002). Edwards' claim for relief is based on the alleged breach of Article 11, Section E of the Agreement, which sets forth certain representations and warranties of BTI in connection with Edwards' purchase of Riverwood stock. Article IX, section A of the Agreement sets forth a limitation on the survival of such representations and warranties as follows:

> Section A.—Survival of Representations and Warranties. All representations and warranties of the Seller and the Company shall survive the execution, delivery and performance of this Agreement for a period extending two (2) years from the Closing Date.

As the Agreement was executed on April 30, 2001, and Edwards does not allege that any notice whatsoever was provided to BTI within the prescribed two-year limitation period of any breach or nonconformity of any representation or warranty, Edwards' claim is therefore barred by the express terms of the Agreement.

"A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim." *State of Tennessee v. Environmental Management Comm.*, 78 N.C. App. 763, 765, 338 S.E.2d 781, 782 (1986). Furthermore, when a complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, the motion to dismiss will be granted and the action dismissed. *Skinner* at 270, 333 S.E.2d at 238. As Edwards' claim for breach of the Agreement was filed in his counterclaim on 4 September 2003, it is more than 2 years after the parties initially entered into the Agreement (30 April 2001) and therefore, barred by an express limitation contained in the Agreement. Such an insurmountable bar to recovery on the claim requires that the claim be dismissed. "A counterclaim is sufficient to withstand the motion [12(b)(6)] where no insurmountable bar to

recovery on the claim appears on its face." *Chrysler Credit Corp. v. Rebhan*, 66 N.C. App. 255, 257, 311 S.E.2d 606, 608 (1984). At the hearing on the motion to dismiss, counsel for BTI explicitly argued Edwards' alleged claim for breach of the Agreement was barred by the express terms of the Agreement. The trial court properly dismissed the claim.

Breach of the 18 January 2002 "Agreement"

[7] In his final counterclaim, Edwards claims the letter sent by BTI to Edwards 18 January 2002 constitutes an "agreement" that BTI has allegedly breached by filing the underlying action. Edwards alleges that "[he] and Timberlake, Inc. reached an agreement in January 2002 pursuant to which Timberlake, Inc. agreed to delay the payment on the $300,000 Note indefinitely. By filing this suit, Timberlake, Inc. has breached such agreement." The letter states, in pertinent part:

> With respect to our final amount of $300,000 due in February, we are willing to extend the payment thereof indefinitely to allow you ample opportunity to grow the business. Additionally, if you are able to effectively merge all of your business interests into a single corporate organization, we would be willing to "contribute" our remaining 10% interest in Riverwood if that helps you clean up all of the structural and ownership issues you currently face. Please let me know if there is anything further you may need in this regard. Please let me know if the above is agreeable to you.

The 18 January 2002 correspondence was a unilateral offer made to Edwards. Edwards does not allege he accepted the offer, but characterizes the correspondence, standing alone, as an "agreement" between the parties. We find this letter falls short of an agreement because Edwards failed to accept the terms.

At the hearing on BTI's Motion, BTI's counsel explicitly argued the letter was, at most, merely an offer, that Edwards never alleged any consideration for the "agreement." We agree. Here, Edwards has not established the existence of a valid contract or a meeting of the minds with respect to the January 2002 letter. The trial court properly granted plaintiff's motion to dismiss defendant's counterclaim.

II

[8] Defendant next argues the trial court erred by denying his motion for leave to amend his counterclaims.

Denial of a motion to amend by the trial court will not be disturbed on appeal absent a showing of abuse of discretion. *Nationsbank of North Carolina, N.A. v. Baines*, 116 N.C. App. 263, 268, 447 S.E.2d 812, 815 (1994). "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Chicora Country Club, Inc., v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998) (citation and quotations omitted). "In the absence of any declared reason for the denial of leave to amend, this Court may examine any apparent reasons for such denial." *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 42-43, 298 S.E.2d 409, 411 (1982), *disc. rev. denied*, 308 N.C. 194, 302 S.E.2d 248 (1983). Some reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments. *Id.* at 42-43, 298 S.E.2d at 411-12.

The trial court did not state a specific basis for its denial of Edwards' motion for leave to amend his counterclaims. The trial court entered its order denying the motion after "having considered the pleadings, legal briefs and arguments of counsel." The transcript indicates that the trial court specifically reviewed Rule 15 in open court after hearing defense counsel's argument. Pursuant to Rule 15, Edwards would have been able to amend his counterclaim, without leave of court, at any point prior to the responsive pleading being filed. N.C. Gen. Stat. § 1A-1, Rule 15. However, it was only after having been served plaintiff's responsive pleading and having notice of plaintiff's motion to dismiss, that Edwards moved orally to amend his pleadings at the hearing. Such an undue delay of time in making a motion to amend is a valid reason for denying such motion. On this record, we find no abuse of discretion by the trial court in denying Edwards' request for leave to amend his pleadings. This assignment of error is overruled.

Because plaintiff's motion to dismiss defendant's counterclaims was properly granted, and because defendant's motion for leave to amend was properly denied, the judgment of the trial court is affirmed.

Affirmed.

Judges McCULLOUGH and TYSON concur.

CRAVEN REGIONAL MEDICAL AUTHORITY D/B/A CRAVEN REGIONAL MEDICAL CENTER, PETITIONER v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND COASTAL CAROLINA HEALTH CARE, P.A., D/B/A COASTAL CAROLINA IMAGING, RESPONDENT-INTERVENOR

No. COA05-284

(Filed 21 February 2006)

1. Hospitals and Other Medical Facilities— certificate of need—agency decision—MRI scanner—Criterion 3—reasonable projections

The whole record test revealed that respondent North Carolina Department of Health and Human Services (DHHS) did not err by granting respondent-intervenor a certificate of need (CON) for an additional MRI scanner based on finding that its application conformed to Criterion 3, because: (1) when considering whether respondent-intervenor was conforming to Criterion 3 by use of a 1.41 ratio for projected scans per patient, a reasonable projection of something that will occur in the future, by its very nature, cannot be established with absolute certainty; (2) respondent-intervenor's methodology was self-validating since during the pendency of DHHS's CON review, utilization information gathered by MRI service providers for 2002 became available; (3) at no time during the hearing before the ALJ did petitioner object to the sixty-five physician letters (pledging to refer patients to respondent-intervenor for MRI procedures) as being inadmissible hearsay, and in fact, petitioner offered respondent-intervenor's application which included the physician letters into evidence without restriction; (4) contrary to petitioner's assertion, DHHS did not use after the fact rationales to justify its decisions, but merely relied on information already contained in respondent-intervenor's application; and (5) even though the record contains evidence which would support findings in support of petitioner's arguments on appeal, there is substantial evidence in the record to support DHHS's findings.

2. Hospitals and Other Medical Facilities— certificate of need—agency decision—MRI scanner—Criterion 5—funds for capital and operating needs—financial feasibility

The whole record test revealed that respondent North Carolina Department of Health and Human Services (DHHS) did not err by granting respondent-intervenor a certificate of need

(CON) for an additional MRI based on finding that its application conformed to N.C.G.S. § 131E-183(a)(5) (Criterion 5), because: (1) although petitioner asserts that respondent-intervenor's revenues to show financial feasibility were based on an overstated procedural volume used for Criterion 3, the Court of Appeals already concluded there was substantial evidence to support DHHS's findings regarding Criterion 3; and (2) the pertinent expired proposed lease agreement for the MRI machine does not go to whether respondent-intervenor can finance the project or the availability of funds, but goes to the projection of costs and charges.

3. Hospitals and Other Medical Facilities— certificate of need—agency decision—MRI scanner—Criterion 18a—expected effects of proposed services

The whole record test revealed that respondent North Carolina Department of Health and Human Services (DHHS) did not err by granting respondent-intervenor a certificate of need (CON) for an additional MRI scanner based on finding that its application conformed to N.C.G.S. § 131E-183(a)(4), (6), and (18a) (Criteria 4, 6, and 18a), because: (1) petitioner failed to make any argument or cite any authority with respect to Criterion 4 or 6, and thus, it abandoned these arguments; (2) petitioner erroneously argues that by giving it a monopoly in the service area since it currently owns the only two MRI scanners within this service area, it would somehow increase competition; and (3) respondent-intervenor demonstrated the cost effectiveness of its project and the positive effect it would have on competition in the area, and it also projected the lowest net revenue per procedure of any applicant.

4. Hospitals and Other Medical Facilities— certificate of need—agency decision—MRI scanner—unlawful self-referrals

A de novo review revealed that respondent North Carolina Department of Health and Human Services (DHHS) did not err by failing to find that respondent-intervenor's certificate of need application for MRI services was based on alleged improper self-referrals in violation of N.C.G.S. § 90-406, because: (1) there is no provision in N.C.G.S. § 131E-183, nor Chapter 131E, which permits DHHS to independently assess whether the applicant is conforming to other statutes; and (2) N.C.G.S. § 90-407 states that the authority to enforce unlawful self-referrals is vested with the

Attorney General, and subject to disciplinary action from the applicable Board created in Chapter 90 of Article 28 of the General Statutes.

5. Hospitals and Other Medical Facilities— certificate of need—agency decision—MRI scanner—reasonable basis to choose one application over another

The whole record test revealed that respondent North Carolina Department of Health and Human Services's (DHHS) preference for respondent-intervenor for a certificate of need over petitioner had a reasonable basis in the record, because: (1) there was evidence in the record that the service area would benefit from having an additional MRI scanner in an outpatient setting and that respondent-intervenor would serve a greater percentage of Medicare patients (underserved groups); (2) evidence in the record demonstrated that an open MRI scanner in the service area was the most effective alternative for the service area, and respondent-intervenor proposed the use of such a scanner and also proposed the lowest net revenue per procedure; and (3) there were reasons to support both applications and deference must be given to the agency's decision where it chooses between two reasonable alternatives.

6. Appeal and Error— preservation of issues—final agency decision—failure to give proper notice of appeal

Although petitioner contends that respondent-intervenor impermissibly amended its certificate of need (CON) application for an MRI scanner after a final agency decision in favor of respondent-intervenor and after issuance of the CON by substituting a mobile closed MIR, this issue is not properly before the Court of Appeals, because: (1) the appellate court's review is limited to the final agency decision, and the CON section granted respondent-intervenor's request for a material compliance determination after the CON was issued; and (2) in the absence of proper notice of appeal from this decision, the Court of Appeals is without jurisdiction to review this issue.

7. Hospitals and Other Medical Facilities— certificate of need—agency decision—findings of fact

Although petitioner contends respondent North Carolina Department of Health and Human Services (DHHS) correctly found that petitioner conformed to Criterion 5 for a certificate of need application but certain of the findings of fact were allegedly

misleading and failed to include facts shown by petitioner, DHHS stated in its final decision that petitioner was conforming to Criterion 5 and nothing further was required.

8. Appeal and Error— preservation of issues—mootness

Although respondent-intervenor cross-assigns as error respondent North Carolina Department of Health and Human Services's (DHHS) finding that petitioner's certificate of need application was conforming with Criterion 5 and related rules, it is unnecessary for the Court of Appeals to address this issue in light of its holding that DHHS's approval of respondent-intervenor's application was supported by the evidence and conformed with the statutory criteria.

Appeal by petitioner from a final agency decision issued 23 July 2004 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 15 November 2005.

Bode Call & Stroupe, L.L.P., by S. Todd Hemphill and Diana Evans Ricketts, and Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by Fred M. Carmichael, for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe and Assistant Attorney General June S. Ferrell, for respondent-appellee.

Kirschbaum, Nanney, Keenan & Griffin, P.A., by Frank S. Kirschbaum and Amy Y. Bason, for respondent-intervenor.

Linwood Jones for North Carolina Hospital Association, amicus curiae.

Brook, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Forrest W. Campbell, Jr., for North Carolina Radiological Society, amicus curiae.

Ward and Smith, P.A., by J. Troy Smith, Jr. and Cheryl A. Marteney, for North Carolina Medical Society, North Carolina Academy of Family Physicians, North Carolina Obstetrical and Gynecological Society, North Carolina Orthopaedic Association, North Carolina Pediatric Society, North Carolina College of Internal Medicine, and North Carolina Neurological Society, amicus curiae.

Parker Poe Adams & Bernstein, by Renee J. Montgomery and Susan L. Dunathan, for OrthoCarolina, P.A., amicus curiae.

Nelson, Mullins, Riley & Scarborough, L.L.P., by Noah H. Huffstetler, III, Barry D. Alexander and Wallace C. Hollowell, III, for Alliance Imaging, Inc., amicus curiae.

STEELMAN, Judge.

Craven Regional Medical Center (Craven) is a hospital, located in New Bern, North Carolina. Coastal Carolina Health Care, P.A. is a physician practice in New Bern, consisting of approximately thirty-four physicians. Coastal Carolina Imaging (Coastal) is a division of Coastal Carolina Health Care, which operates a diagnostic imaging center. Craven operates the only two magnetic resonance imaging scanners (MRI) in Service Area 23: one in the hospital and one at Craven Diagnostic Center, located five miles from the hospital. In 2002, Craven petitioned for an amendment to the State Medical Facilities Plan (SMFP) to include a need determination for one additional MRI in Service Area 23, a five county region which includes Craven County. The SMFP sets forth the medical need requirements in this state and a Certificate of Need (CON) may not be granted which would allow more medical facilities or equipment than are needed to serve the public. *See* N.C. Gen. Stat. § 131E-183(a)(1) (2005). In response to Craven's petition, the 2003 SMFP included a need determination for an additional MRI in Service Area 23. Four applicants, including Craven and Coastal, applied for a CON with respondent, 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. The Agency reviewed the four applications. It found both Coastal and Craven's CON applications conformed to all the statutory and regulatory review criteria. Since there existed a need for only one additional MRI in that region, the Agency performed a comparative analysis of the applications to determine which proposal should be approved. The Agency determined Coastal's application was the most effective proposal and awarded the CON to Coastal. Craven filed a petition for contested case hearing with the Office of Administrative Hearings challenging the approval of Coastal's CON application and the disapproval of its application. Coastal intervened as a respondent. Following an evidentiary hearing, the administrative law judge (ALJ) recommended affirming the Agency's decision. Craven filed exceptions with the Division of Facility Services requesting reversal. On 23 July 2004, the Department issued a final agency decision adopting the ALJ's recommended decision, which affirmed the awarding of the CON to Coastal. Craven appeals.

Standard of Review

The substantive nature of each assignment of error controls our review of an appeal from an administrative agency's final decision. *North Carolina Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004). Where a party asserts an error of law occurred, we apply a *de novo* standard of review. *Id.* at 659, 599 S.E.2d at 894. If the issue on appeal concerns an allegation that the agency's decision is arbitrary or capacious or "fact-intensive issues 'such as sufficiency of the evidence to support [an agency's] decision' " we apply the whole-record test. *Id.* (citations omitted).

Analysis

[1] In its first argument, Craven contends the Agency erred in finding Coastal's application conforming to Criterion 3 for three reasons: (1) Coastal's projections that it would achieve the required 2900 scans by its third year of operation were unreasonable; (2) these projections were erroneously based on physicians' letters; and (3) the Agency's analysis improperly altered Coastal's methodology by using "after the fact" rationales to justify Coastal's projections that it would achieve the required number of scans by its third year. We disagree.

N.C. Gen. Stat. § 131E-183(a)(3) (Criterion 3) provides:

> The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

In addition, the Agency has adopted rules to be used as regulatory criteria in conjunction with Criterion 3. The rules in effect at the time Craven and Coastal sought the CON required an applicant proposing to acquire an MRI scanner for which the need determination in the SMFP was based on the utilization of fixed MRI scanners to:

> (2) demonstrate annual utilization in the third year of operation is reasonably projected to be an average of 2900 procedures per scanner for all existing, approved and proposed MRI scanners or mobile MRI scanners to be operated by the applicant in the MRI service area(s) in which the proposed equipment will be located; and

> (3) document the assumptions and provide data supporting the methodology used for each projection required in this rule.

10 N.C.A.C. 3R.2715(b)(2-3) (recodified as 10A N.C.A.C. 14C.2703).

First, Craven asserts Coastal's CON application was nonconforming with Criterion 3 because the methodologies it utilized to show its MRI scanner will achieve the required 2900 scans by its third year in operation were based on inaccurate assumptions. Craven contends these inaccurate assumptions inflated the average number of projected scans per patient per year from 1.0 to 1.41, thus rendering Coastal's projections unreasonable and its application nonconforming with Criterion 3. It alleges the Agency's finding that Coastal's CON application was conforming to Criterion 3 was not supported by the evidence and was arbitrary and capricious.

Where the appealing party alleges the agency's decision was not supported by the evidence or was arbitrary or capricious, the reviewing court applies the "whole record test." *Dialysis Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000). In applying this test, we must examine the entire record in order to determine whether the agency's decision is supported by substantial evidence. *Id.*

> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are . . . "whimsical" in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment . . . .

Blalock v. N.C. Dep't of Health and Human Servs., 143 N.C. App. 470, 475, 546 S.E.2d 177, 181 (2001) (citations and internal quotation marks omitted). When applying the whole record test "[w]e should not replace the agency's judgment as between two reasonably conflicting views, even if we might have reached a different result if the matter were before us *de novo*." *Dialysis Care*, 137 N.C. App. at 646, 529 S.E.2d at 261. It is irrelevant that the record may contain evidence which would support findings contrary to those found by the Agency since we cannot substitute our judgment for that of the Agency's. *Id.* When considering whether Coastal was conforming to Criterion 3, all that is required is that each applicant "*reasonably project*" it will perform 2900 procedures in its third year of op-

eration. 10 N.C.A.C. 3R.2715. A reasonable projection of something that will occur in the future, by its very nature, cannot be established with absolute certainty.

Craven contends the 1.41 procedure to patient ratio used by Coastal to meet Criterion 3 was improper because not all MRI providers report patients to the Medical Facilities Planning Section in the same manner. Some facilities report each procedure as a new patient, even though that patient may have previously had MRI's that year. Some mobile MRI providers report procedures, but not patients. Respondents concede that the actual procedure to patient ratio is unknown. After reviewing the record, we find there to be substantial evidence supporting the Agency's finding that Coastal's use of a 1.41 ratio was reasonable.

In determining that Coastal met the requirements of Criterion 3, the Agency conducted a detailed analysis of Coastal's projections and assumptions. The Agency specifically rejected Craven's attack on Coastal's use of a 1.41 ratio, finding the use of a 1.41 procedures per patient ratio alone did not defeat Coastal's methodology in demonstrating a need for its project because "ratios for existing facilities range from a 1.11 ratio up to a ratio of 2.24." Although there was contradictory testimony presented, the record contains admissible testimony supporting the use of the 1.41 ratio.

Coastal's methodology was also self-validating. During the pendency of the Agency's CON review, utilization information gathered by MRI service providers for 2002 became available. In its application, Coastal projected 16,663 scans would be performed in the service area in 2002. Coastal arrived at this number by multiplying its patient use rate of 42.39 per thousand persons of population by the 1.41 ratio, resulting in a procedure use rate of 59.8 per thousand. In arriving at this number, Coastal also factored in patients coming into and leaving the service area. The actual number of scans performed in the area for 2002 was 16,528. Thus, there was additional evidence to support the Agency's finding that Coastal's use of the 1.41 ratio was reasonable.

Next, Craven asserts Coastal's CON application was nonconforming with Criterion 3 because its projections were erroneously based on physicians' letters. Included in Coastal's application for the CON were letters from sixty-five physicians in the service area pledging to refer patients to Coastal for MRI procedures. Craven asserts it was improper for the Agency to consider these letters in finding Coastal

conforming to Criterion 3 because they constituted inadmissible hearsay. At no time during the hearing before the ALJ did Craven object to the letters as being inadmissible hearsay. In fact, Craven offered Coastal's application, which included the physician letters into evidence without restriction. It is well-established that an objecting party loses the benefit of any objection to the introduction of evidence, particularly where it was responsible for first introducing that evidence. *State v. Rhue*, 150 N.C. App. 280, 286, 563 S.E.2d 72, 76 (2002). Since Craven introduced the letters into evidence before the ALJ without restriction, it cannot now claim the Agency's consideration of these letters was improper.

Finally, Craven contends the Agency erred in finding Coastal's application conforming with Criterion 3 because it impermissibly used "after the fact" rationales to justify Coastal's projections. After careful review, we hold that the Agency did not use "after the fact rationales" to justify its decision, but merely relied on information already contained in Coastal's application.

In conclusion, even though the record contains evidence which would support findings in support of Craven's arguments on appeal, there is substantial evidence in the record to support the Agency's finding that Coastal was conforming with Criterion 3. This argument is without merit.

[2] In Craven's second argument, it contends the Agency erred in finding Coastal conforming to N.C. Gen. Stat. § 131E-183(a)(5) (Criterion 5), which requires an applicant to demonstrate: (1) the availability of funds for capital and operating needs; and (2) the financial feasibility of the proposal based on the applicant's reasonable projections. N.C. Gen. Stat. § 131E-181(a)(5) (2005). We disagree.

Craven first contends Coastal is nonconforming with Criterion 5 because the revenues upon which Coastal based its showing of financial feasibility were based on an overstated procedural volume as discussed in Argument I above. As this argument is dependent on Craven's success in showing Coastal to be nonconforming with Criterion 3 and we held this argument to be without merit, this argument also fails.

Craven also contends Coastal's application was nonconforming to Criterion 5 because it was based upon a lease arrangement with GE Capital Healthcare Financial Services (GE), the terms of which expired prior to the completion of the CON review process. This pro-

posed lease set forth the financial terms under which Coastal would lease the MRI machine. It was dated 30 January 2003 and its terms expired on 28 February 2003. The cover letter from GE to Coastal stated: "Due [to] the potential change in interest notes, GE HFS cannot extend a firm quote for any longer period of time."

Criterion 5 states:

> Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

N.C. Gen. Stat. § 131E-183(a)(5). The final agency decision contains the following findings of fact relevant to the financial feasibility of Coastal's proposed MRI scanner based on the GE lease proposal:

> 43. [Coastal] proposed to acquire its MRI equipment through an operating lease with GE.
>
> . . .
>
> 45. Ms. Beville [the project analyst] determined that GE's documentation was sufficient to demonstrate [Coastal's] ability to acquire its proposed scanner, even though the quote expired before the March 1, 2003 review began. A quote acquired during the preparation of a CON application is sufficient, because there are variations in the terms offered by different venders. It is not reasonable to expect a financing offer to be held open indefinitely. Respondent would not find an applicant nonconforming because of the expiration of a lease. Respondent can condition someone to demonstrate the financial availability of funds or availability of financing after its application is approved.
>
> . . .
>
> 49. [Coastal] met the requirements of Criterion 5 to demonstrate the immediate and long-term financial feasibility of its project based upon reasonable projections of cost and charges. Respondent properly found [Coastal] conforming with Criterion 5.

(internal references to record and testimony omitted). We hold that each of these findings is supported by substantial evidence in the record.

In *Burke Health Investors v. N.C. Dep't of Hum. Res.*, 135 N.C. App. 568, 574-75, 522 S.E.2d 96, 100-01 (1999), this Court held a letter of interest from a bank to provide financing for a project was sufficient to comply with the requirements of Criterion 5. The proposed lease between Coastal and GE was submitted with Coastal's application. This document clearly showed GE's interest in leasing the MRI equipment in the event Coastal was awarded the CON. This is sufficient to meet the requirements of Criterion 5. It is unrealistic to expect that a lender would extend a commitment to lease terms without time limitation prior to the applicant being awarded a CON.

Craven relies on the case *Johnston Health Care Ctr. v. N.C. Dep't. of Hum. Res.*, 136 N.C. App. 307, 524 S.E.2d 352 (2000) to support its argument. In *Johnston*, the disapproved applicant submitted a bank letter committing the bank to provide a line of credit that expired before the commencement of the proposed project. *Johnston* is distinguishable from the instant case in that the lease does not go to whether Coastal can finance the project or the availability of funds, which was the issue in *Johnston*, but goes to the projection of costs and charges. This argument is without merit.

[3] In Craven's third argument, it contends the Agency erred in finding Coastal conforming with N.C. Gen. Stat. § 131E-183(a)(4), (6), and (18a) (Criterion 4, 6, and 18a). We disagree.

Craven makes no argument nor cited any authority with respect to Criterion 4 or 6. Therefore, it has abandoned these arguments. N.C. R. App. P. 28(b)(6).

Criterion 18(a) provides:

> The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed; and in the case of applications for services where competition between providers will not have a favorable impact on cost effectiveness, quality, and access to the services proposed, the applicant shall demonstrate that its application is for a service on which competition will not have a favorable impact.

N.C. Gen. Stat. § 131E-183(a)(18a) (2005). Specifically, Craven argues the large volume of physicians who stated they would refer patients to Coastal would negatively impact competition. Craven currently

owns the only two MRI scanners within this service area. Craven's argument appears to be that if it operated all three of the MRI scanners this would somehow foster competition rather than if a competitor operated one of the MRI scanners. Craven, in effect, argues that giving it a monopoly in the service area would increase competition. We decline to adopt this incongruous line of reasoning.

In Coastal's application, it demonstrated the cost effectiveness of its project and the positive effect it would have on competition in the area. It also projected the lowest net revenue per procedure of any applicant. Thus, there was evidence in the record to support the Agency's decision. This argument is without merit.

[4] In Craven's fourth argument, it contends the Agency erred in failing to find Coastal's application was based on improper self-referrals, in violation of N.C. Gen. Stat. § 90-406, thereby making Coastal's application nonconforming with the CON review criteria. We disagree.

We note that this issue is properly before this Court. Craven raised it in its petition for a contested case hearing, although it was not discussed in the ALJ's recommended decision. We review this matter *de novo*, as it involves the assertion that the Agency committed an error of law. Under this standard of review, we consider the matter anew and may freely substitute the Agency's decision with our own. *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895. Coastal is a division of Coastal Carolina Heath Care (CCHC). In Coastal's application, CCHC pledged to refer virtually all of its patients, approximately 1742 scans, to its Imaging Center. Coastal's MRI services were to be performed under the supervision of a licensed physician from an independent radiology group, Coastal Radiology. Craven contends these referrals violate N.C. Gen. Stat. § 90-406 prohibiting self-referrals, which provides: "[a] health care provider shall not make any referral of any patient to any entity in which the health care provider or group practice or any member of the group practice is an investor." N.C. Gen. Stat. § 90-406(a) (2005).

In deciding whether to issue a CON, the Agency must determine whether an application meets the criteria set forth in N.C. Gen. Stat. § 131E-183(a). *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 384, 455 S.E.2d 455, 460 (1995). The Department contends it is not within its purview to independently consider whether an applicant is in compliance with other statutes when determining whether to grant or deny a CON. Rather, it contends that its review is limited

to the criteria set forth in N.C. Gen. Stat. § 131E-183, and N.C. Gen. Stat. § 90-407 specifically vests the power to enforce unlawful self-referrals in other state agencies, not itself.

"It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992). Here, the Agency's interpretation is reasonable. There is no provision in N.C. Gen. Stat. § 131E-183, nor Chapter 131E, which permits the Agency to independently assess whether the applicant is conforming to other statutes. Moreover, N.C. Gen. Stat. § 90-407 states that the authority to enforce unlawful self-referrals is vested with the Attorney General, and subject to disciplinary action from the applicable Board created in Chapter 90 of Article 28 of the General Statutes. Therefore, the Agency did not err in finding that Coastal's application did not violate the state's self-referral law. This argument is without merit.

[5] In Craven's fifth argument, it contends the Agency's preference for Coastal had no reasonable basis in the record. We disagree.

In a competitive review, where the Agency finds more than one applicant conforming to the applicable review criteria, it may conduct a comparison of the conforming applications to determine which applicant should be awarded the CON. *Britthaven*, 118 N.C. App. at 385-86, 455 S.E.2d at 461. There is no statute or rule which requires the Agency to utilize certain comparative factors. *Id.* at 384, 455 S.E.2d at 459. In employing a comparative analysis, the Agency may include other " 'findings and conclusions upon which it based its decision.' " *Id.* at 385, 455 S.E.2d at 459 (quoting N.C. Gen. Stat. § 131E-186(b)). "Those additional findings and conclusions give the Agency the opportunity to explain why it finds one applicant preferable to another on a comparative basis." *Id.*

In the instant case, the CON Section compared the following facts: (1) geographic distribution; (2) location; (3) access by underserved groups; (4) operating costs; (5) revenues/net revenues per procedure; and (6) access to an open MRI scanner. Since Craven asserts the Agency's finding was unsupported by the evidence, we apply the whole record test. There was evidence in the record that the service area would benefit from having an additional MRI scanner in an outpatient setting and that Coastal would serve a greater percentage of

Medicare patients, that is, underserved groups. There was also evidence in the record demonstrating that an open MRI scanner was the most effective alternative for the service area. There was not an open MRI scanner in the service area and Coastal was proposing to use such a scanner, while Craven proposed a closed scanner. The evidence further showed that Coastal proposed the lowest net revenue per procedure, making it more cost efficient.

There were reasons to support both applications and deference must be given to the agency's decision where it chooses between two reasonable alternatives. *Dialysis Care*, 137 N.C. App. at 646, 529 S.E.2d at 261. It would be improper for this Court to substitute our judgment for the Agency's decision where there is substantial evidence in the record to support its findings. This argument is without merit.

[6] In Craven's sixth argument, it contends Coastal impermissibly amended its CON application by substituting a mobile closed MRI, invalidating the basis for the Agency awarding it the CON. We disagree.

Following the final agency decision in favor of Coastal and after the issuance of the CON, Coastal sought a material compliance determination from the CON Section. Coastal informed the CON section that pursuant to its CON for an MRI scanner, it intended to temporarily lease a closed mobile scanner during the construction of the fixed, open MRI scanner proposed in its application.

This issue is not properly before this Court. Our review is limited to the final agency decision. The CON Section granted Coastal's request for a material compliance determination after the CON was issued. Craven is asking this Court to review events which occurred after the issuance of the final agency decision. Craven did not give notice of appeal from this decision. Rule 3(d) of the Rules of Appellate procedure requires that the notice of appeal "shall designate the judgment or order from which appeal is taken." N.C. R. App. P. 3(d) (2005). "Proper notice of appeal is a jurisdictional requirement that may not be waived." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). As such, "the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Id.* In the absence of proper notice of appeal, this Court is without jurisdiction to review this issue.

[7] In Craven's seventh and final argument, it contends the Agency correctly found it conforming to Criterion 5, but certain of the findings of fact were misleading and also failed to include facts shown by Craven. We disagree.

A court need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993). The Agency stated in its final decision that Craven was conforming to Criterion 5 and nothing further was required. This argument is without merit.

[8] Coastal cross-assigns as error the Agency's finding that Craven's application was conforming with Criterion 5 and related rules. Based on our holding that the Agency's approval of Coastal's CON application was supported by the evidence and conforming with the statutory criteria, it is unnecessary that we address this issue.

AFFIRMED.

Judges WYNN and JOHN concur.

THE FARNDALE COMPANY, LLC, AND VAL PARTICIPATIONS, S.A., PLAINTIFFS v. FOLCO GIBELLINI AND ACCUMA, S.p.A., DEFENDANTS

No. COA05-451

(Filed 21 February 2006)

1. Corporations— fiduciary relationship—majority shareholder to minority shareholder—responsibility for issuance of stock

The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim of breach of fiduciary duties owed by majority shareholders to minority shareholders even though defendants contend plaintiffs did not produce sufficient evidence that defendants were responsible for an August 1999 issuance of stock, because: (1) there was evidence presented at trial that a shareholder meeting was held in August 1999 for the purpose of voting to amend the pertinent company's articles of incorporation to allow the stock issuance, and that plaintiffs did not vote in favor of this amendment; and (2) there was sufficient

evidence that defendants, as majority shareholders in a closely held corporation, voted to approve the amendment allowing issuance of the stock, and were generally responsible for the company's recapitalization.

2. Corporations— fiduciary relationship—majority shareholder to minority shareholder—recapitalization—breach of fiduciary duty—burden of proof

The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim of breach of fiduciary duties owed by majority shareholders to minority shareholders even though defendants contend plaintiffs did not produce any evidence that the recapitalization of the pertinent company was a breach of their fiduciary duty to plaintiffs, because: (1) once a minority shareholder challenges the fairness of the actions taken by the majority, the burden shifts to the majority to establish that its actions were in all respects inherently fair to the minority and undertaken in good faith; and (2) defendants' liability is not based on a finding that the stock issuance was a per se breach of fiduciary duty, but instead their liability is based on the jury's finding that defendants improperly took advantage of their majority status and that the stock issuance was not done in good faith.

3. Corporations— fiduciary relationship—majority shareholder to minority shareholder—recapitalization—good faith

The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim of breach of fiduciary duties owed by majority shareholders to minority shareholders on the issue of defendants' good faith in issuing the block of shares in August 1999, because there was sufficient evidence of circumstances and context that would allow the jury to find that: (1) the shares were issued at a price significantly below their true value, increasing the total number of shares required to comprise a $6,000,000 block of stock; (2) defendants ignored information that might have justified a higher valuation of the pertinent company; (3) defendants were aware that, since the parties' professional and personal relationships had soured, it was unlikely plaintiffs would choose to invest further in the company; and (4) defendants knew that, assuming plaintiffs did not exercise their preemptive rights, the issuance of $6,000,000 worth of stock at the depressed price per share would give them almost total ownership of the company.

Appeal by defendants from judgment entered 12 October 2004 by Judge Michael E. Beale in Iredell County Superior Court. Heard in the Court of Appeals 17 November 2005.

James, McElroy, & Diehl, P.A., by Preston O. Odom, III, Richard B. Fennell, and Gary S. Hemric, for plaintiffs-appellees.

Moore & Van Allen, PLLC, by Jeffrey J. Davis, Valecia M. McDowell and Amy K. Lamoureux, for defendants-appellants.

LEVINSON, Judge.

Defendants appeal from judgment entered against them for breach of their fiduciary duty to plaintiffs. We affirm.

The parties have a history of commercial and personal relationships for over fifty years, which is summarized as follows: Accuma, S.p.A. ("Accuma Italy") is an Italian corporation, founded in the early 1960's, that makes and sells battery parts. Accuma Italy's founders included defendant Folco Gibellini (Gibellini), who owns a controlling interest in the firm, and Sergio Pezzotti, who owns plaintiff VAL Participations (VAL). As Accuma Italy prospered, it expanded to Luxembourg, the United Kingdom, and then to the United States, where Accuma Italy founded defendant Accuma Corporation (Accuma) in Statesville, North Carolina.

Accuma is a closely held North Carolina corporation that also manufactures and sells battery parts. After its founding in the mid 1980's, plaintiffs VAL and Farndale Company, LLC ("Farndale") loaned the company more than 2.8 million dollars. Farndale is owned by Jim Brennan. In the late 1990's, relationships among the parties deteriorated, and in 1998 plaintiffs demanded repayment of their loans to Accuma. When the parties could not agree on the repayment, plaintiffs filed suit to collect the debt owed by Accuma. At this juncture, Accuma had issued 100,000 shares, and ownership of Accuma was divided as follows:

> Defendant Gibellini: 45%, or 45,000 shares. Defendant Accuma Italy: 10%, or 10,000 shares. Plaintiff VAL: 36%, or 36,000 shares. Plaintiff Farndale: 9%, or 9,000 shares.

After plaintiffs demanded repayment of their loans, Accuma investigated the possibility of issuing additional stock to raise money. To this end, Accuma obtained an outside appraisal of the company's financial status as of 31 December 1998. Based on this appraisal,

Accuma's board of directors in August 1999 proposed issuance of 4,451,035 shares at $1.348 per share, for a total recapitalization of six million dollars. When the shares were issued, all shareholders had an opportunity to purchase an amount of new stock proportional to their respective percent of ownership in Accuma. However, plaintiffs chose not to purchase any of the newly issued shares. Defendants bought all the shares issued in August 1999, after which defendants collectively owned more than ninety-nine (99) percent of Accuma's shares, while plaintiffs owned less than one (1) percent.

On 19 June 2002, plaintiffs filed suit against Gibellini, Accuma, Francesca Invernizzi, Paolo Invernizzi, and Accuma Italy. Plaintiffs sought damages for civil conspiracy, failure to comply with N.C. Gen. Stat. § 55-16-01 *et seq.*, and breach of fiduciary duty. Plaintiffs' complaint alleged that defendants were responsible for the August 1999 issuance of shares, and that the issuance was undertaken with the purpose of squeezing plaintiffs out of the company, and thus a violation of defendants' fiduciary duty to plaintiffs. The case was tried before an Iredell County jury during the 13 September 2004 term of court. Prior to trial, all claims against Paolo Invernizzi were dismissed.

The plaintiffs' trial evidence included, in pertinent part, the following: Jim Brennan testified that he had been Accuma's president from the company's founding in 1984 until he was fired in 1998. Brennan described the growing conflict and tension among the parties in the late 1990's. As owner of Farndale, Brennan had a 9% ownership interest in Accuma's stock before the August 1999 issuance of shares. In 1997, Brennan offered to buy Accuma for eight to ten million dollars. He testified that, in his opinion, the new stock was "remarkably undervalued". Brennan did not purchase any of the shares because he disagreed with the valuation, did not want to put more money into a company that he thought was mismanaged, and did not want to invest in Accuma as a minority shareholder.

Chuck Vance testified that he was a financial analyst who had been hired by Accuma to perform a financial valuation of the company. He was instructed by Accuma to determine the fair market value of the company as of 31 December 1998, in order to calculate the appropriate price per share and the number of shares that would constitute a $5,000,000 block of stock. He was later asked to recalculate the stock issuance based on a $5,500,000 or $6,000,000 block of shares. Ultimately, $6,000,000 worth of shares were issued. Vance submitted a report in 1999, indicating that Accuma was worth

$600,000. He was not asked to revise this valuation, even after Accuma experienced an upturn in profit for the first six months of 1999.

Vance also testified about certain notes he took during the valuation process, explaining that he was asked to calculate the dilutive effect on minority shareholder ownership under various scenarios. These included, *inter alia*: a notation that one might "pay too much for an ownership interest"; a notation referencing an "iterative process of trial and error to get point of ownership"; a notation that "the existing shareholders will maintain a minority interest in the company so you cannot get 100% unless they sell to you"; and the notations "want high 90%," "no more than $6,000,000," and "5.6 to 6.0 scenarios."

Michael Paschal, who was qualified as an expert in business valuation and capitalization, testified that he had been hired by plaintiffs to review Vance's valuation of Accuma. Paschal was critical of Vance's valuation report for several reasons, including: Vance's apparent reliance on mutually inconsistent valuation methods, one of which calculated the company's value at 5.6 million and the other at $600,000; the fact that Vance's projections and assumptions were neither supported nor explained in his report; and Vance's failure to consider offers to purchase Accuma. Paschal also testified that the reduction of plaintiffs' percentage ownership to less than one percent, upon defendants' purchase of 4,451,035 shares, was mathematically dependent on Vance's valuation of Accuma at $600,000 rather than $5,600,000. This testimony related to one of plaintiffs' central theories at trial, that defendants selected the number of undervalued shares the company would offer for the purpose of reducing plaintiffs' percentage ownership in the company, and a corresponding increase in defendants' ownership interest, in the event plaintiffs did not exercise their preemptive rights.

Sergio Pezzotti testified that he was born in Italy and was seventy-three years old. In 1952 he began working at the Gibellini plant in Milano, Italy. In the early 1960's, he was invited to join Gibellini and another man in founding Accuma Italy. Pezzotti testified to Accuma Italy's growth, success, and expansion to North Carolina, where it opened Accuma. In 1997, Accuma owed almost three million dollars to plaintiffs. Pezzotti testified further that the relationships among the parties deteriorated in the late 1990's, and described instances wherein Pezzotti believed defendants betrayed his trust or misman-

aged Accuma. Pezzotti did not buy any of the stock issued in 1999 because he no longer trusted the defendants. However, he believed that Accuma was worth at least five and a half million dollars in 1999, and offered to buy the company from defendants.

Plaintiffs also presented generally corroborative testimony from other witnesses. Ernie Riegel testified that his law firm represented Accuma during its recapitalization. Riegel confirmed that Accuma had issued $6,000,000 in shares after shareholder approval was obtained at a special meeting. Matthew Gillespie, Accuma's chief financial officer from January 1999 to April 2000, testified that the company improved its financial situation during the first six months of 1999. He also conceded that he had calculated the dilutive effect on minority shareholder ownership of various recapitalization alternatives. Robert Faulkner testified that he was employed in the field of business valuation. After reviewing Vance's valuation, Faulkner concluded that Vance valued Accuma too low, and used data that was outdated by the time he submitted his report.

At the close of plaintiffs' evidence, defendants moved for a directed verdict on all claims. The trial court dismissed all of the claims brought against Accuma and Francesca Invernizzi, and dismissed plaintiffs' claims of civil conspiracy and failure to comply with statutory requirements. The court denied defendants' motion for directed verdict on the claims against Gibellini and Accuma Italy for breach of fiduciary duty.

Defendants presented the testimony of J. Robert Philpott, an investment banker and expert in business valuation. Philpott's testimony tended to support Vance's conclusion that on 31 December 1998 Accuma was worth $600,000.

At the close of all the evidence, defendants renewed their directed verdict motion, which the trial court denied. Four questions were submitted to the jury, and answered as follows:

1. Did the defendants . . . take improper advantage of their power as controlling shareholders in Accuma corporation by causing the issuance of stock in Accuma Corporation in August 1999 at a price of six million dollars?

   Answer: Yes.

2. Did the defendants . . . act in good faith and with care and diligence in exercising their power as controlling shareholders of Accuma Corporation?

   Answer: No.

3. What amount is the plaintiff, Farndale Co., LLC, entitled to recover for damages from the defendants?

   Answer: $360,000.

4. What amount is the plaintiff, VAL Participations, S.A., entitled to recover for damages from the defendants?

   Answer: $1,440,000.

Upon this verdict, the trial court entered judgment in favor of plaintiffs, from which defendants appeal.

Standard of Review

Defendants appeal the denial of their motion for directed verdict on plaintiffs' claim of breach of fiduciary duties.

> "The purpose of a motion for directed verdict is 'to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for plaintiffs[.]' The evidence should be considered in the light most favorable to the nonmovant, and the nonmovant is to be given the benefit of all reasonable inferences from the evidence. 'If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied.' "

Whisnant v. Herrera, 166 N.C. App. 719, 722, 603 S.E.2d 847, 849-50 (2004) (quoting *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E.2d 193, 194 (1982), and *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991)). "In deciding whether to grant or deny a motion for directed verdict, 'the trial court must accept the non-movant's evidence as true and view all the evidence in the light most favorable to him.' " *Boggess v. Spencer*, 173 N.C. App. 614, 618, 620 S.E.2d 10, 13 (2005) (quoting *Williamson v. Liptzin*, 141 N.C. App. 1, 9-10, 539 S.E.2d 313, 318-19 (2000)), *disc. review denied*, 360 N.C. 288, —— S.E.2d —— (2005).

On appeal, "[t]he standard of review of directed verdict is whether the evidence, taken in the light most favorable to the nonmoving party, is sufficient as a matter of law to be submitted to the

jury." *Di Frega v. Pugliese*, 164 N.C. App. 499, 505, 596 S.E.2d 456, 461 (2004) (citing *Kelly v. Harvester Co.*, 278 N.C. 153, 158, 179 S.E.2d 396, 397 (1971)). Moreover, "in reviewing the trial court's decision to grant a directed verdict, this Court's scope of review is limited to those grounds asserted by the moving party at the trial level." *Freese v. Smith*, 110 N.C. App. 28, 34, 428 S.E.2d 841, 844-45 (1993) (citing *Southern Bell Tel. & Tel. Co. v. West*, 100 N.C. App. 668, 397 S.E.2d 765 (1990)).

In the instant case, the trial court denied a motion for directed verdict on claims of breach of the fiduciary duty owed by a majority shareholder to a minority shareholder.

> For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. Such a relationship has been broadly defined by this Court as one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . , [and] it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Dalton v. Camp, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (internal quotation marks omitted).

"In North Carolina, it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders." *Freese*, 110 N.C. App. at 37, 428 S.E.2d at 847 (citing *Gaines v. Manufacturing Co.*, 234 N.C. 340, 67 S.E.2d 350 (1951)). "A majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests." *United States v. Byrum*, 408 U.S. 125, 137, 33 L. Ed. 2d 238, 248 (1972). As to "good faith":

> Black's Law Dictionary defines 'good faith' as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." Whether a party has acted in good faith is a question of fact for the trier of fact, but the standard by which the party's conduct is to be measured is one of law. In making the determination as to whether a party's actions constitute a lack of

> good faith, the circumstances and context in which the party acted must be considered.

Bledsole v. Johnson, 357 N.C. 133, 138, 579 S.E.2d 379, 382 (2003) (quoting Black's Law Dictionary 701 (7th ed. 1999), and citing *Embree Construction Group v. Rafcor, Inc.*, 330 N.C. 487, 499, 411 S.E.2d 916, 925 (1992)). Review of a ruling on this issue may, of necessity, look beyond the facial legality of a defendant's actions: "Where fiduciary duties arising from management control are implicated, judicial scrutiny may extend to the purpose for which an otherwise lawful course was undertaken and the result achieved." *Farahpour v. DCX, Inc.*, 635 A.2d 894, 901 (Del. 1994).

I.

[1] Defendants argue first that the trial court erred by denying their motion for directed verdict, on the grounds that plaintiffs did not produce sufficient evidence that defendants were responsible for the August 1999 issuance of stock. We disagree.

"This Court has held that a '[b]reach of fiduciary duty is a species of negligence or professional malpractice.' " *Carlisle v. Keith*, 169 N.C. App. 674, 682, 614 S.E.2d 542, 548 (2005) (quoting *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 244, 388 S.E.2d 178, 183 (1990)). Consequently, "these claims require[] proof of an injury proximately caused by the breach of duty." *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 601, 534 S.E.2d 233, 237 (2000). Thus, in the factual context of this case, plaintiffs were required to produce evidence that (1) defendants owed them a fiduciary duty of care; (2) defendants' August 1999 issuance of stock was a violation of their fiduciary duty; and (3) this breach of duty was a proximate cause of injury to plaintiffs.

On appeal, defendants purport to challenge the element of proximate cause. However, defendants do not address the causal link between the August 1999 stock issuance and plaintiffs' injuries. Instead, they argue that plaintiffs failed to produce any evidence that defendants were responsible for, or "caused", the issuance of stock in August 1999. We disagree.

Defendants do not dispute that Accuma is a closely held corporation, that they are Accuma's majority shareholders, or that majority shareholders owe a fiduciary duty to minority shareholders. They also concede that the August 1999 issuance of stock required shareholder approval. Further, there was evidence at trial that would sup-

port findings that (1) a shareholder meeting was held in August 1999 for the purpose of voting to amend Accuma's Articles of Incorporation to allow the stock issuance, and (2) plaintiffs did not vote in favor of this amendment. We conclude that this constitutes more than a scintilla of evidence that the defendants, by voting to approve the amendment, were responsible for issuance of the shares. Accordingly, the trial court did not err by failing to grant directed verdict on this basis.

Defendants nevertheless argue that, inasmuch as Accuma's Board of Directors set the price per share and took the final vote to issue the block of stock, the Board is solely responsible for issuance of the stock. However:

> The holders of the majority of the stock of a corporation have the power, by the election of directors and by the vote of their stock, to do everything that the corporation can do. Their power to . . . direct the action of the corporation places them in its shoes and constitutes them the . . . trustees for the holders of the minority of the stock. They draw to themselves and use all the powers of the corporation[.]

Gaines, 234 N.C. at 344, 67 S.E.2d at 353 (internal quotation marks omitted). We conclude that there was sufficient evidence that defendants, as majority shareholders in a closely held corporation, voted to approve the amendment allowing issuance of the stock, and were generally responsible for Accuma's recapitalization. This assignment of error is overruled.

II.

[2] Defendants next argue that, even assuming defendants were responsible for the August 1999 issuance of stock, plaintiffs failed to produce any evidence that the recapitalization was a breach of their fiduciary duty to plaintiffs. We disagree.

Regarding the fiduciary duty owed by a majority shareholder as explained by our Supreme Court:

> " '[t]he devolution of unlimited power imposes on holders of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through them—the duty to exercise good faith, care, and diligence . . . [and] to protect the interests of the holders of the minority of the stock[.]' "

Loy v. Lorm Corp., 52 N.C. App. 428, 432, 278 S.E.2d 897, 901 (1981) (quoting *Gaines*, 234 N.C. at 344-45, 67 S.E.2d at 353).

Preliminarily, we observe that defendants' argument, that plaintiffs failed to prove that defendants did not act in good faith, mischaracterizes the burden of proof on this issue. It is "well established in North Carolina . . . that once a minority shareholder challenges the fairness of the actions taken by the majority, the burden shifts to the majority to establish that its actions were in all respects inherently fair to the minority and undertaken in good faith." *Loy*, 52 N.C. App. at 433, 278 S.E.2d at 901.

We also note that defendants argue several times that "the stock issuance was not objectionable *per se*." However, defendants' liability is not based on a finding that the stock issuance was a *per se* breach of fiduciary duty. Rather, their liability is based on the jury's finding that defendants improperly took advantage of their majority status, and that the stock issuance was not done in good faith.

[3] We next consider whether the trial court erred by failing to grant a directed verdict in favor of defendants on the issue of their good faith in issuing the block of shares in August 1999. Defendants note the presence of evidence that Accuma needed money in 1999; that defendants obtained an outside valuation upon which they were legally entitled to rely; and that they complied with relevant statutory requirements regarding preemptive rights. On this basis, defendants argue that "all of the evidence in the record establishes that the decision to issue the shares was a sound one made in good faith after the exercise of diligent examination." We disagree.

As discussed above, in determining if a majority shareholder's actions evince a lack of good faith, "the circumstances and context in which the party acted must be considered." *Bledsole*, 357 N.C. at 138, 579 S.E.2d at 382. In the instant case, the relevant circumstances include evidence that:

1. Accuma fired Brennan, Farndale's owner.

2. Pezzotti, VAL's owner, was upset by defendants' failure to repay his loan, the firing of Brennan, and other actions by defendants.

3. Plaintiffs filed a lawsuit against defendants to obtain repayment of their loan.

4. Brennan and Pezzotti each expressed willingness to purchase Accuma for over $5,000,000.

5. The 31 December 1998 valuation was not revised despite an upturn in Accuma's financial situation in 1999.

6. Before the stock issuance, plaintiffs wrote to defendants, expressing objections and asserting that the stock was undervalued.

7. Certain of Vance's notes indicated he was asked to calculate the dilutive effect of different recapitalization scenarios.

8. Gillespie acknowledged that he calculated the dilutive effect of the stock issuance, assuming plaintiffs would not exercise their preemptive rights.

We conclude that there was sufficient evidence of "circumstances and context" that would allow the jury to find that: (1) the shares were issued at a price significantly below their true value, increasing the total number of shares required to comprise a $6,000,000 block of stock; (2) defendants ignored information that might have justified a higher valuation of Accuma; (3) defendants were aware that, because the parties' professional and personal relationships had soured, it was unlikely plaintiffs would choose to invest further in Accuma; and (4) defendants knew that, assuming plaintiffs did not exercise their preemptive rights, the issuance of $6,000,000 worth of stock at the depressed price per share would give them almost total ownership of Accuma. These findings would, in turn, support the conclusion that defendants acted to further their own interests at the expense of the interests of the minority shareholders, and thus acted in violation of their duty of good faith towards plaintiffs and their corresponding fiduciary duties. Accordingly, the trial court did not err by denying defendants' motion for a directed verdict.

We have considered defendants' other arguments and conclude they are without merit. The judgment of the trial court is

Affirmed.

Judges HUDSON and TYSON concur.

STATE OF NORTH CAROLINA v. JAMES HARRELL BROWN, DEFENDANT

No. COA05-136

(Filed 21 February 2006)

1. Burglary and Unlawful Breaking or Entering— window opened by 13-year-old—authority to consent to entry

There was sufficient evidence to prove burglary or felonious breaking or entering where a 13-year-old allowed defendant (45 years old) into her parent's home for illicit sex while her parents were sleeping. There was sufficient evidence to allow a jury to find that defendant could not have reasonably believed that the child had authority to allow him entry for this purpose.

2. Burglary and Unlawful Breaking or Entering— constructive breaking—window opened by 13-year-old on defendant's instructions

A reasonable jury could find that defendant committed a constructive breaking where a 13-year-old girl followed defendant's instructions in opening her bedroom window so that he could enter her parents home at night for illicit sex with her. Defendant's behavior showed that he knew she lacked authority to consent to his entry.

3. Burglary and Unlawful Breaking or Entering— instruction—consent to enter by 13-year-old

The trial court's instruction as a whole was correct in a prosecution for statutory rape, burglary, and other offenses involving a 13-year-old girl opening her window for the 45-year-old defendant to enter her bedroom for illicit sex. The court focused the jury's attention on the reasonableness of defendant's belief that the child had authority to consent to his entry, and the burden of proof was emphasized elsewhere in the instructions.

4. Evidence— chain of custody—computers

There was no need for testimony setting forth a detailed chain of custody for defendant's computers, and the child pornography within, in a prosecution for statutory rape, burglary, and other offenses. Once the computers were admitted, any doubts were to be resolved by the jury. Defendant did not identify on appeal any reason to believe that the computers' contents may have been altered.

5. Evidence— child pornography—admission not prejudicial

There was no prejudice in a prosecution for statutory rape, burglary, and other offenses in the admission of sexual photographs of children from defendant's computers. Defendant twice confessed to engaging in sex with the child, his e-mail and appearance at her school left no doubt that he knew her age, he took great efforts to conceal himself from her parents, and he told the child that he could spend 20 years in jail if he was caught with her.

6. Sentencing— within presumptive range—no statutory right to appeal—no findings of mitigating factors

A defendant sentenced within the presumptive range has no statutory right to appeal the sentence and this defendant did not file a petition for certiorari. Moreover, the principle that the court must find mitigating factors if a preponderance of the evidence supports them applies only when the trial court imposes a sentence outside the presumptive range.

7. Judgments— clerical errors—dates of offenses

A judgment was remanded for correction of clerical errors involving the dates of offenses.

Appeal by defendant from judgments entered 2 September 2004 by Judge F. Donald Bridges in Burke County Superior Court. Heard in the Court of Appeals 18 October 2005.

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

Franklin E. Wells, Jr. for defendant-appellant.

GEER, Judge.

Defendant James Harrell Brown appeals from his conviction on three counts of statutory rape of a person 13, 14, or 15 years old, two counts of felonious breaking or entering, and one count each of first degree burglary, statutory sexual offense against a person 13, 14, or 15 years old, and indecent liberties with a child. Defendant argues primarily on appeal that there was insufficient evidence to convict him of burglary and breaking or entering because the child victim consented to his nighttime entries into her parents' house. Defendant also makes a related argument pertaining to the jury instructions. Because the State presented evidence that defendant could not have

reasonably believed that the child victim, a 13-year-old, had authority to consent to defendant's entry into her parents' home for the purpose of engaging in sexual intercourse with her and because the trial court properly instructed the jury on this issue, we find no error. Although we also hold that defendant's other contentions on appeal are without merit, we remand this case for the correction of certain clerical errors detailed below.

Facts

The State's evidence tended to show the following. In September 2003, defendant, age 45, began an Internet correspondence with the victim, D.N.K., age 13. D.N.K.'s online username, at the time, was "I'masexygirl." Defendant initiated the correspondence by sending D.N.K. a message saying: "A sexy girl can make men do unbelievable things." When defendant told D.N.K. that he was 45 years old, she informed him that he was too old to have a relationship with her, but that they could still be friends. Later, she told him that she was 13 years old.

The two continued to correspond over the Internet for about a month. During the course of their conversations, defendant asked D.N.K. if she was a virgin, and she replied that she was. Defendant told her that he wanted to have sex with her and that, because he was older and more experienced, he knew "how to be gentle and easy so that you can be fulfilled as a woman and not be hurt."

Defendant told D.N.K. that he wanted to see her, and encouraged her to sneak out of her parents' house to meet him. When D.N.K. refused to do so, the two made plans for defendant to come to D.N.K.'s house on Tuesday, 30 September 2003, between 10:00 and 11:00 p.m. D.N.K. gave defendant her home address and supplied him with a floor plan of her house. Defendant promised that he would bring some Cherry Coke mixed with alcohol to help D.N.K. "relax."

On the designated evening, defendant arrived at D.N.K.'s house wearing a camouflage shirt, pants, and hat, with a camouflage net over his face. As previously arranged, he signaled D.N.K. with a red penlight through the basement window of her house. When she saw the light, D.N.K. opened the basement door for defendant. After defendant entered the house, the two began hugging and kissing, and D.N.K. invited defendant to go up to her bedroom. Defendant instructed D.N.K. to go upstairs, close her bedroom door, turn her bedroom lights off, and open her window. After D.N.K. did so, defend-

ant climbed through the bedroom window, handed her two bottles of Cherry Coke mixed with alcohol, and hid in D.N.K.'s closet. Once D.N.K. was sure her parents had gone to bed, defendant got into D.N.K.'s bed with her, performed oral sex on her, and engaged in sexual intercourse. Defendant left the house around 4:30 a.m.

At approximately 11:00 p.m., on 2 October 2003, defendant again arrived at D.N.K.'s house, signaled her with the penlight, entered her bedroom by climbing through her window, gave her alcohol mixed with Coke, hid in her closet until her parents went to sleep, and then had intercourse with her and performed oral sex on her. He left before D.N.K. awoke in the morning.

On 8 October 2003, defendant went to a football game at D.N.K.'s middle school. He took her to a fast food restaurant and then dropped her off at the school. Later that night, at around 8:00 p.m., defendant went to D.N.K.'s home, signaled her with the penlight, and entered through her bedroom window. He and D.N.K. both hid in her bedroom closet, where they had intercourse and then fell asleep. While they were asleep in the closet, D.N.K.'s mother entered the bedroom. Although D.N.K. was still asleep, defendant awakened and quickly pulled his legs and feet into the closet, so that D.N.K.'s mother did not see him. Later, after D.N.K.'s parents had gone to sleep, defendant and D.N.K. had intercourse in her bed, and defendant left at about 4:30 a.m.

The next day, defendant e-mailed D.N.K. and told her that her mother had almost caught them. He said he wanted to end the relationship, explaining that he was too old for her, that "he could spend 20 years in prison for statutory rape if he got caught," and that "we cannot be sneaking around the next four years till you are of age." The same day, D.N.K.'s parents learned about D.N.K.'s relationship with defendant and called the police. In two separate statements to the police, defendant admitted that he had entered D.N.K.'s house three times while her parents were at home and that he had had sexual intercourse with her.

Following a jury trial, defendant was convicted, with respect to the events of 30 September 2003, of first degree burglary, indecent liberties with a child, statutory sexual offense against a person 13, 14, or 15 years old, and statutory rape of a person 13, 14, or 15 years old. As for the events of 2 and 8 October 2003, he was convicted of two counts of felonious breaking or entering and two counts of statutory rape of a person 13, 14, or 15 years old.

The trial court sentenced defendant to a total of four consecutive sentences of 240 to 297 months, based on his convictions for burglary, rape, and sexual offense. He also received a suspended sentence of 16 to 20 months for his indecent liberties conviction and suspended sentences of 6 to 8 months for each of his breaking or entering convictions.

I

Defendant argues on appeal that the trial court erred in denying his motions to dismiss for insufficiency of the evidence as to the burglary and felonious breaking or entering charges. In ruling on a defendant's motion to dismiss, the trial court must determine whether the State has presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). When considering the issue of substantial evidence in assessing a motion to dismiss, the trial court must view all of the evidence presented "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

"The elements of burglary in the first degree are the breaking and entering, in the nighttime, into a dwelling house or a room used as a sleeping apartment, which is actually occupied at the time of the offense, with the intent to commit a felony therein." *State v. Simpson*, 303 N.C. 439, 449, 279 S.E.2d 542, 548 (1981); *see also* N.C. Gen. Stat. § 14-51 (2005) (defining first degree burglary). The essential elements of felonious breaking or entering are "(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992); *see also* N.C. Gen. Stat. § 14-54(a) (2005) (defining felonious breaking or entering). Although the offense of burglary includes both a breaking element and an entering element, *Simpson*, 303 N.C. at 449, 279 S.E.2d at 548, the offense of felonious breaking or entering requires that the State only prove that *either* breaking or entering took place. *State v. Myrick*, 306 N.C. 110, 114, 291 S.E.2d 577, 579 (1982).

[1] Defendant first argues that the State presented insufficient evidence to prove either burglary or felonious breaking or entering, since D.N.K., a resident of the house, consented to his entry. Defendant is correct that "[a] person entering a residence with the good faith belief that he has the consent of the owner or occupant or his authorized agent is not chargeable with the offense of breaking and entering." *State v. Tolley*, 30 N.C. App. 213, 215, 226 S.E.2d 672, 674, *disc. review denied*, 291 N.C. 178, 229 S.E.2d 691 (1976); *see also State v. Friddle*, 223 N.C. 258, 260, 25 S.E.2d 751, 752 (1943) ("[T]he fact that the breaking and entry was against the will of the owner [does not] create guilt as a matter of law. The intent with which the act was committed is material.").

Our courts have, however, recognized that a child who has a room in his or her parents' house does not have unlimited authority to allow entry to visitors. *State v. Upchurch*, 332 N.C. 439, 458, 421 S.E.2d 577, 588 (1992). Courts considering consent to entry given by a son or daughter have focused on the purpose of the entry and whether the child had authority to consent to entry for that purpose. *See*, *e.g.*, *id.* ("[I]t cannot be said that either [the son] or defendant had any good-faith, reasonable belief that [the son] had authority to give defendant permission to enter his parents' home in the middle of the night when [the son] was not there [for the purpose of murdering the parents]. . . . Any authority [the son] may have had was exceeded and any implied consent was invalid from its inception."); *Tolley*, 30 N.C. App. at 215, 226 S.E.2d at 674 ("Defendant could not have reasonably believed that [the son] had authority to permit defendant to enter his parents' residence for the purpose of stealing valuables which belonged to his parents . . . ."); *see also State v. Thompson*, 59 N.C. App. 425, 426-27, 297 S.E.2d 177, 179 (1982) (daughter not authorized to enter her own parents' home for the purpose of larceny), *appeal dismissed and disc. review denied*, 307 N.C. 582, 299 S.E.2d 650 (1983).

Here, the State presented sufficient evidence to allow a jury to find that defendant could not have reasonably believed that D.N.K. had authority to allow him entry to further his purpose of committing statutory rape. Defendant's covert actions such as arriving late at night, wearing camouflage, signaling D.N.K. with a red penlight, taking precautions about turning off lights, and hiding in D.N.K.'s closet all suggest that he did not believe D.N.K. had full authority to allow him into her parents' house. Defendant's arguments based on D.N.K.'s consent to his entry thus do not support the granting of his motion to dismiss.

[2] Defendant argues, in the alternative, that he did not "break" into D.N.K.'s parents' house on 30 September 2003 because he entered through the open basement door and then re-entered through D.N.K.'s open bedroom window. Therefore, he contends, the trial court should have dismissed the first degree burglary charge, since burglary requires both breaking and entering.

Our Supreme Court has held:

> A constructive breaking in the law of burglary occurs, quite simply, "[w]hen an opening is made not by the defendant but by . . . some other person and, under the circumstances, the law regards the defendant as the author thereof. . . ." 3 C. Torcia ed. Wharton's Criminal Law § 330 at 200 (14th ed. 1980). . . . It is enough if that person is acting at the direction, express or implied, of defendant, or is acting in concert with defendant, or both.

State v. Smith, 311 N.C. 145, 149-50, 316 S.E.2d 75, 78 (1984). There is a constructive breaking, for example, " '[w]hen entrance is obtained by procuring the servants or some inmate to remove the fastening.' " *Id.* at 148, 316 S.E.2d at 77 (quoting *State v. Henry*, 31 N.C. (9 Ired.) 463, 467 (1849)).

In the present case, we hold that a reasonable jury could find that defendant committed a constructive breaking. D.N.K., a minor "inmate" of the house, opened the basement door to defendant as they had pre-arranged, and then, following his instructions, opened her bedroom window for him. Defendant committed a constructive breaking since the window and door were only ajar because defendant induced D.N.K. to open them, and, as we have discussed, defendant's behavior showed that he knew D.N.K. lacked authority to consent to defendant's entry. Since the State presented substantial evidence of a constructive breaking, the trial court properly denied defendant's motion to dismiss the burglary charge.

II

[3] Defendant next argues that the court improperly instructed the jury regarding consent as it relates to burglary and breaking or entering. During deliberations, the jury submitted a question asking the court to "[d]efine ownership and tenant" as those terms relate to consent. The following colloquy then occurred:

> THE COURT: . . . It sounds to me as if the question you're asking is whether or not an occupant of the dwelling would be an owner or tenant for purposes of these instructions.

THE FOREPERSON: Yes, sir.

THE COURT: That is, a person having authority to consent to the entry by another person. And in that regard, I instruct you that occupants in the dwelling do not always have authority to consent to entry by others. Although certainly any occupant of the dwelling may under certain circumstances have consent—or have authority to consent to the entry of the dwelling by others.

Although one may consent to entry by another into an occupied dwelling, that consent is not a valid consent unless there was authority to grant that consent. It is no defense to a burglary charge if a defendant is given consent to enter by one not having authority to do so.

Now, in determining whether or not this defendant had consent of an owner or tenant to enter into the home of [D.N.K.'s father], if you find that he did enter into the home, it would be up to you, as jurors, to determine, based on all of the circumstances as they existed at the time, whether or not that person had authority to grant that consent.

For example, you should consider the time of entry, the purpose of the entry, and the reasonableness of the belief, if any, of the defendant that any person consenting to his entry had authority to grant that consent.

(Emphasis added.) Defendant argues that the trial judge's answer to the question focused on whether the person allowing entry actually had authority to consent, without properly taking into account the importance of defendant's perception of whether that person had such authority.

Our standard of review in cases involving jury instructions is as follows:

> This Court reviews [a trial court's] instructions [to the jury] contextually and in [their] entirety. 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 . . . . 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.

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (internal quotation marks omitted).

Here, the last sentence of the court's answer to the jury's question focuses the jury's attention on the defendant's reasonable belief as to D.N.K.'s authority to consent to his entry. Since jury instructions must be considered as a whole and not in isolated fragments, *State v. Anderson*, 350 N.C. 152, 179, 513 S.E.2d 296, 312, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326, 120 S. Ct. 417 (1999), we can find no error in the judge's response to the jury's question. *See also State v. Humphrey*, 13 N.C. App. 138, 142, 184 S.E.2d 902, 904 (1971) (jury charge "must be considered as a whole, . . . with the presumption that the jury did not overlook any portion of it and if, when so construed, it presents the law fairly and correctly, there is no ground for reversal").

Defendant also contends that the court's answer did not contain any reference to the State's burden of proving beyond a reasonable doubt that defendant could not have believed D.N.K. had authority to consent to his entry into her home. As the Court emphasized the State's burden of proof elsewhere in the jury instructions, the failure to re-emphasize that burden here was not error. *See State v. Morgan*, 359 N.C. 131, 163-64, 604 S.E.2d 886, 906 (2004) (holding that a challenged jury instruction did not impermissibly shift the burden of proof when the trial court elsewhere instructed the jury that the State must prove its case beyond a reasonable doubt), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 79, 126 S. Ct. 47 (2005).

III

[4] Upon defendant's arrest, the State seized his computers and then introduced into evidence child pornography gathered from the hard drives, as well as extensive e-mail correspondence between defendant and D.N.K. Defendant argues that the admission of these exhibits was improper because the State did not properly establish a chain of custody for the computers and their contents between the time the computers were seized from defendant's possession and the time of trial.

With respect to physical objects such as defendant's computers, the object offered into evidence "must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change." *State v. Campbell*, 311 N.C. 386,

388, 317 S.E.2d 391, 392 (1984). Nevertheless, "[a] detailed chain of custody need be established only when [1] the evidence offered is not readily identifiable or is susceptible to alteration and [2] there is reason to believe that it may have been altered." *Id.* at 389, 317 S.E.2d at 392. "[A]ny weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." *Id.*

Here, defendant argues that the computers' contents were "susceptible to alteration" because multiple police officers had access to the computers while they were being seized and, afterwards, the hardware was not stored in a secure location while defendant's case was pending. Defendant has not, however, identified on appeal any "reason to believe that [the computers' contents] may have been altered." *Id.* Therefore, testimony setting forth a detailed chain of custody was not necessary in order for the trial court to properly admit the computers. Once the computers and their contents were admitted, any remaining doubts surrounding their chain of custody were to be resolved by the jury.

IV

[5] Defendant also objects separately under N.C.R. Evid. 402, 403, and 404(b) to the trial court's admission of photographs removed from his computer, showing children engaged in sexual acts or posed in sexual positions. We need not reach the merits of these issues because, even if we assume that the trial court erred in admitting the photographs, defendant has failed to demonstrate prejudice warranting a new trial.

In order to be entitled to a new trial, defendant must show that there is a reasonable possibility that, had the evidence not been admitted, a different result would have been reached at his trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2005) (defining prejudicial error and placing the burden on defendant to make a showing of such error). Here, defendant twice confessed to the police that he had engaged in sexual intercourse with D.N.K. on three occasions in her parents' house. Moreover, the e-mail correspondence and defendant's appearance at D.N.K.'s middle school leave little doubt that defendant knew D.N.K.'s age. Finally, he made great efforts to conceal himself from D.N.K.'s parents and told D.N.K. that if he was caught with her, he could spend 20 years in jail. We can perceive no possibility that the jury would have acquitted defendant absent the admission of the photographs.

V

[6] Defendant's final argument pertains to the trial court's failure to find any mitigating factors during defendant's sentencing hearing. Defendant was sentenced in the presumptive range and, therefore, has no statutory right to appeal his sentence. *See* N.C. Gen. Stat. § 15A-1444(a1) (2005); *see also State v. Brown*, 146 N.C. App. 590, 593-94, 553 S.E.2d 428, 430 (2001), *appeal dismissed and disc. review denied*, 356 N.C. 306, 570 S.E.2d 734 (2002). Since defendant has not filed a petition for writ of certiorari seeking review of this issue, we do not consider it.

We note, however, that although the trial court must consider evidence of mitigating factors, it is within the court's discretion whether to depart from the presumptive range. *See* N.C. Gen. Stat. § 15A-1340.16(a) (2005). *See also Brown*, 146 N.C. App. at 594, 553 S.E.2d at 431 (finding no error when court imposed presumptive range sentence despite defendant's undisputed evidence in mitigation); *State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) (same). *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) does not alter that analysis. *See id.* at 439, 615 S.E.2d at 266 ("Those portions of N.C.G.S. § 15A-1340.16 which govern a sentencing judge's finding of mitigating factors . . . are not implicated by *Blakely [v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004)] and remain unaffected by our decision in this case."). Defendant cites the case of *State v. Walker*, 167 N.C. App. 110, 605 S.E.2d 647 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 642, 614 S.E.2d 921 (2005) for the proposition that the trial court must find mitigating factors if a preponderance of the evidence supports them. This principle applies, however, only when the trial court imposes a sentence outside the presumptive range. *State v. Knott*, 164 N.C. App. 212, 217, 595 S.E.2d 172, 176 (2004).

[7] We conclude our consideration of defendant's case by noting a series of clerical errors in the trial court's judgments imposing sentence. The jury verdicts indicate that defendant was convicted of indecent liberties, statutory rape, burglary, and sexual offense for the events of 30 September 2003. The judgments, however, list the offense date for these crimes as 2 October 2003. With respect to 2 October 2003, the jury convicted defendant of felonious breaking or entering and statutory rape, but the relevant judgments list the offense date for those crimes as 30 September 2003. The verdicts and judgments are correctly matched for the events of 8 October 2003. Because of the discrepancy between the verdicts and the judgments,

we remand this case to the Burke County Superior Court for the correction of this apparent clerical error.

No prejudicial error; remanded with instructions.

Judges WYNN and McGEE concur.

BUILDERS MUTUAL INSURANCE COMPANY, Plaintiff v. NORTH MAIN CONSTRUCTION, LTD, GAJENDRA SIROHI, and wife, POONAM SIROHI, Defendants

No. COA04-1717

(Filed 21 February 2006)

Insurance— commercial liability policy—automobile exclusion—applicability to negligent hiring, supervision and retention claims

The automobile exclusion in a commercial general liability insurance policy issued to a construction company for bodily injury or property damage "arising out of" the ownership, maintenance, use or entrustment of any automobile applied to exclude coverage for defendants' claims for negligent hiring, supervision and retention of an employee of the insured who drove a company automobile while intoxicated, crossed the median, and struck the vehicle in which defendants were riding because: (1) in determining whether an automobile exception applies, the appellate court looks to the actual causes of a given injury and considers whether a cause separate from the use of a vehicle resulted in those particular injuries; and (2) defendants' actual injuries did not result from a cause separate from the employee's use of the automobile.

Judge Wynn dissenting.

Appeal by plaintiff from order entered 19 October 2004 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 20 September 2005.

Pinto, Coates, Kyre & Brown, P.L.L.C., by Richard L. Pinto and John I. Malone, Jr., for plaintiff-appellant.

Pulley, Watson, King & Lischer, P.A., by Guy W. Crabtree, Esq., for defendants-appellees Gajendra Sirohi and Poonam Sirohi.

CALABRIA, Judge.

Builders Mutual Insurance Company ("plaintiff") appeals from the trial court's order granting partial summary judgment in favor of Gajendra and Poonam Sirohi ("Sirohi defendants"). We reverse and remand to the trial court for entry of summary judgment in favor of plaintiff.

Plaintiff is the insurance provider for North Main Construction, Ltd. ("North Main"), under two policies, a Commercial Auto Liability Policy and a Commercial Insurance Policy. The only policy at issue in this case is the Commercial Insurance Policy. Plaintiff sought a declaratory judgment in the Wake County Superior Court that it had no duty to defend or indemnify North Main and Ronald F. Exware, Jr. ("Exware") under the Commercial Insurance Policy.

The underlying facts in the case *sub judice*, as alleged in plaintiff's complaint for declaratory relief, are as follows:

> 9. The specific allegations against the defendants North Main and Exware assert that (a) Exware received a citation for DWI and careless and reckless driving at the time that he became involved in and caused the accident with Poonam Sirohi, (b) Exware's seven year driving record included several citations and driving convictions, including three speeding charges and a charge of transporting an open container after consuming, under [N.C. Gen. Stat. § 20-138.7], and (c) North Main allowed Exware to drive the company van despite Exware's poor driving record.
>
> 10. . . . [T]he plaintiffs specifically allege that North Main was negligent in that (a) North Main knew that its employee, Ronald F. Exware, Jr., was operating one of their vehicles after having received a citation on July 17, 2001 for driving on the wrong side of the road, (b) North Main knew or should have known that Exware's driving record was extremely poor, to the extent that his operation of a motor vehicle would likely cause great risk and danger to others such as the Plaintiff, (c) although North Main knew or should have known that Exware had a bad driving record, North Main provided a company van to Exware, (d) by ignoring Exware's bad driving record and in providing Exware a company vehicle despite his bad driving record, North Main failed to exercise due care for its employees['] safety and for the safety of others traveling upon the public highway such as the plaintiff Poonam Sirohi, (e) failed to enforce a proper policy gov-

erning the safe use of its company vehicles, and failed to exercise due care to ensure its employees were safe drivers and failed to exercise due care for the safety of others traveling upon the public highway, and (f) negligently entrusted a vehicle to Exware.

11. The specific factual allegations in the amended complaint assert (a) employees such as crew chiefs, foremen and officers of North Main, who supervised crews were required to come into the North Main office headquarters from time to time to deliver time sheets and pick up pay checks for their crews, and for other reasons, (b) often while in North Main company headquarters, the crew chiefs, foremen, supervisors and officers of North Main would consume beer and smoke marijuana together and with each other, (c) the senior officers of North Main were aware of the alcohol and marijuana consumption that took place on the company premises both during and after normal working hours, and did nothing to prevent or stop this behavior even though it was known that these individuals would return to work and possibly operate company machinery or equipment, or would leave operating company vehicles, and (d) the conduct of the officers of North Main in condoning the above described conduct, created an atmosphere of tolerance and acceptance of alcohol and drug use among the employees while working or operating company vehicles, machinery or equipment, and which conduct in turn was likely to lead to incidents causing death or injury to others.

12. Based on these additional factual allegations, the amended complaint includes additional allegations of negligence on the part of North Main in that North Main was negligent in that it (a) failed to properly hire, supervise, and retain its employees, (b) participated and condoned conduct by its employees that was likely to lead to death or injury to others, and (c) created and fostered an atmosphere among its employees and officers that the consumption of alcohol and drugs and the use of the company vehicles and equipment was permissible.

The Sirohi defendants further alleged that both Exware's negligence and North Main's negligence resulted in their injuries when Exware drove while intoxicated, crossed the median on Interstate 40, and struck the Sirohi defendants with North Main's automobile.

The trial court heard plaintiff's declaratory judgment action on 11 August 2004. Plaintiff made a motion for judgment on the pleadings, which was converted to a motion for summary judgment, and the

Sirohi defendants also made a motion for summary judgment. On 19 October 2004, after reviewing the insurance policy at issue, Judge Manning granted plaintiff's motion as to all claims for negligent entrustment and negligent driving; however, he granted the Sirohi defendants' motion as to negligent hiring, negligent supervision, and negligent retention. Plaintiff appeals.

The question presented for our review is whether the trial court properly declared, as a matter of law, that

> plaintiff's commercial general liability policy[,] . . . issued to North Main Construction Company, does provide coverage for the claims asserted by the [Sirohi defendants] against the plaintiff's insured, North Main Construction, in the underlying action . . . and plaintiff's motion for summary judgment as to all claims for negligent hiring, supervision, and/or retention is DENIED, and [the Sirohi defendants'] motion for summary judgment as to all claims . . . for negligent hiring, supervision, and/or retention is ALLOWED.

In accordance with the North Carolina Rules of Civil Procedure, summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). In deciding the motion, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Cater v. Barker*, 172 N.C. App. 441, 444, 617 S.E.2d 113, 116 (2005) (citations and internal quotations omitted). "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Id.* (citations omitted).

A trial court's ruling on a motion for summary judgment is reviewed *de novo* by this Court. *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191 (1986). On appeal, we review materials presented to the trial court and determine whether there is a genuine issue as to any material fact and if any party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980). Plaintiff admits a duty to defend North Main against "any 'suit' seeking damages for 'bodily injury' or 'property damage' to which [the insurance policy at issue] . . . appl[ies]." Because "an insurer's duty to defend the insured is broader than its duty to provide liability coverage," *Wilkins v. American Motorists*

Insurance Co., 97 N.C. App. 266, 269, 388 S.E.2d 191, 193 (1990) (citations omitted), we need not consider whether the Sirohi defendants will ultimately prevail in the underlying action. *Id.* This Court has held,

> [t]he duty to defend is determined by the facts as alleged in the pleadings of the lawsuit against the insured; if the pleadings allege any facts which disclose a possibility that the insured's potential liability is covered under the policy, then the insurer has a duty to defend. If, however, the facts alleged in the pleadings are not even arguably covered by the policy, then no duty to defend exists. Any doubt as to coverage must be resolved in favor of the insured.

Id. (citations omitted).

It is uncontested in this case that there are no material issues of fact. We, therefore, limit our analysis to whether the trial court properly determined that the Sirohi defendants were entitled to judgment as a matter of law.

The Commercial Insurance Policy *excluded* from coverage the following:

> g. Aircraft, Auto or Watercraft
>
> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

We initially address whether, under precedent regarding the "arising out of" language in similar insurance policy exclusions, the trial court properly granted summary judgment for the defendants on the negligent hiring, supervision, and retention claims. In reviewing the insurance policy at issue, we are mindful of the rule of construction that "provisions of insurance policies . . . which extend coverage must be construed liberally so as to provide coverage whenever possible by reasonable construction." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986).

In *State Capital*, our Supreme Court considered whether exclusionary language similar to the language at issue in this case would apply under a homeowner's insurance policy to prevent coverage when a rifle accidentally discharged in a car while the insured was

handling it, causing injury to the passenger. In that case our Supreme Court held, "when strictly construed[,] the standard of causation applicable to the ambiguous 'arising out of' language in a homeowner['s] policy exclusion is one of proximate cause." *State Capital*, 318 N.C. at 547, 350 S.E.2d at 74. The Court further held that the exclusionary language "should be interpreted as excluding accidents for which the sole proximate cause involves the use of an automobile. If there is any non-automobile proximate cause, then the automobile use exclusion does not apply." *Id.* Because the Court found that negligent mishandling of the rifle was a non-automobile proximate cause of the injury, the automobile use exception did not apply. *Id.*

In *Wilkins*, this Court distinguished our Supreme Court's holding in *State Capital*. Plaintiff argued that the trial court erred in entering summary judgment for the defendant when "the policy does not clearly exclude coverage for liability based upon failure to warn and negligent instruction." *Wilkins*, 97 N.C. App. at 269, 388 S.E.2d at 193. The underlying facts in that case dealt with an airplane crash, and at issue was an airplane exception similar to the automobile exception at issue in the case at hand. This Court held, "the exclusionary language requires only that the *injuries* arise out of the ownership, maintenance, or use of an aircraft." *Wilkins*, 97 N.C. App. at 270, 388 S.E.2d at 194. Based upon this standard, we held, "The injuries giving rise to plaintiff's potential liability in this case arose from the use of an aircraft and, therefore, coverage is clearly excluded under the terms of the policy." *Wilkins*, 97 N.C. App. at 272, 388 S.E.2d at 195.

In *Nationwide Mut. Ins. Co. v. Davis*, 118 N.C. App. 494, 455 S.E.2d 892 (1995), a woman and her granddaughter were riding in a van. After they reached their destination, the woman safely exited the van, but when the granddaughter exited, she was struck by a vehicle. This Court held,

> the "use" of the van was not the *sole proximate cause* of the accident; a concurrent cause was [the woman's] negligent supervision of [the granddaughter] when [the granddaughter] exited the van to enter the Superette. Therefore, under *State Capital*, because there was a "non-automobile proximate cause" of the accident, the automobile exclusion does not apply to bar coverage under the homeowner's policy.

Id., 118 N.C. App. at 501, 455 S.E.2d at 896.

In *Nationwide Mut. Ins. Co. v. Integon Indem. Corp.*, 123 N.C. App. 536, 473 S.E.2d 23 (1996), this Court considered whether an

automobile exception in a homeowner's policy applied when a man improperly attached a metal livestock trailer to his vehicle, and the trailer came loose, careened across the highway, and resulted in the death of another driver. This Court distinguished *Integon* from *Davis* as follows:

> Coverage existed in *Davis* because the negligent supervision of the child was an act of negligence separate from the use of the vehicle. In this case, however, the defendant Estate's damages are alleged to have resulted solely from Timothy Ward's "use" of the truck in towing the trailer, and not any independent "non-automotive" cause. His alleged negligence in attaching, securing and towing the trailer could not have caused damages that were independent of the "use" of the truck itself.

The instant case is similar to *Integon*. Here, the *injuries* resulted from Exware's use of North Main's automobile, not from a separate cause. Although the Sirohi defendants allege negligent hiring, supervision, and retention of Exware, these causes are intertwined with Exware's use of North Main's automobile, and the Sirohi defendants' particular *injuries* could not have occurred in the absence of the use of the automobile. *See Wilkins*, *supra* (standing for the proposition that allegations of failing to properly instruct a pilot did not prevent an airplane exclusion from applying when the *injuries* suffered were due to an airplane crash).

In determining whether an automobile exception applies, this Court looks to the actual causes of a given injury and considers whether a cause separate from the use of a vehicle resulted in those particular injuries. Thus, although the dissent hypothesizes that "[d]ue to North Main's negligent hiring, supervision, and/or retention an injury could have occurred, for example, through Exware's use of construction equipment," we need not consider such hypothetical injuries when the facts show that the actual injuries did not result from a cause separate from the use of the automobile.

Accordingly, we hold that the trial court erred in granting summary judgment in favor of the Sirohi defendants, and we remand this matter to the trial court for entry of summary judgment in favor of plaintiff.

Having so held, we need not address plaintiff's other assignment of error.

Reversed and remanded.

Judge LEVINSON concurs.

Judge WYNN dissents with separate opinion.

WYNN, Judge, dissenting.

"[T]he sources of liability which are excluded from homeowners policy coverage must be the *sole cause* of the injury in order to exclude coverage under the policy." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 546, 350 S.E.2d 66, 73 (1986) (emphasis added). The majority opinion does not dispute that the plain language of the policy did not exclude from coverage the negligent hiring, supervision, and/or retention claims of the Sirohi defendants against Exware and North Main. Since the negligent hiring, supervision, and/or retention is a non-excluded cause, the trial court did not err in granting summary judgment in favor of Defendants. Accordingly, I respectfully dissent.

It is well settled that in North Carolina insurance policies are construed strictly against insurance companies and in favor of the insured. *Maddox v. Colonial Life & Accident Ins. Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981). Provisions which exclude liability of insurance companies are not favored. Therefore all ambiguous provisions are strictly construed against the insurer and in favor of the insured. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 355, 172 S.E.2d 518, 522-23 (1970).

The exclusion provision at issue in the general liability policy states:

2. Exclusions

This insurance does not apply to:

***

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

Our Supreme Court has previously established the following principle with respect to determining the coverage of homeowners or general "all risks" policies: "[T]he sources of liability which are excluded from homeowners policy coverage must be the *sole cause* of the injury in order to exclude coverage under the policy." *State Capital Ins. Co.*, 318 N.C. at 546, 350 S.E.2d at 73 (emphasis added); *see also Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 150, 195 S.E.2d 545, 549 (1973) ("As a general rule, coverage will extend when damage results from more than one cause even though one of the causes is specifically excluded." (citations omitted)).

In *State Capital*, the owner of a pickup truck and a companion went on a hunting trip. 318 N.C. at 536, 350 S.E.2d at 67. The owner stored a rifle behind the seat of his truck because the truck's gun rack was full. *Id.* The owner saw a deer and reached for the rifle from outside the truck. *Id.*, 350 S.E.2d at 67-68. The rifle discharged, injuring the owner's companion as he was exiting the truck. *Id.*, 350 S.E.2d at 68. The Supreme Court held that "the exclusionary language in the State Capital homeowners policy should be interpreted as excluding accidents for which the sole proximate cause involves the use of an automobile. If there is any non-automobile proximate cause, then the automobile use exclusion does not apply." *Id.* at 547, 350 S.E.2d at 74. The Supreme Court found that the "negligent mishandling of the rifle was a proximate cause of [the companion's] injury[,]" and therefore the automobile use exclusion would not apply. *Id.*

In *Nationwide Mut. Ins. Co. v. Davis*, 118 N.C. App. 494, 501, 455 S.E.2d 892, 896 (1995), this Court found *State Capital* to be controlling. In *Davis*, the insured and her granddaughter were riding in the insured's van. *Id.* at 495, 455 S.E.2d at 893. After they reached their destination, the granddaughter got out of the van, walked around the van, and was struck by another car. *Id.* at 496, 455 S.E.2d at 893. For the purposes of the insured's automobile insurance policy, this Court held that the van was "in use" at the time of the accident. *Id.* at 498, 455 S.E.2d at 895. However, following *State Capital*, for purposes of the insured's homeowners policy which had an automobile use exclusion, this Court held that "the 'use' of the van was not the *sole proximate cause* of the accident; a concurrent cause was Ms. Davis' negligent supervision of [her granddaughter.]" *Id.* at 501, 455 S.E.2d at 895.

Like in *State Capital* and *Davis*, here, the claims of negligent hiring, supervision, and/or retention are non-automobile proximate

causes. *State Capital*, 318 N.C. at 546, 350 S.E.2d at 73. Therefore, since Exware's use of the automobile is not the *sole proximate cause* of the Sirohi's injuries, the claim is not excluded from coverage by the automobile exclusion.

The majority relies on this Court's opinion in *Wilkins v. Am. Motorists Ins. Co.*, 97 N.C. App. 266, 388 S.E.2d 191 (1990), which is distinguishable from the instant case. In *Wilkins*, an airplane, owned by the plaintiff, crashed killing two people and injuring a third. *Id.* at 268, 388 S.E.2d at 192. The plaintiff was sued by the survivors alleging, *inter alia*, that he negligently failed to warn passengers that he damaged the airplane and negligently failed to properly instruct the pilot. *Id.* The plaintiff's homeowners policy had an exclusion provision that did not provide coverage for injuries "arising out of the ownership, maintenance, use, loading or unloading of: (1) an aircraft[.]" *Id.*, 388 S.E.2d at 193. This Court held that the claims were excluded from policy coverage because the alleged failure to warn of the damage to the airplane and negligent instruction to the pilot, "are causes which involve the use of the aircraft and . . . they could cause no injury that was not directly connected to the use of the aircraft." *Id.* at 271-72, 388 S.E.2d at 194-95.

In this case, the claims of negligent hiring, supervision, and/or retention do not involve the use of the automobile and could cause an injury that is not directly connected to the use of the automobile. *See id.* Due to North Main's negligent hiring, supervision, and/or retention an injury could have occurred, for example, through Exware's use of construction equipment. Therefore, *Wilkins* is distinguishable from the instant case.

Accordingly, since the negligent hiring, supervision, and/or retention is a non-automobile proximate cause, the trial court did not err in granting summary judgment in favor of Defendants.

CONTURA R. FONTENOT, EMPLOYEE, PLAINTIFF v. AMMONS SPRINGMOOR ASSOCIATES, EMPLOYER, RELIANCE INSURANCE COMPANY, C/O N.C. INSURANCE GUARANTY ASSOCIATION, CARRIER, DEFENDANTS

No. COA05-396

(Filed 21 February 2006)

1. Workers' Compensation— additional medical expenses— unauthorized medical treatment—notice—reasonable time

The Industrial Commission did not err in a workers' compensation case by ordering defendants to pay plaintiff employee's additional medical expenses for alleged unauthorized medical treatment, because: (1) plaintiff's Form 33 contains a specific allusion to N.C.G.S. § 97-25 which authorizes the Commission to approve an employee's request for medical treatment of her own choosing; (2) based on the facts in this case, the Commission was permitted to find that plaintiff sought its approval for additional medical treatment within a reasonable amount of time after seeking such treatment; (3) the Form 18 at issue constituted a written request for additional medical treatment within two years after the last payment of medical compensation since it specifically referenced a change in plaintiff's medical condition inasmuch as it stated that there was an aggravation of and/or change of condition from accepted injury and set forth a new diagnosis, and it also contained boilerplate language giving notice to the employer in order that the medical services prescribed by the Workers' Compensation Act could be obtained; and (4) the record indicated that defendants were aware that plaintiff was seeking additional medical compensation because the Form 61 which defendants filed in response to plaintiff's Form 18 specifically indicated that further treatment would be denied.

2. Workers' Compensation— disc herniation—causation— accident at work—medical expert

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee's disc herniation was causally related to her 29 March 1999 accident at work, because: (1) if the link between an employee's condition and an accident at work involves a complex medical question, as in the instant case, a finding of causation must be premised upon the testimony of a medical expert; and (2) four doctors provided competent medical evidence that tended to link plaintiff's herniated disc to her 29 March 1999 accident at work.

3. Workers' Compensation— potential future disability— diminished earning capacity

The Industrial Commission erred in a workers' compensation case by awarding compensation for potential future disability, and this portion of the Commission's award is vacated and remanded for entry of a corrected order, because: (1) disability refers to diminished earning capacity, and at the time of the hearing before the Commission, plaintiff was working with a new employer and was earning significantly higher wages than she had earned while working for defendant employer; and (2) no evidence was presented to show that plaintiff would be under a disability in the future, and the Commission made no findings concerning any such future disability.

4. Workers' Compensation— failure to incorporate statute of limitations into award

Standing alone, the failure of the Industrial Commission in a workers' compensation case to state that its award is subject to the statute of limitations under N.C.G.S. § 97-25.1 does not warrant remanding the case to the Commission. However, given that the case is already being remanded for a different issue, the Court of Appeals also remands this case to the Commission to incorporate the statutory limitations into its award.

Appeal by defendants from an opinion and award filed 18 November 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2005.

Law Offices of George W. Lennon, by George W. Lennon, for plaintiff appellee.

Young Moore and Henderson P.A., by Joe E. Austin, Jr., and Jennifer T. Gottsegen, for defendant appellants.

McCULLOUGH, Judge.

Defendant Ammons Springmoor Associates, Incorporated, and its workers' compensation carrier (hereinafter referred to collectively as "defendants") appeal from an opinion and award of the North Carolina Industrial Commission granting medical and disability compensation to claimant Contura R. Fontenot. We affirm in part, vacate in part, and remand.

Facts

On 29 March 1999, claimant Contura R. Fontenot ("Fontenot") was working as a Certified Nursing Assistant for defendant Ammons Springmoor Associates ("Springmoor") when she suffered a back injury while lifting a patient. Ammons and its workers' compensation carrier admitted that Fontenot was entitled to compensation and medical benefits for her back injury, and Fontenot was referred to Tremont Medical Center for treatment. Tremont referred Fontenot to an orthopaedic surgeon, Dr. Daniel J. Albright. Without performing an MRI, Dr. Albright diagnosed Fontenot with a pulled muscle, indicated that she would become better with time, and in April or May of 1999, advised her that she could return to work without any restrictions. When she attempted to resume her employment at Springmoor, Fontenot continued to experience pain.

Thereafter, Fontenot began experiencing pain and numbness in her right hip and right leg, and her pain increased with time. According to Fontenot, she had not experienced an accident, injury, or other traumatic incident in the time period after her 29 March 1999 compensable injury but before the onset of the problems with her right hip and leg.

In November 2000, plaintiff sought treatment at an emergency room for right leg pain and numbness. After an examination at the emergency room, Fontenot was referred to her family doctor, Dr. Balwinder Sidhu. Dr. Sidhu prescribed conservative treatment, and when this course of action was unsuccessful, Dr. Sidhu ordered an MRI and referred Fontenot to a neurosurgeon, Dr. Samuel St. Clair.

After reviewing the MRI, Dr. St. Clair diagnosed Fontenot with a large L5-S1 disc herniation. In an 8 January 2001 appointment with Fontenot, Dr. St. Clair recommended surgery to address the herniation. Fontenot then sought a second opinion from an orthopaedic surgeon, Dr. T. Craig Derian, who concurred with Dr. St. Clair's recommendation.

On 23 January 2001, Fontenot filed a Form 18 "Notice of Accident to Employer and Claim of Employee." This filing contained the following statement: "The nature and extent of injury is HNP L5-S1, full extent unknown—aggravation of and/or change of condition from accepted injury." Defendants responded on 21 September 2001 by filing a Form 61 which provided the following reasons for denying Fontenot's claim: "[F]urther treatment will be denied [because]

employee was released to return to work full duties April/May 1999. Employee sought unauthorized care and ma[de] no mention of 1999 injury by accident over a year and half later. Employee appears to have had a subsequent injury[.]" On 15 March 2002, Fontenot filed a Form 33 requesting that her claim for additional compensation and medical benefits be heard. Defendants then filed a Form 33R stating that the parties were unable to agree on Fontenot's claim for benefits because her herniated disc was not caused by her 29 March 1999 injury at work and because Fontenot "did not consult her authorized treating physician with regard to her new complaints and did not seek approval for her unauthorized care within a reasonable time."

At a hearing before the Industrial Commission, Fontenot presented evidence that her herniated disc was causally related to her admittedly compensable 29 March 1999 accident at work. Specifically, Dr. Albright testified as follows:

> [PLAINTIFF'S COUNSEL]: So, in your opinion, more likely than not, was the injury in March of 1999 the cause of the subsequent disc herniation that was found on [the MRI] by Dr. St. Clair?
>
> [Objection by Defense Counsel]
>
> [DR. ALBRIGHT]: Yes . . . .

Dr. St. Clair testified that the 29 March 1999 compensable injury "could have" caused the herniated disc which he found on the MRI taken of Fontenot's back. Dr. Derian testified as follows:

> I believe to a reasonable degree of medical certainty that, more likely than not, that the patient's symptoms resulting from the on-the-job injury in March of 1999 resulted in the structural findings identified on [the MRI] scan in the year 2000, including disc herniation, disc degeneration at L5-S1 with significant nerve-root compression, particularly on the right.

Defendants contended that Fontenot's herniated disc was unrelated to the 29 March 1999 accident at work. In addition, defendants took the position that Fontenot had not taken the necessary steps to receive authorization from her employer, or the approval of the Industrial Commission, for the medical treatment related to her herniated disc (hereinafter referred to as Fontenot's "additional medical treatment").

The Industrial Commission (hereinafter "the Commission") made the following procedural findings:

> 25. By filing a Form 33, [Fontenot] sought approval for medical treatment with Dr. Sidhu, Dr. St. Clair, and Dr. Derian within a reasonable time after [seeking] . . . treatment [with these providers].
>
> 26. By filing a Form 18 on January 23, 2003 stating a claim for "HNP L5-S1, full extent unknown—aggravation of and/or change of condition from accepted injury," [Fontenot] filed a written request for additional medical treatment within two years after the last payment of medical compensation.

With respect to the substance of Fontenot's claim, the Commission made the following conclusions of law:

> 1. The greater weight of the evidence establishes a causal relationship between [Fontenot's] injury by accident on March 29, 1999 and the herniated disc in her low[er] back. [Fontenot] suffered a compensable injury by accident.
>
> 2. [Fontenot] is entitled to payment of medical expenses incurred or to be incurred as a result of the compensable injury as may reasonably be required to effect a cure, provide relief, or lessen the period of disability, including the recommended back surgery and all evaluations and treatment provided by Dr. Sidhu, Dr. St. Clair, and Dr. Derian.
>
> 3. [Fontenot] is entitled to compensation for future temporary total disability, permanent partial disability, and/or temporary partial disability, should such disability arise as a result of the March 29, 1999 compensable injury by accident or as a result of the treatment therefor.

(Citations omitted.) The Commission entered an award consistent with its findings and conclusions.

Defendants now appeal.

Discussion

I.

[1] The first issue on appeal is whether the Commission erred by ordering defendants to pay Fontenot's additional medical expenses. Defendants contend that the Commission's ruling in this regard is premised upon erroneous determinations that (A) Fontenot sought approval for the medical treatment for her herniated disc within a reasonable amount of time after seeking such treatment pursuant to

section 97-25 of the General Statutes, and (B) Fontenot filed with the Commission a timely application for medical compensation related to her herniated disc pursuant to section 97-25.1 of the General Statutes.

A. Defendants' Arguments Concerning Section 97-25

Pursuant to section 97-25 of the General Statutes, "[m]edical compensation shall be provided by the employer." N.C. Gen. Stat. § 97-25 (2005). As a general rule, an employer that has accepted an employee's injury as compensable has the right to choose the treating medical providers and to direct the medical treatment of the employee. *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 173, 573 S.E.2d 703, 707 (2002), *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003). However, "[t]he Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions . . . ." N.C. Gen. Stat. § 97-25. To effectively request a change of treatment, an injured employee must "obtain 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, *pl.'s pet. for disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990), *and pl.'s pet. for cert. denied*, 328 N.C. 330, 400 S.E.2d 448, *aff'd per curiam with respect to def.'s appeal*, 328 N.C. 327, 401 S.E.2d 366 (1991).

In the instant case, Fontenot first sought treatment from a medical provider of her own choosing in November of 2000, and she submitted a Form 33 requesting that her claim for additional medical benefits be heard on 15 March 2002. Defendants contend that the Commission was compelled to find that (1) the filing of a Form 33 did not constitute a request for approval of unauthorized medical treatment, and (2) even if a Form 33 was sufficient to request such approval, Fontenot's Form 33 was not filed within a reasonable time after procuring alternative treatment.

1.

Defendants' argument concerning the propriety of using a Form 33 to request additional medical treatment is premised upon this Court's decision in *Whitfield Laboratory Corp. of Am.*, 158 N.C. App. 341, 581 S.E.2d 778 (2003). In *Whitfield*, we held that the record did not indicate whether the claimant had sought approval for certain

treatment with his chosen physician, and we remanded the case for findings as to whether plaintiff actually requested such approval. *Id.* at 357, 581 S.E.2d at 788-89. Defendants have produced a copy of the record in the *Whitfield* case, and they note that the only references to medical treatment issues contained in that record are a Form 33 which requests payment of "medical expenses/treatment" and the parties' pretrial agreement in which the claimant asserted an issue as to whether the employer should be required to pay for medical treatment. Defendants posit that *Whitfield* stands for the proposition that a Form 33 can never be used by a claimant to request approval for a change in medical providers.

We are not inclined to read *Whitfield* as broadly as defendants. Rather, we conclude that this Court more narrowly held that Whitfield's Form 33 did not include a request for approval of alternative medical treatment. Significantly, the Form 33 at issue in the instant case differs significantly from the Form 33 filed in the *Whitfield* case. In particular, Fontenot's Form 33 contains a specific allusion to section 97-25 of the General Statutes, which authorizes the Commission to approve an employee's request for medical treatment of her own choosing. This reference provided a basis for the Commission's determination that Fontenot sought approval for her additional medical treatment. As this determination is supported by the record, it must be affirmed. *See Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997) (noting that the standard of review for an opinion and award of the Commission is "(1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law[.]"); *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002) ("The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding.").

2.

With respect to the Commission's finding that Fontenot's request for approval was filed within a reasonable amount of time, we note that what is reasonable is a question of fact to be determined in the light of the circumstances of each case. *Cf. O'Brien v. Plumides*, 79 N.C. App. 159, 162, 339 S.E.2d 54, 55 (1986) (noting that the reasonable value of an attorney's services must be decided based upon the circumstances of a particular case); *Hardee's Food Systems, Inc. v. Hicks*, 5 N.C. App. 595, 599, 169 S.E.2d 70, 73 (1969) (discussing a rea-

sonable amount of time under a contract and reiterating the proposition that "if different inferences may be drawn, . . . such that a definite legal rule cannot be applied . . . , then the matter should be submitted to the [trier of fact]") (citation omitted).

In this case, Fontenot visited an emergency room and saw three physicians of her choosing between November of 2000 and February of 2001. On 23 January 2001, Fontenot filed a request to have defendants pay the costs of this treatment.[1] Had this request been granted, there would have been no need for intervention by the Commission. However, defendants formally refused Fontenot's request for authorization in writing on 21 September 2001. Only five months later, in March of 2002, Fontenot sought to have the Commission approve the course of treatment which defendants had declined to authorize. We conclude that, on these facts, the Commission was permitted to find that Fontenot sought its approval for her additional medical treatment within a reasonable amount of time after seeking such treatment. As this determination is supported by the record, it must be affirmed. *Ante*, slip op. at 8.

B. Defendants' Arguments Concerning section 97-25.1

Under section 97-25.1 of the North Carolina General Statutes, an injured employee's right to medical compensation expires two years after an employer's last payment of such compensation unless, prior to the running of this two-year period, "the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission."[2] N.C. Gen. Stat. § 97-25.1 (2005). Pursuant to the Commission's promulgated rules governing workers' compensation cases, an "application" for the additional medical benefits available under section 97-25.1 of the General Statutes may me made "on a Form 18M or by written request to the . . . Commission." Workers' Compensation Rules of the North Carolina Industrial Commission, Rule 408(2) (2006).

The present case has been complicated by the remiss failure of Fontenot's attorney to file the appropriate form with the Commission. On 23 January 2001, within the two-year period after defendants' last

1. Our discussion of the sufficiency of Fontenot's 23 January 2001 filing is included in section I(B) of this opinion.

2. An employee may also receive additional medical compensation if the Commission makes an *ex mero motu* award of additional medical compensation within the two-year limitation period. N.C. Gen. Stat. § 97-25.1. The Commission did not make a timely *ex mero motu* award of additional medical compensation in this case.

payment of medical compensation, Fontenot's attorney filed a Form 18,[3] rather than a Form 18M. Accordingly, Fontenot was only entitled to additional medical compensation if the Form 18 which was filed on her behalf constituted a written request for such compensation. Defendants take the position that the Form 18 filed on 23 January 2001 failed to make any request for medical treatment such that the Commission was compelled to determine that it was not a written request for additional medical compensation. We disagree.

The Form 18 at issue specifically referenced a change in Fontenot's medical condition inasmuch as it stated that there was an "aggravation of and/or change of condition from accepted injury[,]" and it set forth a new diagnosis: "HNP L5-S1, full extent unknown." Fontenot's Form 18 also contained the following boilerplate language: "This notice is being sent to you [the employer] . . . in order that the medical services prescribed by [the Workers' Compensation Act] may be obtained[.]" Moreover, the record indicates that defendants were aware that Fontenot was seeking additional medical compensation: the Form 61 which defendants filed in response to Fontenot's Form 18 specifically indicated that "further treatment will be denied [because Fontenot] was released to return to work full duties April/May 1999." These facts permitted a finding by the Commission that Fontenot's Form 18 constituted a written request for additional medical treatment within two years after the last payment of medical compensation.[4] As the Commission's determination is grounded in the record, it must be affirmed. *Ante*, slip op. at 8.

II.

[2] The next issue for our consideration is whether the Commission erred by concluding that Fontenot's disc herniation was causally related to her 29 March 1999 accident at work. Defendants contend that this conclusion is not supported by competent evidence in the record. We disagree.

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3. A Form 18 is the document by which an injured employee provides the requisite notice to her employer that she is seeking benefits for a work-related injury. Workers' Compensation Rules of the North Carolina Industrial Commission, Rule 103(1) (2006).

4. This holding should not be construed to establish that the filing of a Form 18 will always constitute a written request for additional medical treatment. Rather, our holding is limited to a determination that in this case the Commission did not err by determining that the Form 18 at issue constituted a written request for additional medical treatment.

The Commission's causation determination must be affirmed if it is supported by **any** competent evidence in the record. *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). If the link between an employee's condition and an accident at work involves a complex medical question, as in the instant case, a finding of causation must be premised upon the testimony of a medical expert. *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Medical certainty from the expert is not required, but if an expert's opinion as to causation is based on speculation, his opinion is not competent evidence which supports a finding that an accident at work caused the employee's injury. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003); *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000). Even if an expert is unable to state with certainty that there is a nexus between an event and an injury, his testimony relating the two is at least some evidence of causation if there is additional evidence which establishes that the expert's testimony is more than conjecture. *See Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 154, 619 S.E.2d 888, 893-94 (2005); *Adams v. Metals USA*, 168 N.C. App. 469, 482, 608 S.E.2d 357, 365, *aff'd per curiam*, 360 N.C. 54, —— S.E.2d —— (2005).

In this case, Drs. Albright, Sidhu, St. Clair, and Derian provided competent medical evidence which tended to link Fontenot's herniated disc to her 29 March 1999 accident at work. Accordingly, the Commission's finding that the two were causally related is supported by competent evidence in the record and must be affirmed.

III.

[3] Defendants have also raised an issue as to whether the Commission erred by awarding compensation for potential future disability. The Commission concluded that Fontenot "is entitled to compensation for future . . . disability, should such disability arise as a result of the March 29, 1999 compensable injury by accident or as a result of the treatment therefor[]" and entered a corresponding award of compensation for potential future disability.

Under the North Carolina Workers' Compensation Act, a disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2005). Thus, the term "disability" refers to diminished earning capacity. *See id.* The

Commission's conclusion concerning disability must be affirmed if it is consistent with applicable law and is based upon findings of fact which are, in turn, based upon competent evidence in the record. *See Creel*, 126 N.C. App. at 552, 486 S.E.2d at 480.

In the instant case, it is undisputed that, at the time of the hearing before the Commission, Fontenot was working with a new employer and was earning significantly higher wages than she had earned while working for Springmoor. No evidence was presented to show that Fontenot would be under a disability in the future, and the Commission made no findings concerning any such future disability. Accordingly, the Commission's conclusion that she was entitled to potential future disability compensation is not supported by findings of fact or competent evidence in the record. The offending conclusion and the corresponding portion of the Commission's award are vacated, and this matter is remanded to the Commission for entry of a corrected order.

IV.

[4] The final issue presented by defendants is whether the Commission erred by failing to provide that its award of medical compensation was subject to the two-year statute of limitations contained in section 97-25.1 of the General Statutes. Though an award of medical compensation is subject to the statute of limitations prescribed in section 97-25.1, whether or not the Commission so specifies, we acknowledge that it is the better practice for the Commission to incorporate language to this effect in an opinion and award. *See Effingham v. Kroger Co.*, 149 N.C. App. 105, 119, 561 S.E.2d 287, 297 (2002). Standing alone, the failure of the Commission to state that its award is subject to the statute of limitations does not warrant remanding the case to the Commission; however, given that the case is being remanded pursuant to section III of this opinion, we also remand to the Commission to incorporate the statutory limitations into its award.

Affirmed in part, vacated in part, and remanded.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA v. LAURA ANN FULLER

No. COA05-289

(Filed 21 February 2006)

1. Evidence— denial of motion to prevent expert witness from testifying—probable blood alcohol content prior to breathalyzer

The trial court did not abuse its discretion in a driving while impaired case by denying defendant's motion to prevent the State from calling its expert witness to testify regarding defendant's probable blood alcohol content at times prior to a breathalyzer test, because: (1) defendant was on notice that such evidence might be offered as extrapolation evidence has been accepted in this state since 1985; and (2) in light of defendant's clear understanding of the importance of this evidence to the State's case against her and its longstanding acceptance in the courts of this state, it cannot be concluded that the trial court's decision to deny defendant's motion was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

2. Motor Vehicles— driving while impaired—motion for mistrial—mentioning Alco-Sensor test

The trial court did not abuse its discretion in a driving while impaired case by denying defendant's motion for a mistrial after an officer referred to an Alco-Sensor test during his testimony, because: (1) the officer did not testify regarding the results of the Alco-Sensor test, but only that one was administered; (2) the results of an alcohol screening test may be used by an officer to determine if there are reasonable grounds to believe that a driver has committed an implied consent offense under N.C.G.S. § 20-16.2; and (3) immediately after the officer's testimony regarding his reliance on the Alco-Sensor results, the trial court instructed the jury to dismiss that statement from their minds and not consider it in deliberations, and all jurors raised their hands at the trial court's request to indicate that they could follow the trial court's instruction.

3. Evidence— expert opinion—blood alcohol concentration at relevant time

The trial court did not err in a driving while impaired case by allowing over defendant's objection the State's expert to offer his

opinion as to defendant's blood alcohol concentration at the time she was first contacted by the officers, because: (1) for purposes of N.C.G.S. § 20-4.01(33a), the term relevant time after the driving refers to any time after the driving in which the driver still has in his body alcohol consumed before or during the driving; and (2) there was no evidence that defendant consumed any alcoholic beverages between the time of the accident and the arrival of the officers, and consequently, the officers' arrival time meets the statutory definition of a relevant time after the driving.

4. Evidence— publication of expert calculation document— relevant time

The trial court did not err in a driving while impaired case by allowing the State to publish its expert's calculation document to the jury regarding defendant's blood alcohol concentration at the time she was first contacted by the officers, over defendant's objection, based on the same reasoning the Court of Appeals has already used in this case regarding the definition of relevant time.

5. Motor Vehicles— driving while impaired—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired at the close of all evidence, because the opinion of the State's expert that defendant's blood alcohol concentration at the time the officers first made contact with her was .08 is, alone, sufficient to withstand dismissal.

Judge TYSON concurring in the result.

Appeal by defendant from judgment entered 8 December 2004 by Judge Robert H. Hobgood in Alamance County Superior Court. Heard in the Court of Appeals 2 November 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Isaac T. Avery, III, for the State.

James M. Bell, for defendant-appellant.

JACKSON, Judge.

Defendant, Laura Ann Fuller, appeals from a verdict and judgment entered 8 December 2004 in Alamance Superior Court finding

her guilty of Driving While Impaired ("DWI") and sentencing her to sixty days confinement, which was suspended for twenty months subject to supervised probation.

At trial the State's evidence tended to show that on 27 March 2004 at 7:51 p.m., Corporal Duane Flood ("Corporal Flood") and Officer Jennifer Brown ("Officer Brown"), both of the Graham Police Department, responded to a reported hit and run vehicle accident. When the officers arrived at the scene they observed defendant and another woman sitting in a vehicle on the shoulder of the road. Defendant was seated behind the wheel of the vehicle. Officer Brown approached defendant and immediately detected a moderate to strong odor of alcohol and that her speech was slurred. When Officer Brown asked defendant to step out of the vehicle, defendant seemed unsteady on her feet and immediately leaned against the vehicle. Corporal Flood also detected a strong odor of alcohol on defendant's breath after she exited the vehicle. Corporal Flood observed that defendant's eyes were red, bloodshot, and glassy and her speech was slurred.

Defendant claimed that another vehicle, which she could not describe, had crossed the center line and sideswiped her vehicle as she attempted to turn from a side road. Neither officer observed any physical evidence to support defendant's claim that her vehicle had been sideswiped by another vehicle. There was no paint transfer on defendant's vehicle nor any vehicle debris in the roadway where the collision purportedly occurred to indicate she had collided with another vehicle. The only evidence of a collision was the damage to defendant's vehicle.

Corporal Flood asked defendant to perform field sobriety tests, but she refused due to a knee injury which she believed would affect her ability to perform the tests. Defendant stated to Corporal Flood that she had been drinking beer prior to the accident. Corporal Flood testified that based upon his observations of defendant, the fact that she was involved in an accident, her statement that she had been drinking beer prior to the accident, and a field Alco-Sensor reading, he arrested defendant for DWI. Defendant objected to Corporal Flood's reference to the Alco-Sensor test as inadmissible. The trial court sustained the objection and instructed the jury to disregard the statement. The trial court then asked the jurors if they could disregard the statement in their deliberation and all of the jurors indicated that they could. Defendant moved for a mistrial. The motion was denied.

Corporal Flood and Officer Brown transported defendant to the Alamance County Jail where Corporal Flood, who held a permit to administer blood alcohol breath tests on the Intoxilyzer 5000, administered an Intoxilyzer test to defendant with her consent. The Intoxilyzer test was administered at 8:58 p.m. and showed a blood alcohol concentration of 0.07—one hour and seven minutes after the officers' arrival at the accident scene. After being read her Miranda Rights and taking the breath test, defendant told the officers, in response to their questions, that she had begun drinking about 2:30-3:00 p.m. and had consumed about one and a half beers. Defendant further stated that she had stopped drinking about three to four hours before being questioned. Defendant also denied being under the influence of any intoxicants other than the beer she had consumed.

Defendant pled guilty to DWI in Alamance County District Court and was sentenced on that charge. Defendant then appealed the judgment to the Alamance County Superior Court. On the morning of defendant's trial in superior court, the State served notice on defendant that it would be calling an expert witness to testify regarding defendant's probable blood alcohol content at times prior to the breath test. Defendant made a motion to prevent the State from calling the expert, which was denied. The expert testified at trial that defendant's blood alcohol concentration at the time the officers first came into contact with her was likely 0.08.

Defendant was convicted of DWI and sentenced to sixty days confinement, which was suspended for twenty months subject to supervised probation. Defendant filed timely notice of appeal.

On appeal, defendant assigns as error: (1) the trial court's denial of her motion to prevent the State from calling its expert witness; (2) the trial court's denial of her motion for a mistrial following Corporal Flood's testimony regarding an Alco-Sensor test; (3) the trial court's allowing the State's expert to testify regarding his opinion of defendant's probable blood alcohol concentration at a particular point in time, over defendant's objection; (4) the trial court's allowing a redacted alcohol concentration calculation to be published to the jury; and (5) the trial court's denial of her motion to dismiss at the close of the evidence.

[1] Defendant first argues that the trial court erred in denying her motion to prevent the State from presenting its expert witness as she was not notified of the State's intention to call the expert in sufficient time to allow her to procure a rebuttal witness. Defendant concedes

that there are no statutory discovery requirements under the circumstances of this case as defendant had pled guilty to the offense in district court and appealed to superior court. Article 48 of the North Carolina General Statutes, Discovery in the Superior Court, applies only to cases within the Superior Court's original jurisdiction. N.C. Gen. Stat. § 15A-901 (2003).

Defendant contends, however, that the trial court abused its discretion in denying her motion as doing so was fundamentally unfair and highly prejudicial to her. Defendant asserts that, with her blood alcohol reading of .07 at 8:58 p.m. and little other evidence of intoxication, the expert testimony regarding her probable higher blood alcohol content at the time the officers first encountered her was essential for the State to prove her guilt. Defendant cites no persuasive authority in support of her argument.

The State contends that all legal requirements were followed and that the trial court did not abuse its discretion in denying defendant's motion. The State also points out that defendant was on notice that such evidence might be offered as extrapolation evidence has been accepted in this State since 1985. *State v. Davis*, 142 N.C. App. 81, 90, 542 S.E.2d 236, 241, *disc. review denied*, 353 N.C. 386, 547 S.E.2d 818 (2001).

An abuse of discretion occurs "where the 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 light of defendant's clear understanding of the importance of this evidence to the State's case against her and its longstanding acceptance in the courts of this state, we cannot conclude that the trial court's decision to deny defendant's motion was "manifestly unsupported by reason . . . or so arbitrary that it could not have been the result of a reasoned decision." Accordingly, this assignment of error is overruled.

[2] Defendant next argues that the trial court erred by denying her motion for mistrial after Corporal Flood referred to an Alco-Sensor test during his testimony.

> The decision to grant a motion for a mistrial is within the discretion of the trial court. *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995), *cert. denied*, 517 U.S. 1110, 116 S.Ct. 1332, 134 L. Ed. 2d 482 (1996). A mistrial should be declared only if there are serious improprieties making it impossible to reach a

fair, impartial verdict. *Id.* at 383, 462 S.E.2d at 35-36. "Jurors are presumed to follow a trial court's instructions." *Id.* at 384, 462 S.E.2d at 36.

State v. Prevatte, 356 N.C. 178, 253-54, 570 S.E.2d 440, 482 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003).

During cross-examination, defendant's attorney questioned Corporal Flood regarding what he relied upon to determine that defendant was appreciably impaired prior to arresting her. Corporal Flood replied that he had relied upon "[a] strong odor of alcohol . . . red glassy eyes, her speech, and then also with the backings of an Alco-Sensor test that was performed."

North Carolina General Statutes, section 20-16.3(d) (2003) controls the use of alcohol screening results as evidence. Section 20-16.3(d) provides, in relevant part, "[e]xcept as provided in this subsection, the *results* of an alcohol screening test may not be admitted in evidence in any court or administrative proceeding." (emphasis added). In the case *sub judice*, Corporal Flood did not testify regarding the results of the Alco-Sensor test, only that one was administered. The results of an alcohol screening test may be used by an officer to determine if there are reasonable grounds to believe that a "driver has committed an implied-consent offense under G.S. 16.2." N.C. Gen. Stat. § 20-16.3; *Moore v. Hodges*, 116 N.C. App. 727, 730, 449 S.E.2d 218, 220 (1994). Accordingly, Corporal Flood's testimony that he relied on the alcohol screening in making the determination that he had reasonable grounds to arrest defendant for DWI was properly admissible. Additionally, immediately after Corporal Flood's testimony regarding his reliance on the Alco-Sensor results the trial court instructed the jury to dismiss that statement from their minds and not consider it in deliberations. The trial court then asked the jurors to each raise their hand if they could follow the trial court's instruction. All jurors raised their hand in response. Accordingly, this assignment of error is overruled.

[3] Defendant next argues that the trial court erred in allowing, over her objection, the State's expert to offer his opinion as to defendant's blood alcohol concentration at the time she was first contacted by the officers. Defendant contends that the point in time selected by the expert was arbitrary and did not constitute a "relevant time after driving."

North Carolina General Statutes, section 20-138.1(a)(2) (2003) provides that "[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 . . . [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." Defendant apparently contends that the only "relevant times" that may be used in extrapolating a defendant's blood alcohol content are the time of an accident or the time a defendant is stopped by the police because those are times immediately after the suspect had been operating the vehicle. For purposes of Chapter 20, Motor Vehicles, of the North Carolina General Statutes, the term "relevant time after the driving" refers to "[a]ny time after the driving in which the driver still has in his body alcohol consumed before or during the driving." N.C. Gen. Stat. § 20-4.01(33a) (2003). This definition does not limit the meaning of "relevant time" to points immediately following the driving, but specifies "*any time* after the driving." *See State v. Rose*, 312 N.C. 441, 445, 323 S.E.2d 339, 341 (1984).

Defendant does not dispute the accuracy of the calculations, the validity of the methodology, nor the expert's qualifications, on appeal. Defendant takes exception only to the point in time utilized. There is absolutely no evidence that defendant consumed any alcoholic beverages between the time of the accident and the arrival of the officers and, consequently, the officers' arrival time meets the statutory definition of a "relevant time after the driving." Accordingly, this assignment of error is overruled.

[4] Defendant next assigns error to the publishing of the State's expert's calculation document to the jury over defendant's objection. In support of this contention, defendant reasserts the same arguments presented in the preceding assignment of error. For the reasons stated *supra*, this assignment of error is also overruled.

[5] Defendant's final assignment of error is that the trial court erred in denying her motion to dismiss for insufficient evidence at the close of all evidence. The standard of review on a motion to dismiss for insufficient evidence is whether the State has offered substantial evidence of each required element of the offense charged. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620 (2002). Substantial evidence is relevant evidence which would be sufficient to convince a rational juror to accept a particular conclusion. *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000). The evidence must be viewed in the light most favorable to the State and the State must be given the ben-

efit of every reasonable inference which may be drawn from the evidence when deciding a motion to dismiss for insufficient evidence. *State v. Martinez*, 149 N.C. App. 553, 561, 561 S.E.2d 528, 533 (2002).

The elements of the offense of impaired driving are either that the defendant has "ingested a sufficient quantity of an impairing substance to cause his faculties to be appreciably impaired," *State v. Phillips*, 127 N.C. App. 391, 393, 489 S.E.2d 890, 891 (1997), or that the defendant consumed sufficient alcohol that she has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. N.C. Gen. Stat. § 138.1(a)(2). The opinion of the State's expert that defendant's blood alcohol concentration at the time the officers first made contact with her was .08 is, alone, sufficient to withstand dismissal for insufficient evidence on appeal. Defendant argues that the State's evidence was insufficient without the expert's opinion. As we already have held that the expert's opinion was properly allowed, this argument must fail. This assignment of error is overruled.

No error.

Judge TYSON concurs in results only in separate opinion.

Judge SMITH concurs.

TYSON, Judge concurring in the result.

The majority's opinion holds no error occurred in defendant's conviction of driving while impaired ("DWI"). I concur in the result to sustain defendant's conviction. I disagree with the majority's conclusion that the trial court did not err when it allowed State's witness Paul Glover ("Glover") to testify that defendant's blood alcohol level was 0.08 at the time of the accident using an average retrograde extrapolation rate. Glover was never able to identify when Plaintiff drove her vehicle, and he admitted that the time of driving is a critical issue.

I. Expert Testimony

Defendant argues "at best, the admission of Mr. Glover's testimony was highly misleading, prejudicial and confusing." I agree.

> The trial court admitted, over defendant's specific objection, Glover's testimony that . . . defendant had a 0.08 at the time of the accident. Glover relied on average extrapolation rate, pure

hearsay, instead of defendant's actual elimination rate to reach his conclusions. Glover failed to establish any connection or common attributes to correlate the average extrapolation rate to defendant's actual rate to establish relevancy.

State v. Taylor, 165 N.C. App. 750, 759, 600 S.E.2d 483, 490 (2004) (Tyson J. concurring) (internal quotations omitted). In the absence of any testimony that correlated the alcohol elimination rate to defendant's specific characteristics, this testimony is irrelevant and prejudicial. However, defendant failed to object to either the jury instructions or the verdict sheet and failed to preserve this issue for our review.

The judge instructed the jury as follows:

If you find from the evidence beyond a reasonable doubt that on or about March 27, 2004, the defendant drove a vehicle on a highway or street in this state, and that when she did so, she was under the influence of an impairing substance, or had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of .08 or more, it would be your duty to return a verdict of guilt. If do you not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

. . . .

Now, in the absence of the 12 trial jurors, any objection, corrections, or additions to the charge?

[Defendant's attorney]: To the charge, Your Honor?

COURT: Yes.

. . . .

[Defendant's attorney]: No, no, Your Honor.

This Court has stated:

Nothing in the record indicates defendant requested the jury designate on the verdict sheet which prong it found defendant to have violated. As defendant failed to: (1) request separate instructions; (2) object to the trial court's instructions; (3) assign error to the instructions; or (4) request that the jury determine on the verdict sheet under which prong of the statute they found her guilty or argue plain error, this issue is not reviewable. The trial

court properly denied defendant's motion to dismiss. This assignment of error is overruled.

State v. Wood, 174 N.C. App. 790, 796, 622 S.E.2d 120, 124 (2005).

Although Glover's irrelevant and improper testimony prejudiced defendant, Corporal Duane Flood's ("Corporal Flood") and Officer Jennifer Brown's ("Officer Brown") testimony together with defendant's admission that she had "consumed alcohol prior to driving, a fact confirmed by the breathalyzer result" were sufficient evidence to prove defendant operated a motor vehicle while she was under the influence of an impairing substance. *Id.* Corporal Flood testified that he observed a strong odor of alcohol on defendant's breath, and defendant's eyes were bloodshot, glassy and red. Officer Brown also observed a strong odor of alcohol and that defendant was not steady on her feet.

This Court has stated:

> Other testimony sufficiently supports the jury's conviction of defendant under N.C. Gen. Stat. § 20-138.1(a) (1) of driving "[w]hile under the influence of an impairing substance." *See State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984) (N.C. Gen. Stat. § 20-138.1 creates one offense that "may be proved by either or both theories.") *see also State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002), *aff'd*, 357 N.C. 242, 580 S.E.2d 693 (2003) ("The opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment."). "An officer's opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer's personal observation of an odor of alcohol and of faulty driving or other evidence of impairment." *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) (citation omitted).

Id.

II. Conclusion

Defendant failed to object and preserve any error to the jury's instructions or to request the jury specifically find which prong of the statute she was guilty of committing. "The trial court did not err in denying defendant's motion to dismiss the charge of impaired driving." *Id.* I concur in the result reached by the majority's opinion and vote to sustain defendant's conviction.

IN RE M.N.C.

[176 N.C. App. 114 (2006)]

IN THE MATTER OF: M.N.C.

No. COA05-829

(Filed 21 February 2006)

1. Termination of Parental Rights— findings of fact—judicial notice of previous orders

The trial court did not err in a termination of parental rights case by its finding of fact twelve even though respondent father contends it is a very lengthy summation of what is apparently the contents of the court files in the underlying neglect case and that none of the alleged facts recited therein were before the trial court at the termination of parental rights hearing, because: (1) the trial court took judicial notice of previous orders in the cause, and the pertinent orders document respondent's progress in completing the remedial efforts ordered by the court prior to 19 August 2004; (2) a trial court may take judicial notice of earlier proceedings in the same cause and it is not necessary for either party to offer the file into evidence; and (3) there was clear, cogent, and convincing evidence to support finding twelve.

2. Termination of Parental Rights— conclusion of law—best interests of child

The trial court did not err in a termination of parental rights case by its finding of fact sixteen (more properly viewed as a conclusion of law) that it was in the best interest of the child that respondent father's parental rights be terminated, because: (1) the court considered the minor child's tender age of six years, the fact the child had been placed in foster care for a year and a half, the child's adjustment to her placement, and the foster family's commitment to the child; and (2) the findings concerning the minor child combined with the court's findings concerning respondent's failure to complete the court ordered tasks of obtaining psychological evaluation and substance abuse assessment and completing anger management classes, respondent's failure to visit with the minor child on a consistent basis prior to 10 January 2005 (approximately three weeks prior to the termination hearing), and respondent's homelessness and hungry status within two months of the termination hearing constitute findings sufficient to support the conclusion that it was in the child's best interest to terminate respondent's parental rights.

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

The trial court did not abuse its discretion by terminating respondent father's parental rights, because: (1) the trial court's findings are supported by clear, cogent, and convincing evidence; and (2) the findings support the conclusion that neglect existed as a ground for termination.

Appeal by respondent from an order entered 25 February 2005 by Judge Donna H. Johnson in Cabarrus County District Court. Heard in the Court of Appeals 11 January 2006.

Kathleen A. Widelski for petitioner-appellee Cabarrus County Department of Social Services.

Victoria Bost for guardian ad litem-appellee.

Carol Ann Bauer for respondent-appellant.

SMITH, Judge.

Respondent father ("respondent") appeals the trial court's order terminating his parental rights to the minor child M.N.C. For the reasons stated herein, we affirm.

On 24 September 2003, M.N.C., age five, and her fourteen year old sister, D.C.C., were placed in the custody of the Cabarrus County Department of Social Services ("CCDSS") pursuant to a petition alleging the minor children were neglected by their parents in that "the parents regularly engage in domestic violence and use drugs in front of the children". On 4 December 2003, respondent consented to an order adjudicating his daughters neglected. CCDSS filed a motion in the cause to terminate respondent's parental rights on 14 September 2004, alleging respondent (1) neglected the minor child; (2) failed to pay a reasonable portion of the cost of care of the juvenile although physically and financially able to do so; and (3) was incapable of providing for the proper care and supervision of the minor child such that she is dependent and there is a reasonable probability that such incapacity will continue for the foreseeable future.

Following a hearing conducted on 3 and 4 February 2005, the trial court entered an order terminating respondent's parental rights to the minor child M.N.C. Respondent appeals.

Respondent presents the following issues for appellate review: (1) whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence; (2) whether the findings support the conclusions of law; and (3) whether the trial court abused its discretion in terminating respondent's parental rights.

In a proceeding to terminate parental rights, the trial court must first determine if one or more statutory grounds exist for termination pursuant to N.C. Gen. Stat. § 7B-1111 (2003). The petitioner has the burden of proving by clear, cogent, and convincing evidence that such ground(s) exist. The standard for appellate review of the trial court's determination that sufficient ground(s) exist pursuant to N.C. Gen. Stat. § 7B-1111 is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996).

[1] Respondent contends the trial court "erred in finding of fact #12 in that the evidence in that finding was not properly before the trial court." We disagree.

Finding twelve reads:

> That statutory grounds exist by clear, cogent and convincing evidence to terminate the parental rights of [respondent] in that the Respondent has neglected the juveniles within the meaning of N.C.G.S. 7B-101(15) and there is a likelihood that such neglect will continue in the future.
>
> > a. Reports to the Cabarrus County Department of Social Services regarding the . . . family began in March 1992. A petition was filed [i]n July 1993. The issues which led to the filing [of] said petition were drug use by [respondent mother] and [respondent father] and domestic violence in the home. A non secure custody order was issued for D.C.C. and her older sibling. The family entered into an agreement to address the issues of drug use and domestic violence and the petition was dismissed. On September 22, 2003 another report was made. During an investigation, D.C.C. and M.N.C. confirmed their parents' drug use and domestic violence. On September 23, 2003, D.C.C. presented herself to the Cabarrus County Department of Social Services and stated that she was afraid to go home. The social worker went to the . . . home on September 24, 2003, but no one would answer the door.

Thirty minutes after the social worker left the home, [respondent mother] removed M.N.C. from school. When the social worker returned to the . . . home, she found [respondent mother] irate and irrational. [Respondent] was unsteady on his feet and appeared to be under the influence of an impairing substance.

b. On December 14, 2003 [respondent] appeared and stipulated to neglect of the children.

c. Pursuant to a disposition, [respondent] agreed and was ordered to complete the following tasks designed to address the issues which led to the children's removal from his home:

1) Submit to a psychological evaluation and complete all recommended treatment.

2) Submit to a substance abuse assessment to be performed by Northeast Psychiatric and Psychological Institute. The initial appointment was to be scheduled by December 15, 2003.

3) Submit to random drug screens within 8 hours of the request by the social worker.

4) Attend counseling for anger management.

5) Attend a parenting class and demonstrate age appropriate discipline techniques.

6) Obtain and maintain stable housing[.]

7) Contact child support enforcement to enter into a support agreement.

8) Contact the social worker weekly as to the status of the case and his progress on ordered tasks.

9) Abide by a visitation plan.

10) Inform the social worker of any transportation problems.

11) Cooperate with D.C.C.'s counseling if recommended.

d. A review was scheduled for February 19, 2004, but the matter was continued for good cause shown. [Respondent] was present and told in open court to return on March 25, 2004.

e. A review was held on March 25, 2004 before the undersigned Judge. Despite actual notice, [respondent] did not appear. A court summary and a GAL report were admitted. The Court found that [respondent] had made minimal progress in addressing the issues which led to placement.

1) [Respondent] attended the first appointment for his psychological evaluation but was later terminated for missed appointments.

2) [Respondent] completed a substance abuse assessment, however, he did so before the Department could submit background information to the assessing agency.

3) [Respondent] submitted to two drug screens which were negative.

4) [Respondent] began attendance at anger management classes and did well during the sessions initially. However, he did not complete the program and therefore he was terminated from classes.

5) [Respondent] attended a parenting class and demonstrated age appropriate discipline techniques. He acknowledged that drugs and his anger issues had affected his family.

6) [Respondent's] housing was unstable. He had lived at different places since the disposition.

7) The social worker verified that [respondent] received disability.

8) [Respondent] did not contact the social worker weekly. He did speak to her after visits.

9) [Respondent] abided by a visitation plan.

10) [Respondent] did not report any transportation problems.

11) [Respondent] attended one session of counseling with D.C.C.

f. [Respondent] was personally served on June 3, 2004 for a June 18, 2004 review hearing. He appeared that day and was ordered to submit to drug testing and the matter was contin-

ued until June 24, 2004 for the review and the results of the drug test. A court summary and [GAL] report were admitted into evidence.

g. A review was held on June 24, 2004. Despite actual notice in open court, [respondent] did not appear. A court summary and GAL report were admitted. After review of the court summary and [GAL] report submitted on June 18, 2004 and the addendum submitted on June 24, 2004, the Court found that [respondent] had made no progress in addressing the issues which led to placement. The Court also found that reasonable efforts to reunify the children with [respondent] were futile and inconsistent with the children's need for a safe and permanent home within a reasonable period of time.

1) [Respondent] had been discharged for failure to attend appointments for his psychological evaluation. He was given another chance but failed to show for that appointment.

2) [Respondent] had not completed a substance abuse assessment wherein the Department was given the opportunity to submit background information to the assessing agency.

3) [Respondent] refused to submit to drug testing on April 7 and 21, 2004.

4) [Respondent] had not completed anger management classes.

5) [Respondent] attended a parenting class and demonstrated age appropriate discipline techniques.

6) [Respondent] had housing, but each time the social worker went to the home, no one would answer the door.

7) [Respondent] had not contacted the social worker weekly.

8) [Respondent] attended seven out of eleven visits.

9) [Respondent] did not report any transportation problems.

10) [Respondent] failed to complete a drug screen as ordered by the Court in open court on June 18, 2004.

> h. A permanency planning hearing was held on July 15 and 16, 2004. [Respondent] was present. A court summary was admitted into evidence. The Court determined that the permanent goal for the children was adoption. Since the June 25, 2004 review, [respondent] had attended one out of three visits. He missed the third visit because he had a court date for criminal charges against him. He did not provide verification of completion of any of the tasks previously ordered by the Court. The matter was continued until August 19-20, 2004.
>
> i. A permanency planning review was held on August 19, 2004. [Respondent] was not present although he had received actual notice of the prior court date. A court summary was admitted into evidence. Since [respondent] had attended all of the visits. He did not provide verification of completion of any of the tasks previously ordered by the Court.
>
> j. Since August 19, 2004 [respondent] has not provided verification of completion of any of the court ordered tasks. He has not completed a psychological evaluation. He has not completed an approved substance abuser assessment. He has not completed anger management classes. He has not contacted the social worker weekly. On December 6, 2004 [respondent] told the social worker that he was homeless and hungry with outstanding warrants. He was incarcerated and released on January 10, 2004. He currently resides with his sister. He did not visit on a consistent basis until January 10, 2005.

Respondent argues finding twelve is "a very lengthy summation of what is apparently the contents of . . . the court files in the underlying neglect case" and that "[n]one of the alleged facts" recited therein "were before the trial court at the Termination of Parental Rights hearing." It is apparent from a careful review of the record that the trial judge took judicial notice of previous orders in the cause including the consent order filed on 4 December 2003 and review orders filed on 19 February 2004, 25 March 2004, 18 and 24 June 2004, 15 and 16 July 2004, and 19 August 2004. The orders document respondent's progress in completing the remedial efforts ordered by the court prior to 19 August 2004. This Court has held "[a] trial court may take judicial notice of earlier proceedings in the same cause" and that it is not necessary for either party to offer the file into evidence. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991) (cit-

ing *Matter of Byrd*, 72 N.C. App. 277, 279, 324 S.E.2d 273, 276 (1985)). We note the record in the instant case does not indicate the trial judge expressly stated she was taking judicial notice of prior orders in the cause. Though not required, we believe the better practice would be to explicitly give all parties notice by announcing in open court that it is taking judicial notice of the matters contained in the court file.

Finding twelve is also based, in part, on the testimony of Carrie Phillips ("Phillips), a social worker with CCDSS. Phillips testified at the termination hearing concerning various meetings she had with respondent to discuss the agency's case plan and respondent's attempts to fulfill the requirements of the plan. Phillips also testified that she met with respondent on 6 December 2004 and that respondent stated he was hungry, homeless, and was planning to turn himself in to law enforcement because he had outstanding warrants. Respondent was incarcerated that date and released on 10 January 2004. At the time of the hearing, respondent was residing with his sister. Phillips also testified concerning respondent's visits with the minor children. We conclude from the foregoing that there was clear, cogent and convincing evidence to support finding twelve.

[2] Respondent also argues that "the trial court erred in finding of fact #16 in that it is not supported by the evidence nor is it a proper finding of fact."

> Finding sixteen reads as follows:
>
> [I]t is in the best interest of M.N.C. that the parental rights of [respondent] be terminated.
>
> a. M.N.C., age six, has been in the same placement for one and one-half years. She is currently placed with D.C.C. and her nephew.
>
> b. M.N.C.'s foster family is committed to her. M.N.C. has undergone therapy and she has adjusted well.

Respondent properly characterizes that portion of finding sixteen that speaks to the best interest of the child as a conclusion of law.

> Matters of judgment are not factual; they are conclusory and based ultimately on various factual considerations. Facts are things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation. Facts, in turn, provide the bases for conclusions.

State ex rel. Utils. Comm. v. Public Staff, 322 N.C. 689, 693, 370 S.E.2d 567, 570 (1988). "[B]est interest determinations are conclusions of law because they require the exercise of judgment." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). "We note that, if a finding of fact is essentially a conclusion of law it will be treated as a conclusion of law which is reviewable on appeal." *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004) (quotation and citation omitted), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005).

Respondent challenges the trial court's conclusion that it was in the best interest of the child that respondent's parental rights be terminated arguing the conclusion was not supported by the evidence. We disagree.

Where the trial court finds circumstances authorizing termination under N.C. Gen. Stat. § 7B-1111, the trial court must next determine whether termination is in the best interests of the minor child.

> In making this determination, the court shall consider the following:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a).

In the instant case the court considered the minor child's tender age of six years, the fact the child had been placed in foster care for a year and a half, the child's adjustment to her placement, and the foster family's commitment to the child. Those findings concerning the minor child combined with the court's findings concerning respondent's failure to complete the court ordered tasks of obtaining a psychological evaluation and substance abuse assessment and completing anger management classes; respondent's failure to visit with

the minor child on a consistent basis prior to January 10, 2005 (approximately three weeks prior to the termination hearing); and respondent's homelessness and hungry status within two months of the termination hearing constitute findings sufficient to support the conclusion that it was in the child's best interest to terminate respondent's parental rights. We hold the trial court did not err in concluding it was in the child's best interest to terminate respondent's parental rights.

[3] Lastly, we address respondent's contention that the trial court abused its discretion in terminating respondent's parental rights. The trial court has discretion to terminate parental rights if it finds termination would be in the best interest of the juvenile. *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001). The standard for appellate review of the trial court's decision to terminate parental rights is abuse of discretion. *In re Brim*, 139 N.C. App. 733, 745, 535 S.E.2d 367, 374 (2000). Based on our review of the testimony in this case, the trial court's findings which we hold are supported by clear, cogent, and convincing evidence and support the conclusion that neglect existed as a ground for termination, we discern no abuse of discretion in the trial court's decision to terminate respondent's parental rights to the minor child. The order of the trial court is affirmed.

Affirmed.

Judges BRYANT and CALABRIA concur.

CEDRIC PERRY, EMPLOYEE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, EMPLOYER, DEFENDANT

No. COA05-184

(Filed 21 February 2006)

1. Appeal and Error— record and brief—multiple violations

Although not dispositive, the Department of Correction violated the Rules of Appellate Procedure by submitting an unmanageable record with an inadequate index; by placing its assignments of error at the wrong point in the record and not including any record references; by including legal argument with

citations with its "non-argumentative" summary of the facts; and by not including pertinent record page numbers with the reference to assignments of error in the brief. DOC's conditional motion to amend the record and brief was not sufficient to remedy all of the violations.

2. Appeal and Error— appealability—denial of stay—interlocutory order

An appeal was interlocutory where the matter arose from a termination of workers' compensation benefits, subsequent orders, and the denial of a request for a stay. The order appealed from merely temporarily determines a portion of the action before further proceedings that may negate that order.

Appeal by defendant from an order entered 19 November 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 October 2005.

Brantley, Jenkins, Riddle, Hardee & Hardee, by J. Christopher Brantley and Gene A. Riddle, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Gary A. Scarzafava, for defendant-appellant.

GEER, Judge.

In this workers' compensation case, defendant, the North Carolina Department of Correction ("DOC"), appeals from the Industrial Commission's denial of DOC's motion for a stay of a decision of the Commission's Executive Secretary reinstating benefits after DOC unilaterally ceased paying benefits to plaintiff Cedric Perry for his admittedly compensable injury. Because this appeal is interlocutory and does not involve a substantial right that will be lost absent immediate review, we dismiss the appeal.

Compliance with the Appellate Rules

[1] We first address DOC's failure to comply with the Rules of Appellate Procedure. Rule 18(c)(1) requires that the record on appeal contain "an index of the contents of the record." DOC's index, after identifying material on four pages, then refers generally to pages 6 through 202 as "Exhibit 'A'." Contained in those unitemized 196 pages are all of the documents filed in the Industrial Commission. This index does not comply with Rule 18(c)(1) and results in an unmanageable record on appeal.

Rule 10(c)(1) (emphasis added) specifies the form to follow in making assignments of error: "A listing of the assignments of error upon which an appeal is predicated shall be stated *at the conclusion of the record on appeal* . . . ." The assignments of error must include "clear and specific record or transcript references." DOC, however, included its assignments of error on pages 4 and 5 of the record, and, following those assignments of error, it failed to include any record references.

With respect to the brief, Rule 28(b)(5) requires a statement of the facts that "should be a non-argumentative summary of all material facts." While some leeway must be granted for advocacy in the statement of facts, DOC's statement crosses the line and includes legal argument with case citations. In addition, Rule 28(b)(6) requires that each question presented in the brief shall be followed by "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." Although DOC included a reference to the assignments of error in its brief, it did not reference the pertinent page numbers of the record on appeal.

DOC did file a "Conditional Motion" to amend the record and its brief to supply the missing citations to the record following the assignments of error. In that motion, however, DOC does not acknowledge any failure to comply with the rules. Instead, despite the fact that its record and brief cannot be reconciled with the plain language of the Rules, DOC asserts that it "believes" that its record and brief are "in compliance with the Rules of Appellate Procedure" and states that it is moving to amend only if "this Court deem[s] it necessary for compliance with the Rules." Suffice it to say that the motion is necessary, but not sufficient, to remedy all of the violations. We need not, however, decide whether DOC's violations require dismissal, *see Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005) (per curiam), because DOC's appeal is interlocutory and must be dismissed.

The Interlocutory Nature of the Appeal

[2] After plaintiff was injured in a motor vehicle accident, DOC admitted that plaintiff's claim was compensable and paid him benefits pursuant to a State salary continuation plan. *See* N.C. Gen. Stat. § 143-166.13 *et seq.* (2005). While on 2 December 2003, DOC filed a Form 24 application to terminate benefits because, according to DOC, plaintiff was able to return to work, it subsequently withdrew

the Form 24 application on 22 December 2003. The administrative order removing the application from the informal hearing calendar specified that "[s]hould a dispute arise hereafter which is not resolved by the parties, the defendants may submit a new Form 24 setting forth the new issue . . . ." Nevertheless, DOC unilaterally ceased paying benefits without filing a new Form 24 or otherwise seeking approval from the Commission.

On 19 March 2004, plaintiff filed "a motion to reinstate benefits and for sanctions against the defendants for terminating benefits without filing a Form 24." On 23 April 2004, Executive Secretary Tracey H. Weaver entered the following order: "Upon motion of plaintiff['s] counsel and for good cause showing defendants are hereby ordered to reinstate temporary total disability compensation to employee as of last date of salary payment; defendants are further ordered to pay a 10% penalty for all sums not paid within 14 days of date due."

On 30 April 2004, a Key Risk senior claims representative wrote the Executive Secretary stating that she had not received a copy of plaintiff's motion until after receiving the Executive Secretary's order. The letter sought reconsideration of the order, enclosed medical records and other documents relating to plaintiff's ability to return to work, and stated that "[t]he most pressing disputed issue relates to Mr. Perry's return to work, however there are additional issues involving medical opinions and we feel these matters should be resolved via an evidentiary hearing, rather than in an administrative forum." Plaintiff argued in response that benefits should continue to be paid since DOC had not yet sought permission to terminate benefits under N.C. Gen. Stat. § 97-18.1 (2005).

On 23 July 2004, the Executive Secretary entered the following order:

> Based on a review of the defendants' request for reconsideration, IT IS HEREBY ORDERED that the defendants' request is GRANTED. The undersigned has now reviewed the original Motion, the defendants' filing dated May 4, 2004, the issue that is presented regarding the cessation of compensation when the compensation being paid is salary continuation in lieu of temporary total disability compensation.
>
> After reconsideration, IT IS HEREBY ORDERED that the April 23, 2004 Order is affirmed and remains in full force and effect.

> *It is noted that the defendants may appeal this Administrative Order on this significant issue. The defendants, however, shall comply with this Order by issuing payments to the plaintiff, and then may request a credit if there is a different outcome following a full evidentiary hearing.*

(Emphasis added.)

On 3 August 2004, DOC filed a request for a hearing *de novo* and asked that the case be placed on the hearing docket as soon as possible. DOC also filed a separate request for a stay of the 23 July 2004 administrative order. On 18 October 2004, the parties appeared for the *de novo* hearing before Deputy Commissioner Philip A. Baddour, III. At the hearing, DOC contended it had not yet complied with the 23 July 2004 order because the Executive Secretary had not ruled on its request for a stay.

Also on 18 October 2004, the Executive Secretary denied DOC's motion for a stay. When Deputy Commissioner Baddour received the Executive Secretary's denial on 19 October 2004, he wrote the parties that the issue "whether defendant may properly fail to comply with an administrative order while a request for a stay is pending, . . . is now moot because the Executive Secretary has now denied defendant's request for a stay." The Deputy Commissioner stated: "I trust that the defendant will now comply with the administrative Order of July 23, 2004." He stated that if DOC did not comply, the proper procedure would be for plaintiff to file a formal motion to show cause directed to Chief Deputy Commissioner Stephen T. Gheen. The Deputy concluded that "[a]fter the issue of defendant's failure to comply with the July 23, 2004 Order has been resolved, the parties should request that the hearing of this matter by the undersigned be reconvened to address all other pending issues."

On 29 October 2004, DOC filed a request pursuant to Rule 703 of the Workers' Compensation Rules seeking a stay from the Executive Secretary's administrative order.[1] On 1 November 2004, plaintiff filed a motion to show cause why DOC should not be held in civil contempt for willful refusal to comply with the 23 April 2004 order of the Executive Secretary. Plaintiff sought an order that DOC immediately

1. Rule 703(2) provides that "the Administrative Officer making the Decision or a Commissioner may enter an Order staying its effect pending the ruling on the Motion for Reconsideration or pending a Decision by a Commissioner or Deputy Commissioner following a formal hearing. In determining whether or not to grant a stay, the Commissioner or Administrative Officer will consider whether granting the stay will frustrate the purposes of the Order, Decision, or Award."

pay plaintiff the past due temporary total disability benefits, a 10% penalty on all amounts more than 14 days past due, attorneys' fees, and "sanctions, the amount to be determined by the Industrial Commission." The next day, DOC forwarded a letter to Deputy Commissioner Baddour making an "informal request that [he] voluntarily step down as the Deputy Commissioner in this case," arguing that "further proceedings before [him] would constitute something less than the true *de novo* hearing for the parties on the central issue of whether benefits are owed." The record contains no order regarding plaintiff's motion to show cause or defendant's "informal request."

On 19 November 2004, Buck Lattimore, Chairman of the Industrial Commission, filed an order denying DOC's request for a stay of the three administrative orders filed by the Executive Secretary on 23 April 2004, 23 July 2004, and 18 October 2004. On the same date, DOC filed a notice of appeal from that denial. On 14 December 2004, DOC filed an amended notice of appeal stating:

> NOW COMES the Defendant-Employer, N.C. DEPARTMENT OF JUVENILE JUSTICE, who hereby gives NOTICE OF APPEAL to the NORTH CAROLINA COURT OF APPEALS from the ORDER for the Full Commission, filed by Chairman Lattimore on November 18, 2004. Defendant-Employer asserts that it has exhausted its administrative remedy pursuant to I.C. Rule 703, and that it is entitled to appeal the ORDER of the Full Commission pursuant to Section 97-86 and because said ORDER affects a substantial right.

Prior to the filing of the briefs in this appeal, plaintiff moved to dismiss the appeal as interlocutory. In its response opposing this motion, DOC asserted that it was appealing a sanctions order and, therefore, was entitled to proceed interlocutorily. *See Adams v. M.A. Hanna Co.*, 166 N.C. App. 619, 623, 603 S.E.2d 402, 405 (2004) ("[A]n order imposing sanctions may affect a substantial right, and thus be immediately appealable."). Based on plaintiff's motion and DOC's response, the motion was denied.

The appellate briefs, however, filed nearly a month after the motion was denied, showed that DOC in fact was appealing only from Chairman Lattimore's order denying DOC's motion for a stay of the order compelling payment of benefits and not from any imposition of a sanction. DOC acknowledges that "the parties are entitled to a *de novo*, formal (evidentiary) hearing on the issue whether Plaintiff-Appellee is entitled to benefits. . . . By this appeal, the Appellant-

Defendant is not requesting to delay that hearing." Since DOC has not appealed from any sanction order, we must, therefore, determine whether there is another basis for jurisdiction in this Court.

"An appeal from an opinion and award of the Industrial Commission is subject to the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. Parties have a right to appeal any final judgment of a superior court. Thus, an appeal of right arises only from a final order or decision of the Industrial Commission." *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002) (internal citations and quotation marks omitted). A decision of the Industrial Commission "is interlocutory if it determines one but not all of the issues in a workers' compensation case." *Id.* A decision that "on its face contemplates further proceedings or which does not fully dispose of the pending stage of the litigation is interlocutory." *Watts v. Hemlock Homes of the Highlands, Inc.*, 160 N.C. App. 81, 84, 584 S.E.2d 97, 99 (2003).

Our Court has already held that an order denying a stay is an interlocutory order not subject to immediate appeal: "Defendants cite no authority for the proposition that denial of a stay is appealable. We find no such authority in North Carolina. We do, however, find caselaw in other jurisdictions holding that the denial of a stay is not immediately appealable." *Howerton v. Grace Hosp., Inc.*, 124 N.C. App. 199, 201, 476 S.E.2d 440, 442-43 (1996). In this case, DOC has not addressed *Howerton* or cited any authority justifying an immediate appeal of the denial of a stay.

Instead, DOC argues that the denial of the stay deprives it of a substantial right that will be lost absent immediate review. *See id.*, 476 S.E.2d at 443 (holding, in an appeal from denial of a stay, that "defendants must show that the trial court's decision deprives them of a substantial right which will be lost absent immediate review"). Our cases have established a two-part test for determining whether an interlocutory order affects a substantial right. First, the right itself must be substantial. *Ward v. Wake County Bd. of Educ.*, 166 N.C. App. 726, 729, 603 S.E.2d 896, 899 (2004), *disc. review denied*, 359 N.C. 326, 611 S.E.2d 853 (2005). Second, the deprivation of that substantial right must potentially work injury if not corrected before appeal from a final judgment. *Id.* at 729-30, 603 S.E.2d 899.

DOC argues that a substantial right is involved because it will be required to pay benefits prior to any determination that such

benefits are due and that if these payments are later determined not to be due, then there "is no probability of recovery." DOC also argues that these circumstances mean that the denial of the stay "[i]n effect determines the action and prevents a judgment from which appeal might be taken" under N.C. Gen. Stat. § 7A-27(d)(2) (2005). We disagree.

These same circumstances arise in almost every case in which a workers' compensation defendant fails to prevail in connection with a Form 24 request to terminate benefits.[2] To allow a defendant to take an interlocutory appeal from any requirement that it continue to pay benefits pending Commission proceedings would result in precisely the " 'yo-yo' procedure, up and down, up and down," which this Court has held "works to defeat the very purpose of the Workers' Compensation Act." *Hardin v. Venture Constr. Co.*, 107 N.C. App. 758, 761, 421 S.E.2d 601, 602-03 (1992). Even if, as DOC apparently assumes, the case could proceed on its merits while the interlocutory appeal was pending, this Court would ultimately be asked to decide very similar issues twice, once on the limited administrative record and a second time on a full record. *See Berger v. Berger*, 67 N.C. App. 591, 595, 313 S.E.2d 825, 828, *disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984) (observing that the rule prohibiting interlocutory appeals is intended "to prevent delay and expense from fragmentary appeals and to expedite the administration of justice").

In other contexts when a party has been required to make payments *pendente lite*, this Court has nonetheless held that no substantial right exists to justify an interlocutory appeal. *See*, *e.g.*, *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("Interlocutory appeals that challenge only the financial repercussions of a separation or divorce generally have not been held to affect a substantial right."); *cf. Berger*, 67 N.C. App. at 600, 313 S.E.2d at 831 (holding that a defendant could be held in contempt for failing to pay "a nonappealable *pendente lite* award" because payment of such an award could not be stayed pending an interlocutory appeal by the posting of a bond). When the sole issue is the payment of money pending the litigation, we see no reason why a different result should occur in workers' compensation cases.

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2. Rule 404(5) of the Workers' Compensation Rules, for example, provides "[i]f the Deputy Commissioner reverses an order previously granting a Form 24 motion, the employer or carrier/administrator shall promptly resume compensation or otherwise comply with the Deputy Commissioner's decision, notwithstanding any appeal or application for review to the Full Commission under N.C. Gen. Stat. § 97-85."

N.C. Gen. Stat. § 7A-27(d)(2), also cited by DOC, permits an immediate appeal only when the ruling being appealed has effectively determined the entire action. The interlocutory order being appealed in this case, however, merely temporarily determines a portion of the action before further proceedings come about that may negate that order and does not, therefore, justify an interlocutory appeal. *Cf. Lee County Bd. of Educ. v. Adams Elec., Inc.*, 106 N.C. App. 139, 141-42, 415 S.E.2d 576, 577 (1992) (where the trial court had not yet determined if the parties had entered into an enforceable contract requiring arbitration, an order granting a preliminary injunction enjoining arbitration did not "determine the action").

We note further that had DOC proceeded in an orderly fashion rather than with an interlocutory appeal of the denial of a stay, N.C. Gen. Stat. § 97-86 (2005) provides that upon appeal "from the decision of the Commission, . . . said appeal or certification shall operate on a supersedeas except as provided in G.S. 97-86.1, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this Article." Further, when an employer meets the requirements of N.C. Gen. Stat. § 97-42 (2005), it may receive a credit for overpayments. *Moretz v. Richards & Assocs., Inc.*, 316 N.C. 539, 542, 342 S.E.2d 844, 846 (1986) ("Because defendants accepted plaintiff's injury as compensable, then initiated the payment of benefits, those payments were due and payable and were not deductible under the provisions of section 97-42, *so long as the payments did not exceed the amount determined by statute or by the Commission to compensate plaintiff for his injuries*." (emphasis added)). Indeed, the Executive Secretary specifically provided that DOC "shall comply with this Order by issuing payments to the plaintiff, and then may request a credit if there is a different outcome following a full evidentiary hearing."

With respect to DOC's alternative contention—included in the response to the motion to dismiss—that it is appealing from the imposition of a sanction, that brief when read in conjunction with the record reveals that no sanction is at issue. While the Executive Secretary ordered reinstatement of the unilaterally suspended benefits, she noted that DOC had raised a "significant issue" and did not impose any sanctions. The only possible sanction reflected in the record is the Executive Secretary's provision in her first order that defendant "pay a 10% penalty for all sums not paid within 14 days of date due." DOC has not, however, made any argument in its assign-

ments of error or in its brief regarding the 10% penalty. Without appeal of a sanction, no substantial right exists justifying interlocutory review.

Conclusion

We conclude Chairman Lattimore's order is interlocutory and that DOC has failed to establish a basis for this Court's asserting jurisdiction over this interlocutory appeal. The appeal is, therefore, dismissed.

Dismissed.

Judges WYNN and McGEE concur.

JAMES EDD LIGON, JR., Plaintiff v. MATTHEW ALLEN STRICKLAND and GERALD ALLEN STRICKLAND, Defendants

No. COA04-822

(Filed 21 February 2006)

1. Motor Vehicles— crossing center line and striking pedestrian—directed verdict denied

A directed verdict for defendants was correctly denied in a negligence action arising from a pedestrian being struck at night by an automobile. The evidence permits an inference that defendant driver was negligent in crossing the center line and completely leaving the road to avoid a roaming black dog.

2. Motor Vehicles— pedestrian struck by automobile—contributory negligence

The trial court erred by not submitting contributory negligence to the jury where there was evidence that plaintiff was walking along a road at night, intoxicated, and in dark clothes, and that he was struck in the road.

3. Motor Vehicles— instructions—sudden emergency—swerving to avoid black dog

In a case remanded on other grounds, the trial court's modification of the pattern jury instruction on sudden emergency was unlikely to have confused the jury in a negligence action where

defendant allegedly swerved his automobile to miss an animal and hit plaintiff, who was walking on the opposite side of the road. However, on remand the court was urged to take care that the sudden emergency instruction focuses on whether the driver was suddenly and unexpectedly confronted with imminent danger to himself or others.

Appeal by defendants from judgment entered 12 April 2004 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 2 March 2005.

Clarke K. Wittstruck for plaintiff-appellee.

Cogburn, Goosmann, Brazil & Rose, P.A., by Andrew J. Santaniello, for defendants-appellants.

GEER, Judge.

Defendants Matthew Allen Strickland and Gerald Allen Strickland appeal from a verdict in favor of plaintiff James Edd Ligon, Jr. Ligon contended and the jury found that Matthew Strickland ("Strickland"), who was driving the car of his father Gerald Strickland, swerved across a road and struck Ligon as he was walking along the opposite side of the road. Defendants argue on appeal that the trial court erred (1) in denying their motion for a directed verdict on the issue of negligence and (2) in not instructing the jury on the issue of contributory negligence. Because the evidence is undisputed that Strickland crossed the center line and Ligon offered sufficient evidence to permit a reasonable juror to find that Strickland struck Ligon, the trial court properly denied defendants' motion for a directed verdict. We agree with defendants, however, that when the evidence is viewed in the light most favorable to them, the record contains sufficient evidence to warrant submission of the issue of contributory negligence to the jury. Defendants are, therefore, entitled to a new trial.

Facts

On the evening of 21 December 1997, Ligon went to a ball field with his friend, Charlie Hawkins, where they drank a bottle of liquor. At some point between midnight and 1:00 a.m., Ligon, who was dressed in dark clothes, left Hawkins and began to walk home along Green Valley Road in rural Buncombe County. Ligon was walking along the left hand side of the road facing the traffic. In a field next

to the road, he noticed a white horse that he knew and clapped his hands to get the horse's attention. Ligon testified that he then heard a noise like a "whoosh." He does not remember anything further until he woke up in the hospital.

Strickland, who was called as a witness by Ligon, testified that at approximately 12:30 or 1:00 a.m. on 21 December 1997, he was driving his father's car on Green Valley Road. According to Strickland, approximately a quarter of a mile down the road, he saw an animal in the middle of the road, he swerved off to the left, and he struck a fence five to six feet off the left side of the road with sufficient force to deploy his air bag. Strickland testified that, without stopping, he "got back control" and returned to the road and drove to his house.

He woke his father and told him that he had hit a fence. The two Stricklands then drove back to the scene. Both testified they wanted to make sure that no livestock was escaping through the damaged fence. They found Ligon tangled up in the fence exactly where Strickland had struck the fence. Strickland's father called 911.

James Powell, a firefighter and EMS technician, responded to the accident. Upon arrival, he found Ligon sitting in a fence five to six feet from the road. Powell described Ligon as confused, disoriented, and inebriated. Although Ligon stated that he wanted to get up and walk home, Powell could tell from his observations that Ligon had suffered a broken leg. A state highway patrol trooper, Stan Webb, also responded and, after interviewing Strickland, prepared a report of the accident.

At the hospital, Ligon was treated for a compound fracture of the right leg and multiple abrasions on the right shoulder. At that time, Ligon's blood alcohol level was .08.[1] Ligon's treating orthopedic surgeon testified that the injuries to Ligon's right leg were consistent with a high energy impact from behind by a motor vehicle.

The case was tried in Buncombe County Superior Court beginning 6 January 2004. The trial court denied defendants' motion for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence. Over defendants' objection, the court submitted only two issues to the jury: whether plaintiff was injured by defendants'

1. At trial, defendants also pointed to the fact that the hospital report indicated that Ligon had trace amounts of benzodiazepines and opiates in his system. Two doctors, however, testified that they would expect those findings since such medications are routinely used in the emergency room for pain, sedation, and intubation.

negligence and, if so, the amount of damages plaintiff was entitled to recover. The jury awarded plaintiff $50,000.00.

On 2 April 2004, the trial court entered judgment against defendants for the amount awarded by the jury and for additional costs incurred by plaintiff. Defendants' motions for judgment not withstanding the verdict and for a new trial were denied in an order dated 29 April 2004. Defendants filed their notice of appeal on 4 May 2004.

Denial of Defendants' Directed Verdict Motion

[1] Defendants first assign error to the trial court's denial of their motion for a directed verdict at the close of plaintiff's evidence and again at the close of all the evidence. As this Court has explained, however:

> When a motion is made for directed verdict at the close of the plaintiff's evidence, the trial court may either rule on the motion or reserve its ruling on the motion. By offering evidence, however, a defendant waives its motion for directed verdict made at the close of plaintiff's evidence. Accordingly, if a defendant offers evidence after making a motion for directed verdict, "any subsequent ruling by the trial judge upon defendant's motion for directed verdict must be upon a renewal of the motion by the defendant at the close of all the evidence, and the judge's ruling must be based upon the evidence of both plaintiff and defendant."

Stallings v. Food Lion, Inc., 141 N.C. App. 135, 136-37, 539 S.E.2d 331, 332 (2000) (internal citations omitted) (quoting *Overman v. Gibson Prods. Co.*, 30 N.C. App. 516, 520, 227 S.E.2d 159, 162 (1976)). The question before this Court is, therefore, whether the trial court properly denied defendants' motion for a directed verdict at the close of all the evidence.

Defendants argue that a directed verdict was warranted because the record contains insufficient direct or circumstantial evidence of negligence. The party moving for a directed verdict " 'bears a heavy burden under North Carolina law.' " *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (quoting *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987)). When a motion for a directed verdict is made, the trial court must determine

> "whether the evidence is sufficient to go to the jury. In passing upon such motion the court must consider the evidence in the light most favorable to the non-movant. That is, the evidence in

> favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor. It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motion should be granted."

Dockery v. Hocutt, 357 N.C. 210, 216-17, 581 S.E.2d 431, 436 (2003) (internal quotation marks and citation omitted) (quoting *Rappaport v. Days Inn of Am., Inc.*, 296 N.C. 382, 384, 250 S.E.2d 245, 247 (1979), *overruled on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998)). On appeal, we must uphold the denial of a directed verdict "if there is more than a scintilla of evidence to support each element of the nonmovant's *primae* [sic] *facie* case." *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 9, 607 S.E.2d 25, 30 (2005).

In this case, it is undisputed that Strickland crossed the center line on the road, traveled all the way across the left lane, and drove off the left shoulder, before, as he testified, getting "back control," and returning to his proper lane of travel. N.C. Gen. Stat. § 20-146(d) (2005) provides:

> (d) Whenever any street has been divided into two or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply.
>
> (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

As this Court has previously stated, "[o]ur Courts have consistently held that the violation of this section constitutes negligence *per se*, and when it is the proximate cause of injury or damage, such violation is actionable negligence." *Sessoms v. Roberson*, 47 N.C. App. 573, 579, 268 S.E.2d 24, 28 (1980). *See also Anderson v. Webb*, 267 N.C. 745, 749, 148 S.E.2d 846, 849 (1966) ("When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to his left of the center of the highway, such evidence makes out a *prima facie* case of actionable negligence.").

A defendant may, as defendants do in this case, present evidence "that [defendant] was driving on the wrong side of the road for reasons other than his own negligence, but, in such a case, such showing

by the defendant serves merely to raise an issue of credibility for the jury to resolve." *Sessoms*, 47 N.C. App. at 579, 268 S.E.2d at 28. Thus, this Court has held that a motion for a directed verdict should be denied when the plaintiff's evidence established that the defendant drove left of center even though the defendant offered evidence that he skidded due to ice. *Brewer v. Majors*, 48 N.C. App. 202, 205, 268 S.E.2d 229, 230-31, *disc. review denied*, 301 N.C. 400, 273 S.E.2d 445 (1980). *See also Anderson*, 267 N.C. at 749, 148 S.E.2d at 849 (reversing nonsuit when the evidence indicated that the defendant had crossed the center line while skidding on wet pavement even though no one survived the accident and there were no eyewitnesses to testify that the skidding was due to negligence); *Sessoms*, 47 N.C. App. at 579, 268 S.E.2d at 28 (reversing grant of directed verdict when the defendant conceded that he crossed the center line, but claimed he did so to avoid hitting the plaintiff since "this evidence alone . . . is sufficient to require the submission of this case to the jury").

Here, defendants contend that Strickland crossed the center line to avoid an animal, identified as possibly being a local black dog who tended to run loose in the neighborhood. Ligon offered evidence that he noticed the dog, but that the dog was in a yard up a hill right before the collision; no one else saw a dog in the area after the collision. Strickland's testimony was vague: he said "something came out in front of [him] in the middle of the road"; he did not recall it darting, but rather it was simply "in the road"; he could only "guess" where he first saw the animal; and he could not recall from which direction the animal had come, although he would "guess" that it came from the right side. He said that his recollection was "very vague" and he was having a "hard time remembering." Thus, there is a question for the jury as to whether an animal was in the road that caused Strickland to cross over the center line.

Even if the presence of the animal were undisputed, plaintiff also offered evidence that Strickland traveled 20 feet across the center line from his legal lane of travel and continued to the fence. Further, there is no evidence suggesting that Strickland attempted to brake or slow down to avoid the animal. Strickland testified:

> Q And you saw the animal in your lights and you swerved across the roadway to the left, and that you swerved all the way across the roadway to the left across this section here and hit this fence. (Indicating) Is that your testimony?
>
> A Correct.

> Q And then after you hit the fence your car kept going and righted itself and you ended up back on the roadway here? (Indicating)
>
> A I don't know if it righted itself.
>
> Q That's what I was confused about. You said you came back to and you were on the road.
>
> A I hit the fence and I must have corrected it. I don't see how it would have righted itself up on the road. The next thing I remember, I was on the road.

He later confirmed that he was traveling 35 to 40 miles per hour, hit the fence with "[m]ore of a sidewswipe and [kept] going." He stated: "I never stopped." According to Strickland, once he "got back control" or "gained control," he was again on the road. With respect to Ligon, he testified: "I never saw him." Ligon, however, presented evidence that it was a clear, moonlit night, and he was standing next to the road.

As this Court explained in *Brewer*:

> [T]he question to be resolved by the jury is not simply whether defendants' car skidded, but whether [the] defendant [driver] was in the wrong lane, and if so, whether he was there through no fault of his own. It cannot be said that the skidding of the defendants' vehicle immediately preceding the collision establishes a lack of any negligence on [the driver's] part, as a matter of law. It was not only [the driver's] duty to drive in the right-hand lane, but it was also his duty to keep his vehicle under proper control so as to avoid injury to others.

Brewer, 48 N.C. App. at 205, 268 S.E.2d at 230-31. Plaintiff's evidence in this case, when viewed in the light most favorable to plaintiff, is sufficient to allow a jury to find that Strickland was negligent in failing to keep his car under control—even if he needed to avoid an animal—and in failing to keep a proper lookout. *See Troy v. Todd*, 68 N.C. App. 63, 66, 313 S.E.2d 896, 898 (1984) (reversing directed verdict when the defendant struck a person walking on the side of the road at night and in dark clothes because "the failure of a motorist to see a person in or upon a roadway at night before striking him constitutes some evidence of negligence"); *Sessoms*, 47 N.C. App. at 580, 268 S.E.2d at 28 (holding that even though the defendant claimed he crossed the center line to avoid the plaintiff, the evidence permitted

an inference that the defendant failed to exercise due care to avoid hitting the plaintiff in that he failed to keep a proper lookout or keep his car under proper control).

Defendants also argue that the evidence is merely speculative that Strickland, as opposed to someone else, struck Ligon. Strickland, however, admitted that Ligon was found entangled in the fence at the precise point where he struck the fence. In addition, the timing of his collision with the fence corresponds with the timing of Ligon being struck by a vehicle from behind. It is not speculation but rather a reasonable inference that only one car during the time frame of 12:30 to 1:00 a.m. ran off the road at the particular spot where Ligon was standing and struck the fence. Further, the state highway patrol trooper's report states that Strickland struck Ligon. While defendants objected to the trial court's admission of the report, they have not challenged that ruling on appeal. This evidence, when viewed in the light most favorable to Ligon, was sufficient to allow a reasonable juror to disbelieve defendants' two vehicle theory and find that Strickland struck Ligon.

Defendants rely upon *Thompson v. Coble*, 15 N.C. App. 231, 189 S.E.2d 500, *cert. denied*, 281 N.C. 763, 191 S.E.2d 360 (1972) to support their argument that a directed verdict should have been granted. In *Thompson*, the plaintiff's evidence showed that the defendant was driving in the center of her lane with her lights on when she heard a noise. *Id.* at 232, 189 S.E.2d at 501. The defendant knew that she had hit something, but had not seen anything prior to hearing the noise. *Id.* Subsequently, using a flashlight, she and her husband found an injured man in a ditch. *Id.* This Court held that a directed verdict was appropriate because "[t]he jury would have to engage in pure speculation of how deceased was injured." *Id.* Similarly, in *Whitson v. Frances*, 240 N.C. 733, 738, 83 S.E.2d 879, 881 (1954), also cited by defendants, there was no evidence at all that the defendant's vehicle left the road, nor was there evidence as to where the deceased was standing when he was struck.

Unlike *Thompson* and *Whitson*, this case involves both (1) evidence permitting an inference that Strickland was negligent by crossing the center line and completely leaving the road and (2) evidence that Ligon, who was on the shoulder on the opposite side of the road, was injured by being struck from behind by a motor vehicle at generally the same time that Strickland was swerving. The question is only whether it was Strickland's car that struck Ligon. *See Walker v. Pless*, 11 N.C. App. 198, 199-200, 180 S.E.2d 471, 472 (1971) (reversing grant

of directed verdict when the plaintiff was struck from behind by an automobile even though the plaintiff could not testify as to what happened other than that the defendant was at the scene immediately after he was hit). As this Court stated in *Sessoms*, 47 N.C. App. at 581, 268 S.E.2d at 29, "[w]e cannot imagine a more clearcut case for the twelve."

Contributory Negligence

[2] Defendant next assigns error to the trial court's refusal to submit the issue of contributory negligence to the jury. When deciding whether to instruct the jury on contributory negligence,

> [t]he trial court must consider any evidence tending to establish plaintiff's contributory negligence in the light most favorable to the defendant, and if diverse inferences can be drawn from it, the issue must be submitted to the jury. If there is more than a scintilla of evidence that plaintiff is contributorily negligent, the issue is a matter for the jury, not for the trial court.

Cobo v. Raba, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998) (internal citations omitted).

In this case, the state trooper's report offered as evidence by Ligon, when viewed in the light most favorable to defendants, suggests that Ligon was standing in the road, as opposed to by the fence. The diagram drawn by Trooper Webb to reconstruct the accident has Ligon first being struck by Strickland's vehicle in the middle of the road and then being pushed to the fence. The narrative portion of the report states, consistent with the diagram, that "[t]he pedestrian was struck by Vehicle 1. Vehicle 1 and the pedestrian *continued off the roadway* to the left" before colliding with the fence. (Emphasis added.) In order to continue off the roadway after being struck, one must first be in the roadway. Although Ligon, at trial, challenged the basis for the officer's statement that Ligon was in the road, Ligon was the party who offered the officer's testimony and Ligon relied upon the report in establishing Strickland's negligence.

The jury should have had an opportunity to decide whether Ligon was in fact in the road. When this evidence is considered in addition to evidence that Ligon was walking along a road at night in dark clothes while intoxicated, we believe that the trial court erred in failing to present the issue of contributory negligence to the jury. *Clark v. Bodycombe*, 289 N.C. 246, 253-54, 221 S.E.2d 506, 511-12 (1976) (holding that contributory negligence instruction should have been

given where plaintiff stepped a foot off of the curb into the roadway when she was struck, which created "diverse inferences as to whether plaintiff acted in a reasonable manner and whether her acts proximately caused her injuries").

Defendants are, therefore, entitled to a new trial. Based upon our review of the issues and the evidence, we have concluded that the issues of negligence and contributory negligence "are so intertwined that the ends of justice will be best met by a new trial on both issues." *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 485, 157 S.E.2d 131, 142 (1967). *See also McMahan v. Bumgarner*, 119 N.C. App. 235, 238, 457 S.E.2d 762, 764 (1995) ("[S]ince the facts and issues surrounding defendant's counterclaim are inextricably intertwined with plaintiff's claim, a new trial should be granted on both claims so that all issues and legal theories that arise from the evidence can be presented to the jury.").

Sudden Emergency Doctrine

[3] Because there will be a new trial on all issues, we need not fully address defendants' remaining assignment of error regarding the trial court's instruction on the sudden emergency doctrine. Nevertheless, because this issue is likely to recur at the second trial, we address it briefly. We agree with defendants that, based upon the evidence offered at trial, the court properly gave an instruction regarding sudden emergency. Defendants, however, have objected to the trial court's alteration of the pattern jury instruction (N.C.P.I.—Civ. 102.15 (motor veh. vol. 1996)) by adding the following sentence: "This doctrine of sudden emergency only applies when a person is apparently or actually in danger. It does not apply if only a non-human animal is in danger."

In making this alteration, the trial court explained that he wanted to make sure that the jury understood that the doctrine applied only if the driver was acting to avoid danger to himself or to another person and did not apply if the driver swerved only "to save the life of an animal." Defendants do not disagree with the trial court's reasoning, but argue that a jury could misunderstand the instruction to preclude application of the doctrine if the animal in the road was in imminent danger regardless of any accompanying danger to the driver.

We believe it unlikely that the jury interpreted the instruction in that fashion given that the trial court's alteration of the pattern

instruction stated that the doctrine "does not apply if *only* a non-human animal is in danger." (Emphasis added.) Nevertheless, on remand, we urge the trial court to take care to ensure that any sudden emergency instruction that is given focuses on whether the driver was "suddenly and unexpectedly confronted with imminent danger to himself or others." *Holbrook v. Henley*, 118 N.C. App. 151, 153, 454 S.E.2d 676, 677-78 (1995).

New trial.

Judges McGEE and TYSON concur.

BRIAN DAVIS, Plaintiff-Appellee v. JOSEPH DIBARTOLO, ARRCS, INC., ARRCS, INC. d/b/a ANNIE'S OLD FASHIONED TRATTORIA AND PIZZERIA, MONTGOMERY DEVELOPMENT CAROLINA CORP., S.V. CENTER, LLC, MEL DeSHA d/b/a MEL'S PLUMBING & ELECTRIC CO., ROGER ALAN GIBSON d/b/a GIBSON PLUMBING and the TOWN OF CHAPEL HILL, a North Carolina Municipality, Defendants-Appellants

No. COA05-222

(Filed 21 February 2006)

Immunity— sovereign—building inspection—insurance coverage

Defendant town waived sovereign immunity by its purchase of liability insurance and the trial court did not err by denying the town's motion to dismiss a claim for a negligent building inspection arising from an accident in a restaurant with an "unrestrained" deep-fat fryer. In determining whether plaintiff's injuries were caused by an occurrence under the insurance policy, the focus should be on whether plaintiff's damages were unexpected and unintended rather than on the precedent negligent acts of the building inspector.

Appeal by defendant Town of Chapel Hill from order entered 22 November 2004 by Judge Wade Barber in Superior Court, Orange County. Heard in the Court of Appeals 14 November 2005.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr.; and Heidi G. Chapman, PLLC, by Heidi G. Chapman, for plaintiff-appellee.

Little & Little, PLLC, by Cathryn M. Little, for defendant-appellant, Town of Chapel Hill.

McGEE, Judge.

Brian Davis (plaintiff) filed a complaint on 11 June 2004 alleging he was injured on 14 June 2003 while working as a bartender at ARRCS, Inc. d/b/a Annie's Old Fashioned Trattoria and Pizzeria in Chapel Hill, North Carolina. Plaintiff alleged that various non-appealing defendants created a dangerous condition by installing a gas-powered deep fat fryer, a Pitco Friolator Model #35C (the fryer), in contravention to the architect's plans and the installation instructions. Plaintiff filed an amendment to the complaint on 12 July 2004, alleging that he slipped on the unprotected floor of Annie's Old Fashioned Trattoria and Pizzeria on 14 June 2003 while working there as a bartender. Plaintiff further alleged he fell and slid towards the fryer. Plaintiff alleged he struck the fryer feet first, causing the "unrestrained" fryer to topple over onto him, spilling hot grease on plaintiff's torso, arms and legs. Plaintiff alleged he sustained second and third degree burns.

Plaintiff also made several allegations specifically against the Town of Chapel Hill (defendant). Plaintiff alleged defendant was grossly negligent because defendant's employees in its building inspections department failed to properly inspect the construction of Annie's Old Fashioned Trattoria and Pizzeria with respect to the placement and installation of the fryer.

Defendant filed motions to dismiss plaintiff's complaint and amendment to the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and Rule 12(b)(6) on 2 August 2004. In support of its motions, defendant argued that plaintiff did not allege any waiver of defendant's sovereign immunity by purchase of liability insurance by defendant. Defendant also contended that it was denied liability coverage for plaintiff's claim by its insurance carrier and that defendant had not purchased any other form of liability insurance.

The trial court granted plaintiff's motion to amend his complaint to allege the existence of defendant's applicable liability insurance, if such insurance existed, in an order filed 13 September 2004. The trial

court also ordered defendant to "produce complete copies of all liability insurance policies that have any conceivable coverage in this case," and deferred ruling on defendant's motions to dismiss.

Defendant provided plaintiff with, *inter alia*, a certified copy of its general liability insurance policy for the coverage period 1 July 2002 through 1 July 2003. Plaintiff filed a second amendment to his complaint on 29 September 2004, alleging that defendant had liability insurance that was applicable to this case and that defendant waived any governmental immunity by its purchase of insurance.

Plaintiff subsequently filed a motion for leave to file a third amendment to his complaint, which the trial court granted. Plaintiff filed a third amendment to his complaint on 16 November 2004, amending two paragraphs of the complaint.

Defendant filed renewed motions to dismiss plaintiff's complaint under Rule 12(b)(1) and Rule 12(b)(6) on 2 November 2004, again raising the defense of sovereign immunity. The trial court denied defendant's motions to dismiss in an order filed 22 November 2004, finding that defendant waived sovereign immunity by the purchase of general liability insurance coverage for the period 1 July 2002 through 1 July 2003. Defendant appeals.

Defendant argues that it has sovereign immunity from plaintiff's action. Specifically, defendant argues plaintiff's alleged injuries were not caused by an occurrence, as defined by its general liability insurance policy, but rather were caused by the intentional, discretionary acts of its building inspector, acts for which defendant has sovereign immunity. Plaintiff argues, and the trial court found, that defendant waived sovereign immunity by its purchase of general liability insurance coverage for the period 1 July 2002 through 1 July 2003. Plaintiff argues his injuries were caused by an occurrence, which was covered by defendant's general liability insurance policy, and that defendant waived its sovereign immunity to the extent of that coverage.

The denial of a 12(b)(6) motion to dismiss for failure to state a claim is immediately appealable where the motion raises the defense of sovereign immunity. *Anderson v. Town of Andrews*, 127 N.C. App. 599, 601, 492 S.E.2d 385, 386 (1997). However, in *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 545 S.E.2d 243 (2001), our Court stated that "an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction[.]" *Id.* at 100, 545 S.E.2d at 245-46. Therefore, our Court held that the denial of a 12(b)(1) motion to dis-

miss for lack of subject matter jurisdiction is not immediately appealable, even where the defense of sovereign immunity is raised. *Id.* at 100, 545 S.E.2d at 246. Accordingly, we only review the trial court's denial of defendant's 12(b)(6) motion. "The question before a court considering a motion to dismiss for failure to state a claim is whether, if all the plaintiff's allegations are taken as true, the plaintiff is entitled to recover under some legal theory." *Toomer v. Garrett*, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002), *appeal dismissed and disc. review denied*, 357 N.C. 66, 579 S.E.2d 576 (2003)).

"It is a fundamental rule that sovereign immunity renders this state, including counties and municipal corporations herein, immune from suit absent express consent to be sued or waiver of the right of sovereign immunity." *Data Gen. Corp.*, 143 N.C. App. at 100, 545 S.E.2d at 246. However, a city or town may waive its sovereign immunity pursuant to N.C. Gen. Stat. § 160A-485(a) (2005), which provides:

> Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability.

An insurance policy is a contract and should be interpreted so as to effectuate the intent of the parties at the time the policy was issued. *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299, 524 S.E.2d 558, 563 (2000). To the extent possible, every word and provision of an insurance policy should be given effect. *Id.* However, ambiguous provisions and words should be construed in favor of the insured. *Id.* at 299-300, 524 S.E.2d at 563. An insurer's unilateral determination of the scope of its insurance policy's coverage is not binding. *Herndon v. Barrett*, 101 N.C. App. 636, 641, 400 S.E.2d 767, 770 (1991).

Defendant's general liability insurance contract provides that the Interlocal Risk Financing Fund of North Carolina "will pay those sums that [defendant] becomes legally obligated to pay as compensatory damages because of 'bodily injury' or 'property damage' to which this insurance applies." Defendant's general liability insurance policy further provides that "[t]his insurance applies to 'bodily injury' and 'property damage' only if: (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage ter-

ritory[.]' " Defendant's general liability insurance policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Finally, defendant's general liability insurance policy excludes from coverage " '[b]odily injury' or 'property damage' expected or intended from the standpoint of any insured."

Defendant's general liability insurance policy does not define the term "accident." However, as our Court has recently noted: " 'Nontechnical words are to be given their meaning in ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning.' " *McCoy v. Coker*, 174 N.C. App. 311, 315, 620 S.E.2d 691, 694 (2005) (quoting *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 95, 518 S.E.2d 814, 816-17 (1999), *disc. review denied*, 351 N.C. 350, 542 S.E.2d 205 (2000)). In *McCoy*, our Court quoted Black's Law Dictionary's definition of an accident in the context of insurance policies as " ' "an occurrence which is unforeseen, unexpected, extraordinary, either by virtue of the fact that it occurred at all, or because of the extent of the damage." ' " *McCoy*, 174 N.C. App. at 315, 620 S.E.2d at 694 (quoting Black's Law Dictionary 15 (8th ed. 2004) (citation omitted)).

In *McCoy*, the plaintiff filed suit against a county and its building inspector for property damage and personal injuries allegedly sustained when the building inspector failed to properly inspect work performed on the plaintiff's house and improperly issued a certificate of occupancy. *McCoy*, 174 N.C. App. at 312, 620 S.E.2d at 692-93. The defendants' motion for summary judgment based on sovereign immunity was denied because the defendants waived sovereign immunity by the purchase of insurance. *Id.* at 313, 620 S.E.2d at 693.

The language of the general liability insurance policy at issue in *McCoy* was substantially the same as the language of the policy at issue here. The policy at issue in *McCoy* covered damages for "bodily injury" or "property damage" caused by an "event," which the policy defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 314-15, 620 S.E.2d at 694. As discussed above, our Court defined "accident" according to its ordinary meaning. *Id.* at 315, 620 S.E.2d at 694.

In *McCoy*, our Court analogized several cases in which the insurance policies at issue defined "occurrence" as " 'an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from*

the standpoint of the insured.' " *McCoy*, 174 N.C. App. at 316, 620 S.E.2d at 694-95 (quoting *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 694, 340 S.E.2d 374, 379 (1986)). In so doing, our Court in *McCoy* focused upon "whether the *damages incurred* were expected or intended by the insured in light of the conduct in question[]" rather than on whether the underlying conduct was accidental. *McCoy*, 174 N.C. App. at 316, 620 S.E.2d at 695 (emphasis added). Our Court stated the applicable test for determining whether the plaintiff's damages were "neither expected nor intended from the standpoint of the insured[,]" and thus were caused by an "accident":

> "[t]he test should be a 'subjective one, from the standpoint of the insured, and not an objective one asking whether the insured "should have" expected the resulting damage,' i.e., whether the resulting damage was unexpected or unintended, not whether the act itself was unintended. An 'expected or intended' exclusion applies only 'if the resulting injury as well as the act were intentional.' "

McCoy, 174 N.C. App. at 316, 620 S.E.2d at 695 (quoting *Washington Housing Auth. v. N.C. Housing Authorities*, 130 N.C. App. 279, 285, 502 S.E.2d 626, 630, *disc. review denied*, 526 S.E.2d 477 (1998)).

In *McCoy*, we applied the test set forth in *Washington Housing Authority* to hold that while the building inspector's actions in inspecting the plaintiff's property and issuing a certificate of occupancy were intentional, the plaintiff's resulting property damage and bodily injuries were neither intended nor expected. *McCoy*, 174 N.C. App. at 316-17, 620 S.E.2d at 695. Accordingly, the plaintiff's damages were caused by an "accident," and therefore an "event," which was covered by the defendants' insurance policy. Our Court held the defendants waived sovereign immunity to the extent of the applicable insurance coverage. *Id.*

The insurance policy at issue in *McCoy* did not contain the following language within its definition of occurrence: "[W]hich results in bodily injury or property damage neither expected nor intended from the standpoint of the insured[.]" *McCoy*, 174 N.C. App. at 317, 620 S.E.2d at 695. Similarly, the policy at issue in this case does not include, within its definition of "occurrence," the language quoted above. However, defendant's general liability insurance policy does exclude from coverage " '[b]odily injury' or 'property damage' expected or intended from the standpoint of any insured."

In *Holz-Her U.S., Inc. v. U.S. Fid. & Guar. Co.*, 141 N.C. App. 127, 539 S.E.2d 348 (2000), this Court also applied the test set forth in *Washington Housing Authority* to the determination of whether damages were caused by an "occurrence." *Id.* at 129-30, 539 S.E.2d at 350-51. In *Holz-Her*, our Court cogently set forth the proper focus of the inquiry:

> The ultimate focus is on the *injury*, i.e., whether it was expected or intended, not upon the act and whether it was intended. Even intentional acts can trigger a duty to defend, so long as the injury was "not intentional or substantially certain to be the result of the intentional act."

Holz-Her, 141 N.C. App. at 129, 539 S.E.2d at 350 (internal citations omitted).

In the case before us, as in *McCoy*, *Holz-Her* and *Washington Housing Authority*, in determining whether plaintiff's alleged injuries were caused by an "occurrence," the focus should be on whether plaintiff's damages were unexpected and unintended. In other words, we should not focus on the nature of defendant's alleged precedent acts of negligence in determining whether plaintiff's alleged damages were caused by an 'occurrence." Plaintiff alleged he was

> severely injured, when he slipped on the unprotected floor while walking towards the fryer. He fell and slid towards the fryer, feet first. His feet struck the unrestrained Pitco Friolator Model #35C, causing it to tip over. The fryer toppled over on top of him, spilling hot grease over his torso, arms and legs. Plaintiff . . . sustained second and third degree burns over his torso, arms and legs, while performing his job duties as a bartender.

Such a sequence of events clearly was "unforseen" and "unexpected" pursuant to Black's Law Dictionary's definition of an "accident." Additionally, plaintiff's damages were unexpected and unintended from defendant's standpoint. If anything, plaintiff's damages in the present case were more unexpected than the plaintiff's damages in *McCoy* where the plaintiff was the homeowner who suffered damages as a result of the defendants' negligent inspection of her home. In the present case, it was clearly unintended and unexpected that a third party occupant of the building would suffer damages as a result of defendant's allegedly negligent inspection. Therefore, we hold that

defendant's general liability insurance policy covers plaintiff's alleged injuries and defendant has waived its sovereign immunity to the extent of the coverage. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

Defendant's reliance on *City of Wilmington v. Pigott*, 64 N.C. App. 587, 307 S.E.2d 857 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 650 (1984) is unpersuasive. In *Pigott*, the City of Wilmington's chief building inspector informed the plaintiffs that two greenhouses on their property did not conform to the city building code. *Id.* at 587, 307 S.E.2d at 858. The building inspector gave the plaintiffs thirty days in which to remove the greenhouses and the plaintiffs complied by removing them. *Id.* Subsequently, the building inspector informed the plaintiffs that if the greenhouses were less than 400 square feet, they would be allowed. The plaintiffs then filed suit against the City of Wilmington for damages for the loss of their greenhouses, alleging their greenhouses met the requirements of the building code. *Id.*

The City of Wilmington had purchased liability insurance, but its insurance company denied liability for the plaintiffs' claims. *Id.* The City of Wilmington filed a motion for summary judgment which the trial court denied. *Id.* at 588, 307 S.E.2d at 858. The City of Wilmington then filed an action for declaratory judgment and the trial court found that the City of Wilmington's insurance policy covered the plaintiffs' claims for damages. *Id.*

The insurance policy at issue in *Pigott* was similar to the policy in the case before us in that it covered damages for "bodily injury" or "property damage" caused by an "occurrence," which it defined as an "accident." *Id.* at 588, 307 S.E.2d at 858-59. In reversing the trial court, the Court held as follows:

> We cannot label [the building inspector's] order to the [plaintiffs] to remove their greenhouses an "accident." The decision did not happen by chance and was not unexpected, unusual or unforseen. It was certainly intended by the City that [the] chief building inspector . . . would exercise his discretion to make these sorts of decisions as he saw fit. While [the building inspector] may have mistakenly or erroneously interpreted the Wilmington building code, his conduct did not amount to an "accident." Since there was no showing at trial that the act of the City constituted an "accident," we find that there was no

"occurrence" within the meaning of the multi-peril insurance policy.

Id. at 589, 307 S.E.2d at 859.

In determining the plaintiffs' injuries were not caused by an occurrence, the Court appeared to focus on the nature of the precedent acts of the building inspector rather than on the damages suffered by the plaintiffs. However, in light of *McCoy*, *Holz-Her* and *Washington Housing Authority*, this was an improper focus. We find the test articulated in *McCoy*, *Holz-Her* and *Washington Housing Authority* to be more persuasive on the facts in the present case. Additionally, even if we were unable to conclusively determine whether plaintiff's damages were caused by an "accident," we are required to construe any ambiguities within an insurance policy in favor of the insured. *McCoy*, 174 N.C. App. at 317, 620 S.E.2d at 695; G*aston County Dyeing Machine Co.*, 351 N.C. at 299-300, 524 S.E.2d at 563.

Defendant also attempts to argue the trial court erred by denying defendant's motions to dismiss based upon a lack of proximate cause between defendant's alleged negligence and plaintiff's alleged injuries. However, because defendant failed to assign error to this issue in the record on appeal, we do not review this argument. N.C.R. App. P. 10(a).

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. HASSELL LEE CORUM

No. COA05-443

(Filed 21 February 2006)

1. Robbery— threat to victim—evidence sufficient

There was sufficient evidence to support a conviction for the armed robbery of a store where an accomplice entered separately and began talking to the clerk, and defendant entered and threatened the accomplice with a knife to get the victim to open the

cash drawer. The defendant was just across a counter when he brandished the knife, and the jury could have inferred that defendant posed a danger to the life of the victim.

2. Evidence— prior crimes and bad acts—common plan or scheme

The trial court did not err in an armed robbery prosecution by admitting evidence of a prior robbery where the two robberies occurred in neighboring counties at night within a two-day period, both robberies occurred at convenience stores, and the perpetrator of both wore gloves and a blue hood or mask of similar description.

3. Criminal Law— question from jury—written ex parte response

The trial court did not err in an armed robbery prosecution by answering a question from the jury with a written response delivered by a bailiff. Defendant explicitly approved the procedure and defense counsel approved of the substance of the communication.

Appeal by defendant from judgment entered 7 September 2004 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Court of Appeals 28 November 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General T. Lane Mallonee, for the State.

John T. Hall for defendant.

McGEE, Judge.

Hassell Lee Corum (defendant) was convicted of robbery with a dangerous weapon and sentenced to a term of 132 months to 168 months in prison. At trial, William Earl Menikheim (Menikheim) testified that in October or November 2003, he and defendant spent part of one day drinking alcohol together at defendant's house. Menikheim further testified that he and defendant decided to drive in Menikheim's vehicle to get more beer around 8:00 p.m. or 9:00 p.m. While they were driving to get more beer, they decided to rob Hilltop Grocery and Hardware (the store) in Guilford County.

Menikheim testified that he parked his vehicle beside the store and went inside "to get a beer and see who was working." Menikheim returned to his vehicle and told defendant that "there was an older

lady working and nobody else was in [the store]." Menikheim testified he and defendant then left the store, drove around a little while, and returned to the store.

Menikheim testified he let defendant "out [of the car] down the road" from the store. Menikheim then drove to the store and parked in front. Menikheim entered the store and engaged the clerk in conversation. Menikheim told the clerk he was waiting for his brother. Menikheim testified he waited about five or ten minutes. He further testified as follows:

> [Defendant] came in. You know. Held her up with the knife. Told her that—to open up the cash register. And she was hesitant for a little while. So he turned the knife onto me and said, if she don't open it, I'll cut him. Then she opened up the drawer. [Defendant] grabbed the cash drawer and then [ran] out [of] the store.

Menikheim also testified that defendant wore a ski mask and tan gloves and used a big "chef cook knife" during the robbery.

Menikheim testified that after the robber left the store, the clerk asked him to "run out" to see what vehicle the robber was driving. Menikheim went outside and saw defendant run behind the store. Menikheim returned and told the clerk the robber was on foot. Menikheim told the clerk he had been drinking and did not want to talk to the police; Menikheim then left in his car. Menikheim testified he picked up defendant and the two of them got some beer and returned to defendant's house.

Cynthia Crouse (Ms. Crouse) testified she was working as a clerk at the store on 3 November 2003. Ms. Crouse testified a man came into the store, bought a beer and told her he was waiting for his brother. Ms. Crouse said the man waited a few minutes and then left. Ms. Crouse said the man returned and carried on a conversation with her. Ms. Crouse further testified that

> a few minutes later this guy came running in with a hooded—or a hood on and knife. And said open the drawer. And I sort of hesitated, you know, a minute. And he said open the drawer. You want me to take out your buddy over here, like that, and shook the knife at him. And then kind of—well, doesn't matter what it seemed to me. But anyway, then I opened the drawer, and he reached in and grabbed the cashier drawer, took it out, and left.

Ms. Crouse testified that the robber was just across the counter from her when he brandished the knife at Menikheim. Ms. Crouse testified the robber had on a "dark blue, hood jacket and covered his face[,]" and that the robber wore white gloves.

Andrea Azelton (Azelton), an investigator with the Randolph County Sheriff's Office, testified she searched defendant's house on 21 November 2003 and found a blue ski mask and a work glove in an air conditioning vent in defendant's house.

Clyde Staley (Staley) testified concerning a prior robbery allegedly committed by defendant. Staley testified that he was working as a clerk at the Quick Chek convenience store in Franklinville, North Carolina on 1 November 2003. Staley testified that a man wearing a blue ski mask and tan gloves and brandishing a large knife came into the Quick Chek convenience store on the night of 1 November 2003. The man walked up to the counter and "demanded the money or [Staley's] life." The man grabbed the money and left. Staley identified defendant as the man who had robbed him on 1 November 2003.

I.

[1] Defendant first argues the trial court erred by denying his motion to dismiss the charge of robbery with a dangerous weapon because there was insufficient evidence that defendant endangered or threatened the life of Ms. Crouse by the use of a dangerous weapon. Defendant contends that because the use of the knife was a "sham" and was directed at Menikheim, Ms. Crouse's life was not endangered or threatened. The elements of robbery with a dangerous weapon are "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). *See also*, N.C. Gen. Stat. § 14-87(a) (2005).

In deciding a motion to dismiss for insufficiency of the evidence, a trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). If substantial evidence exists, the motion to dismiss should be

denied. *Id.* at 584, 461 S.E.2d at 663. On appeal, we must view the evidence in the light most favorable to the State, drawing all inferences in the State's favor. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). It is within the province of the jury to resolve any contradictions and discrepancies in the evidence. *Id.* at 379, 526 S.E.2d at 455.

Defendant in the case before us contends he did not use the knife to endanger or threaten the life of Ms. Crouse. In *State v. Moore*, 279 N.C. 455, 183 S.E.2d 546 (1971), the defendant was convicted of armed robbery. *Id.* at 457, 183 S.E.2d at 547. The State presented testimony from Grover Lowery (Lowery) that the defendant walked up to Lowery's truck with a knife in his hand, demanded money, and took money from Lowery's pocket. *Id.* at 456, 183 S.E.2d at 547. Lowery further testified the defendant demanded Lowery's billfold, and Lowery told the defendant he did not have a billfold. *Id.* Lowery then began to close the door of his truck and the defendant struck at Lowery with the knife. However, the defendant struck the glass with the knife and Lowery was able to get away. *Id.* at 456-57, 183 S.E.2d at 547.

Lowery also testified he was not scared or fearful for his life during the robbery. *Id.* at 457, 183 S.E.2d at 547. On appeal, the defendant argued that Lowery's lack of fear negated the defendant's guilt. *Id.* However, our Supreme Court held that "[t]he jury might infer that one who engages in the perpetration of a robbery by means of an opened knife intends to use the knife to inflict injury to the extent necessary or apparently necessary to accomplish his purpose." *Id.* at 459, 183 S.E.2d at 548. Therefore, the Court upheld the defendant's conviction. *Id.*

Likewise, in the present case, the jury could have inferred that defendant posed a danger to the life of Ms. Crouse. Ms. Crouse testified that defendant "shook the knife at [Menikheim]" and threatened to "take out [Menikheim]" if Ms. Crouse did not open the cash drawer. Menikheim also testified that defendant "turned the knife onto [Menikheim]" and defendant said he would "cut [Menikheim]" if Ms. Crouse did not open the cash drawer. This evidence was sufficient to enable the jury to infer that Ms. Crouse's life was endangered and threatened by defendant's use of the knife.

The present case is also analogous to *State v. Thomas*, 85 N.C. App. 319, 354 S.E.2d 891 (1987). In *Thomas*, the defendant was convicted of two counts of robbery with a dangerous weapon. *Id.* at

319-20, 354 S.E.2d at 892. The evidence showed that Mr. and Mrs. Nicoll encountered the defendant as they walked toward their apartment building. *Id.* at 320, 354 S.E.2d at 892. While Mrs. Nicoll stood about one foot away from Mr. Nicoll, the defendant held a shotgun about nine inches from Mr. Nicoll's face and reached for Mr. Nicoll's notebook. When Mr. Nicoll said he had no money there, the defendant hit Mr. Nicoll in the face and Mr. Nicoll fell to the ground. The defendant then straddled Mr. Nicoll and took Mr. Nicoll's wallet and watch. *Id.*

Mrs. Nicoll went toward her husband, and her purse slipped off her shoulder onto her arm. The defendant took Mrs. Nicoll's purse and left. The defendant "did not strike Mrs. Nicoll, never pointed the gun at her and never spoke to her." *Id.*

On appeal, the defendant argued there was insufficient evidence he robbed Mrs. Nicoll with a dangerous weapon because there was no evidence he took Mrs. Nicoll's purse by threatening or endangering her life with a firearm. *Id.* at 321, 354 S.E.2d at 892-93. However, our Court held as follows:

> [The] [d]efendant's assault of Mr. Nicoll in order to take [Mr. Nicoll's] property spoke louder than any words of threat could have spoken to Mrs. Nicoll.
>
> Mrs. Nicoll was aware of [the] defendant's taking her purse from her arm; she did not resist. She had been standing about a foot from [Mr. Nicoll] during [the] defendant's assault upon [Mr. Nicoll]. While standing there, [Mrs. Nicoll] had seen [the] defendant reach for [Mr. Nicoll's] notebook[,] then knock [Mr. Nicoll] to the ground. [Mrs. Nicoll] had then seen [the] defendant take [Mr. Nicoll's] watch and wallet. It is clear from this evidence that [the] defendant made a threat to Mrs. Nicoll's life.

Id. at 321-22, 354 S.E.2d at 893.

In the present case, defendant similarly did not verbally threaten Ms. Crouse's life, and did not waive the knife at Ms. Crouse. However, defendant did threaten Menikheim's life, which caused Ms. Crouse to open the cash drawer. Additionally, Ms. Crouse testified defendant was just across the counter from her when he brandished the knife at Menikheim. When viewed in the light most favorable to the State, this evidence was sufficient to support a verdict of guilty of robbery with a dangerous weapon. Therefore, we overrule defendant's assignment of error.

II.

[2] Defendant next argues that in violation of N.C. Gen. Stat. § 8C-1, Rule 404(b), the trial court erred by allowing the State to introduce evidence that defendant committed a prior robbery. Specifically, defendant argues there was "insufficient evidence of relevant and unusual facts common to both the charge on trial and the prior alleged act." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

"Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that [a] defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002). In order for evidence to be admissible under Rule 404(b), it "must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if requested, must be coupled with a limiting instruction." *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992).

In the present case, the State argues the evidence was admissible under Rule 404(b) to show that a common scheme or plan existed between the two crimes and to show the identity of defendant. The State also argues there were sufficient similarities between the two crimes to indicate defendant committed both crimes. We agree.

"[E]vidence that [a] defendant committed similar acts which are not too remote in time may be admitted to show that these acts and those for which the defendant is being tried all arose out of a common scheme or plan on the part of the defendant." *State v. Rosier*, 322 N.C. 826, 828, 370 S.E.2d 359, 360-61 (1988). Also, evidence of a prior bad act is admissible to establish the identity of a defendant. N.C. Gen. Stat. § 8C-1, Rule 404(b); *State v. Gary*, 348 N.C. 510, 521, 501 S.E.2d 57, 64-65 (1998). However, in order to be relevant, "there must be shown some unusual facts present in both crimes or particularly similar acts which would indicate that the same person commit-

ted both crimes." *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983).

Defendant's alleged robbery of the Quick Chek convenience store was sufficiently similar to the charged robbery at issue in the case before us to allow admission of Staley's testimony. The robberies occurred in neighboring counties at night within a two-day period. Both robberies occurred at convenience stores. Also, the perpetrator of both robberies wore gloves and a blue hood or mask of similar description. Accordingly, the trial court did not err by allowing Staley's testimony and we overrule this assignment of error.

Although defendant attempts to argue that the probative value of the evidence concerning the Quick Chek convenience store robbery was substantially outweighed by the danger of unfair prejudice, defendant does not allege any prejudice. Additionally, defendant did not assign error to this issue in the record on appeal, and we do not review it. N.C.R. App. P. 10(a).

III.

[3] Defendant argues the trial court erred when it "directed the bailiff to conduct *ex parte* communication of instructions to the jury." N.C. Gen. Stat. § 15A-1234(d) (2005) directs that "[a]ll additional instructions must be given in open court and must be made a part of the record." N.C. Gen. Stat. § 15A-1236(c) (2005) states:

> If the jurors are committed to the charge of an officer, he must be sworn by the clerk to keep the jurors together and not to permit any person to speak or otherwise communicate with them on any subject connected with the trial nor to do so himself, and to return the jurors to the courtroom as directed by the judge.

In *State v. Gay*, 334 N.C. 467, 434 S.E.2d 840 (1993), the defendant argued the trial court erred by directing the bailiff to inform the jurors they were on break and they should continue to abide by the trial court's earlier instructions. *Id.* at 482, 434 S.E.2d at 848. The defendant's attorney approved of this procedure and declined the opportunity to be heard on the matter. *Id.* The Court held the subject matter of the communication did not amount to an instruction as to the law and did not relate to the defendant's guilt or innocence. The Court also held that the subject matter of the communication did not implicate the defendant's right of confrontation. *Id.* The Court emphasized the defendant's approval of the shorthand procedure and found no reversible error. *Id.* at 482-83, 434 S.E.2d at 848.

In the present case, the jury delivered the following written question to the trial court through the bailiff: "Was photo of [defendant] included in lineup for Ms. Crouse?" Defendant's counsel requested the trial court to instruct the jurors to "rely on their own recollections" and the trial court agreed. The trial court said it would prefer to send a written response to the jurors rather than having the jurors return to the courtroom, and asked defendant's counsel and the State if they had any objections to that procedure.

Both defendant's counsel and the State agreed to the shorthand procedure. The trial court then had defendant brought into the courtroom to make certain defendant had no objection to the shorthand procedure. Defendant's counsel consulted with defendant and defendant's counsel said: "Your Honor, [defendant] is satisfied with that way of handling it." The trial court then wrote its response on the same piece of paper on which the jury's question was written, as follows: "You must rely on your own recollection as to what the evidence showed." The trial court instructed the bailiff to deliver the note to the jury.

As in *Gay*, the substance of the communication in the present case did not implicate defendant's right of confrontation. As in *Gay*, defendant in the present case explicitly approved of the procedure. Moreover, it is clear that defendant's counsel approved of the substance of the communication because defendant's counsel requested the trial court to make the instruction to the jury. Accordingly, we find no reversible error and overrule this assignment of error.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. JAMES PRENTICE ROBERTS, DEFENDANT

No. COA05-288

(Filed 21 February 2006)

1. Sexual Offenses— first-degree—failure to instruct on acting in concert or aiding and abetting—failure to show defendant personally employed or displayed dangerous or deadly weapon

The trial court erred by concluding that the evidence was sufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant committed first-degree sexual offense, and the case is remanded for entry of judgment against defendant for second-degree sexual offense, because: (1) the jury was instructed it could find defendant guilty of first-degree sexual offense only if he employed or displayed a dangerous or deadly weapon; (2) without an instruction on acting in concert or the theory of aiding and abetting, the evidence must support a finding that defendant personally employed or displayed a dangerous or deadly weapon in the commission of the sexual offense; (3) there was no evidence at trial that defendant ever, personally, employed or displayed a dangerous weapon during the time he was in the victim's apartment; (4) all the testimony at trial established that another man held the shotgun throughout the incident; and (5) the jury's verdict is recognized as a verdict of guilty of second-degree sexual offense.

2. Kidnapping— second-degree—sufficiency of evidence

The trial court did not err by concluding that the evidence was sufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant committed two counts of second-degree kidnapping, because although the trial court failed to give an instruction permitting the jury to rest a verdict of guilt on either acting in concert or aiding and abetting, the evidence at trial was sufficient to establish that: (1) the removal of one of the victims to the bathroom and the binding of his hands were not acts necessarily inherent in the commission of the other felonies of robbery, sexual offense, and burglary; and (2) after defendant sexually assaulted another victim, her hands were bound and she was left tied up.

3. Conspiracy— first-degree burglary—robbery with dangerous weapon—separate conspiracies

The trial court did not err by concluding that the evidence was sufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant committed two separate conspiracies to commit first-degree burglary and robbery with a dangerous weapon, because: (1) the State presented evidence showing the first conspiracy was formed on the evening of 15 December 2002 when defendant agreed with two others to rob someone, and there was no evidence that this agreement consisted of more than that of robbing someone on that night; and (2) the mere fact that defendant was involved in a similar crime the next night does not indicate the two crimes were committed as part of the agreement made on 15 December 2002.

Appeal by defendant from judgments dated 4 May 2004 by Judge Knox V. Jenkins in Cumberland County Superior Court. Heard in the Court of Appeals 19 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

BRYANT, Judge.

James Prentice Roberts (defendant), appeals a judgment dated 4 May 2004, entered consistent with jury verdicts finding him guilty of: two counts of first degree burglary; two counts of robbery with a firearm; two counts of conspiracy to commit the offenses of first degree burglary and robbery with a dangerous weapon; one count of first degree sexual offense; and two counts of second degree kidnapping.[1] For the reasons below, we vacate defendant's conviction on first degree sexual offense, remanding to the trial court for an entry of judgment against defendant on second degree sexual offense, and find no error regarding defendant's other convictions.

Facts

The State's evidence tended to show that on 15 December 2002, defendant was involved in the robbery and burglary of Jesus and

1. The trial court arrested judgment on a jury verdict of first degree kidnapping as to Alison Kilbourn and entered judgment for second degree kidnapping.

Erika Vega-Mendoza at their apartment. That evening, defendant and two other men discussed robbing someone and they drove to the Morganton Place apartment complex in Fayetteville, North Carolina. It was agreed defendant would stay in the car to act as a lookout and blow the horn if he saw anything suspicious while the other two men broke into an apartment. At approximately 11:00 p.m., Erika responded to a knock at the door to their apartment and was met by a man requesting to use the telephone. Another man was standing outside the doorway with a mask drawn over his face. Both men pushed their way into the apartment and the masked man pulled out a shotgun. Erika and Jesus were tied up and Erika was forced to remove her clothes and perform fellatio on the masked man. Both men gathered items of value from the apartment and then left the room.

The State further presented evidence that defendant took an active part in another burglary/robbery on the night of 16 December 2002. That night, Richard Waddell was approaching the apartment of his girlfriend, Alison Kilbourn when three African-American men came up to him and asked if they could use his telephone. Waddell entered Kilbourn's apartment and returned outside with a cordless phone for the men to use. The men returned the phone to Waddell after attempting to make a call and as Waddell went back into Kilbourn's apartment, the men forced their way through the door. One of the men pulled a mask down over his face and pulled out a shotgun. Kilbourn was led to her bedroom by a man she identified as defendant. Kilbourn testified defendant made her undress and forced her to perform fellatio upon him. The men tied up both Waddell and Kilbourn and Waddell was taken into the bathroom and placed into the bathtub. The men then left, removing several items of value from the apartment, including Waddell's wallet.

Procedural History

On 19 May 2003, the Cumberland County Grand Jury returned three indictments charging defendant with various crimes. The first (02 CRS 67387) and second (02 CRS 67388) indictments charged defendant with offenses committed against Alison Kilbourn and Richard Waddell on 16 December 2002: first degree burglary of Kilbourn's apartment; robbery with a firearm; first degree sexual offense against Kilbourn; first degree kidnapping of Kilbourn; second degree kidnapping of Waddell; and conspiracy to commit the offenses of first degree burglary and robbery with a firearm. The third indictment (02 CRS 67389) charged defendant with offenses committed

against Jesus and Erika Vega-Mendoza on 15 December 2002: first degree burglary of their apartment; robbery with a firearm; assaulting Jesus with a deadly weapon inflicting serious injury; and conspiracy to commit the offenses of first degree burglary and robbery with a dangerous weapon.

The case came on for trial at the 26 April 2004 Criminal Term of the Cumberland County Superior Court, the Honorable Knox V. Jenkins, presiding. Prior to trial, an order was entered granting the State's motion to join the charges in the three indictments for trial. On 4 May 2004, the jury returned verdicts finding defendant not guilty of the charge of assaulting Jesus with a deadly weapon inflicting serious injury and guilty of all of the remaining offenses charged in the three indictments. The trial court arrested judgment on the verdict of guilty of first degree kidnapping of Kilbourn, and entered judgment for second degree kidnapping. Defendant appeals.

Defendant raises the issues of whether the evidence was sufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant: (I) committed first degree sexual offense; (II) committed two counts of kidnapping; and (III) committed two counts of conspiracy.

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Scott, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (internal citations and quotations omitted). The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires

that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed. *Presnell v. Georgia*, 439 U.S. 14, 16, 58 L. Ed. 2d 207, 211 (1978).

I

[1] Defendant first argues there was insufficient evidence to support the jury's guilty verdict on first degree sexual offense. Section 14-27.4 of the North Carolina General Statutes states that a person is guilty of first degree sexual offense if the person engages in a sexual act:

> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person; or
>
> c. The person commits the offense aided and abetted by one or more other persons.

N.C. Gen. Stat. § 14-27.4(a)(2) (2005). In its charge to the jury, the trial court instructed that the jury may find defendant guilty of first degree sexual offense:

> [I]f you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in a sexual act with the victim, and that he did so by force or threat of force, and that this was sufficient to overcome any resistance which the victim might make, and that the victim did not consent and it was against her will, and that the defendant employed or displayed a weapon, it would be your duty to return a verdict of guilty of first degree sexual offense.

The trial court then instructed the jury on the three elements of the lesser included offense of second degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.5.

However, the trial court did not instruct the jury that they may find defendant guilty of first degree sexual offense under either the theory of acting in concert or aiding and abetting. In the absence of an instruction permitting the jury to convict defendant on any theory of vicarious liability, the State was required to prove defendant per-

sonally committed each element of first degree sexual offense. *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510-11 (1996) ("[I]n the absence of an acting in concert instruction, the State must prove that the defendant committed each element of the offense. Thus, even where the evidence is sufficient to support a conviction . . . on a theory of . . . acting in concert, the conviction cannot be upheld absent a jury charge to that effect."); *State v. Cunningham*, 140 N.C. App. 315, 321, 536 S.E.2d 341, 346 (2000) ("When no such instruction is submitted to the jury, a defendant may not be convicted under a theory of constructive breaking. Instead, the State is required to prove that the defendant personally committed the breaking.").

The jury was instructed it could find defendant guilty of first degree sexual offense only if he employed or displayed a dangerous or deadly weapon. Without an instruction on acting in concert or the theory of aiding and abetting, the evidence must support a finding that defendant personally employed or displayed a dangerous or deadly weapon in the commission of the sexual offense. There was no evidence at trial that defendant ever, personally, employed or displayed a dangerous weapon during the time he was in Kilbourn's apartment. All the testimony at trial established another man held the shotgun throughout the incident. The evidence is insufficient to permit a reasonable jury to convict defendant of first degree sexual offense.

However, when viewed in the light most favorable to the State, the evidence was sufficient to prove defendant committed the lesser included offense of second degree sexual offense. Kilbourn identified defendant as the man who forced her to perform fellatio.

> Because in finding defendant . . . guilty of a first degree sexual offense the jury necessarily found as fact all the elements constituting second degree sexual offense, and the evidence is insufficient on the element which would make it a first degree offense, the verdict of guilty of a first degree sexual offense must necessarily be viewed by this Court as a verdict of guilty of a second degree sexual offense.

State v. Barnette, 304 N.C. 447, 469, 284 S.E.2d 298, 311 (1981). We therefore recognize the jury's verdict as a verdict of guilty of second degree sexual offense, vacate the judgment imposed upon the verdict of first degree sexual offense and remand to the lower court to impose a judgment upon a verdict of second degree sexual offense.

II

[2] Defendant next argues the evidence was insufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant committed the crimes of second degree kidnapping of Kilbourn and second degree kidnapping of Waddell. Section 14-39 of the North Carolina General Statutes defines second degree 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.
>
> (b) . . . If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree . . . .

N.C. Gen. Stat. § 14-39 (2005). The restraint involved in the offense of kidnapping must not be the restraint that is an inherent, inevitable element of another felony such as armed robbery or rape. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Similarly, the removal element of kidnapping must be an asportation that is not an inherent part of the commission of another felony such as armed robbery. *State v. Irwin*, 304 N.C. 93, 102-03, 282 S.E.2d 439, 446 (1981). However, "[a]sportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape." *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987).

In the instant case, the jury was instructed that they may find defendant guilty of the kidnappings of Kilbourn and Waddell if they found defendant unlawfully confined, restrained or removed them from one place to another without their consent for the purpose of facilitating the commission of the felonies of burglary, robbery with a firearm and first degree sexual offense. However, as in Issue *I*, *supra*, the trial court failed to give an instruction permitting the jury to rest a verdict of guilt on either acting in concert or aiding and abetting.

Nevertheless, evidence at trial was sufficient to establish that the removal of Waddell to the bathroom and the binding of his hands were not acts necessarily inherent in the commission of the other felonies of robbery, sexual offense and burglary. Similarly, after defendant sexually assaulted Kilbourn, her hands were bound and she was left tied up. There was no specific testimony as to which of the three men tied up either Kilbourn or Waddell, only that they were tied up by the perpetrators and Waddell was led into the bathroom by two of the men and left in the tub. However, this is sufficient evidence to establish the restraint necessary beyond either the burglary, robbery or sexual offense. Furthermore, based on the evidence presented the jury could have reasonably concluded defendant was involved in tying up both Kilbourn and Waddell. Therefore, sufficient evidence exists to support the two counts of second degree kidnapping. This assignment of error is overruled.

III

[3] Defendant also argues the evidence was insufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant committed separate conspiracies. Defendant was charged with conspiring with others to commit the felonies of first degree burglary and robbery with a dangerous weapon against Waddell and Kilbourn. Defendant was also charged with conspiring with others to commit the felonies of first degree burglary and robbery with a dangerous weapon against Jesus and Erika Vega-Mendoza. Defendant asserts the State proved only the existence of a single conspiracy encompassing both incidents.

Conspiracy is "an 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." *State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 830 (1991). A single conspiracy may consist of a criminal confederation involving the commission of a series of different criminal offenses

and may even involve variation in the members of the conspiracy over a period of time. *State v. Fink*, 92 N.C. App. 523, 532, 375 S.E.2d 303, 308-09 (1989). Convicting and punishing a defendant for multiple counts of conspiracy when the evidence shows a conspiracy with some of the same people over a short period of time to commit a series of related crimes violates the defendant's state and federal constitutional right to be free from double jeopardy. *State v. Medlin*, 86 N.C. App. 114, 121, 357 S.E.2d 174, 178 (1987). However,

> [t]he question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury. The nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings are all factors that may be considered.

State v. Tirado, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004) (internal citations omitted).

Here, the State presented evidence showing the first conspiracy was formed on the evening of 15 December 2002 when defendant agreed with Rafael Purdie and Darrell Meyers to rob someone. There was no evidence that the agreement formed on 15 December 2002 consisted of more than that of robbing someone on that night. The mere fact that the defendant was involved in a similar crime the next night does not indicate the two crimes were committed as part of the agreement made on 15 December 2002. Viewing the evidence in the light most favorable to the State, evidence was presented allowing the jury to find that defendant was involved in two separate conspiracies. This assignment of error is overruled.

Vacated and remanded in part, no error in part.

Judges HUDSON and CALABRIA concur.

JAMES M. EVERETTE, JR. AND GLORIA EVERETTE, PLAINTIFFS v.
PATRICE A. COLLINS, DEFENDANT

No. COA04-1625

(Filed 21 February 2006)

1. Child Support, Custody, and Visitation— custody—best interest of child—primary physical custody with father

The trial court did not abuse its discretion in a child custody case by finding and concluding that it was in the minor child's best interest to award primary physical custody to plaintiff father, because: (1) defendant mother had serious medical complications and admitted that she is still blind, cannot drive, and cannot cook (except on good days); (2) at the 2004 court appearances, defendant could not read and was unable to walk without assistance; (3) defendant is currently unable to take care of her own needs as well as those of a five-year-old child; (4) defendant's health is uncertain as she attempts to recover from the effects of her stem cell transplant; (5) defendant's future plans as to providing care for herself or the minor child are unknown; and (6) plaintiff and his mother are presently providing a stable and healthy environment for the minor child.

2. Child Support, Custody, and Visitation— custody—physical placement with paternal grandmother

The trial court did not violate defendant mother's constitutional rights in a child custody case by granting physical placement with the minor child's paternal grandmother, because: (1) the custody action was between both natural parents and the trial court was careful to point out that no evidence was presented nor findings made as to the constitutional presumption both parents enjoyed; (2) using a best interest analysis, the trial court granted primary physical custody to plaintiff and specifically approved the current placement of the minor child in the home of plaintiff's mother; (3) plaintiff's mother was not granted any custodial rights; and (4) defendant, in addition to obtaining joint legal custody, was granted liberal visitation privileges as well as additional visitations as agreed upon by the parties.

Appeal by defendant from an order signed 2 July 2004 by Judge Thomas R. J. Newbern in Northampton County District Court. Heard in the Court of Appeals 15 June 2005.

Mitchell S. McLean for plaintiff-appellees.

Pritchett & Burch, PLLC, by Melissa L. Skinner, Lars P. Simonsen and Lloyd C. Smith, Jr., for defendant-appellant.

BRYANT, Judge.

Patrice A. Collins (defendant-mother) appeals from an order signed 2 July 2004 awarding James M. Everette, Jr. (plaintiff-father) primary physical custody of their minor child, D.J.E.[1] Plaintiff-father and defendant-mother were granted joint legal custody of D.J.E. The trial court order also "specifically approve[d] the current placement of [D.J.E.] in the home of the plaintiff's mother, Gloria Everette" (plaintiff-grandmother).

Plaintiff-father and defendant were married on 9 February 1998. The couple was separated in May 1998 and D.J.E. was born on 14 October 1998. In December 1998, defendant and D.J.E. left North Carolina for defendant to complete her military duty assignment without plaintiff-father. During that time, defendant and D.J.E. visited with plaintiffs every other weekend.

From June 1999 until 2001, defendant's mother and defendant's two children (D.J.E. and another child) lived with defendant in Fort Hood, Texas. For three months in 2000 and six months in 2001, D.J.E. stayed with plaintiff-grandmother in North Carolina. In September 2001, defendant, D.J.E. and her other child moved to New Mexico due to military reassignment.

In March 2002, defendant began having seizures and began to experience grand mal seizures in June 2002. During this time, plaintiff-father was stationed at Fort Carson, Colorado. Defendant allowed D.J.E. to stay with plaintiff-grandmother in Conway (Northampton County), North Carolina until defendant could control her seizures.

On 16 January 2003, defendant suffered an allergic reaction to her anti-seizure medication and went into a coma from which she awoke in March 2003. The allergic reaction caused severe burns over defendant's body and the stem cells in her eyes burned, which caused her blindness. Defendant began rehabilitation and resided in Maryland from May to July 2003 to receive further treatment for her condition. In late May 2003, defendant told plaintiffs she was coming to North Carolina to see D.J.E. When defendant arrived at plaintiff-grand-

1. Initials used throughout to protect the identity of the juvenile.

mother's home in Conway, she was informed plaintiff-father had taken D.J.E. to his home in Fayetteville. Defendant traveled to Fayetteville, but was not allowed to see D.J.E.

Shortly thereafter, plaintiffs filed a complaint for custody of D.J.E. and a Temporary Custody Order was entered granting plaintiffs temporary legal custody and placing D.J.E. with plaintiffs. In July 2003, defendant moved to Louisiana to reside with her mother and her other child. While there, she underwent several eye operations, including a stem cell transplant, from August 2003 through January 2004.

On 26 July 2004, a Custody Order was entered by Judge Thomas R. J. Newbern. Pursuant to the terms of the order, plaintiff-father and defendant were granted joint legal custody of D.J.E. Plaintiff was granted primary physical custody of D.J.E. and the trial court approved physical placement with plaintiff-grandmother. Defendant was granted reasonable visitation privileges which included every other weekend, one-half of the holiday periods, and two separate two-week periods during the summer. From this order, defendant appeals.

Defendant raises two issues on appeal: (I) whether the trial court erred in finding and concluding that it was in D.J.E.'s best interest to award primary physical custody to plaintiff; and (II) whether the trial court violated defendants constitutional rights by granting physical placement with plaintiff-grandmother.[2]

I

[1] Defendant argues the trial court's findings were not supported by competent evidence and that the trial court erred in concluding D.J.E.'s best interests were served by awarding joint legal custody to D.J.E.'s mother and plaintiff-father and physical custody to plaintiff-father. We disagree.

The findings of fact are conclusive on appeal if there is evidence to support them, even if evidence might sustain findings to the contrary. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). The evidence upon which the trial court relies must be substantial evidence and be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Pulliam*

2. Plaintiff-grandmother was dismissed as a party to this action by the trial court pursuant to defendant's motion to dismiss.

v. Smith, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998). Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal. *In re Mason*, 13 N.C. App. 334, 185 S.E.2d 433 (1971). The trial court's conclusions of law and orders will not be reversed if supported by the findings of fact. *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990). Based on competent evidence, the trial court found and defendant now challenges the following facts:

> 7. That [D.J.E.] has resided in the custody of the plaintiffs since the institution of this action.
>
> . . .
>
> 10. That defendant has suffered serious medical complications which have left her basically blind at this point and unable to care for the needs of [D.J.E.], who is five years old; the defendant was unable to walk in the courtroom without assistance.
>
> 11. That the defendant's living situation is uncertain at this time due to her medical condition.
>
> 12. That at this time the plaintiff, James M. Everette, Jr. can offer more stability for the child and has acted in the child's best interests; the minor child has resided with the plaintiff's mother, Gloria Everette, since May, 2002; during this time the child has resided in a safe, stable and wholesome environment, which has been conducive to the best interests of the child; the child is flourishing in this environment and is doing very well in all respects.
>
> 13. That the plaintiff, James M. Everette, Jr. has acted in the child's best interests and has visited the child every weekend since his return home from active military duty in Iraq; said plaintiff has placed his child in a stable environment which has been in the best interests and general welfare of his child, considering his continuing military service in Fayetteville, North Carolina.
>
> . . .
>
> 15. That the defendant is currently receiving medical treatment to assist her in her eyesight; however, she is still basically blind and unable to care for the needs of a five-year-old child.
>
> . . .

18. That the defendant had a lack of communication with Gloria Everette and the minor child between May, 2002 and the filing of this lawsuit; this was largely due to the defendant's medical condition; however, even considering her medial [sic] condition and other reasonable considerations, the defendant did not communicate with Gloria Everette or [D.J.E.] as much as she should have during that period; after the filing of the lawsuit the defendant did begin communicating more frequently and appropriately with Gloria Everette and [D.J.E.]

19. That since May, 2002 the defendant was unable to visit with [D.J.E.] except on occasions when the defendant was already in the area in connection with this lawsuit.

In addition to these challenged findings, the trial court made a finding of fact allowing defendant's motion to dismiss plaintiff-grandmother from this action, "as there has been no compelling evidence presented that would result in the defendant losing her constitutional presumptions as a parent." The trial court concluded that "plaintiff, James M. Everette, Jr., is a fit and proper person to have physical custody of [D.J.E.] and it would be in the best interests of the child to be in his physical custody." Further the trial court concluded that defendant is a "fit and proper person to have reasonable visitation privileges with the minor and it would be in the best interests of the child to have reasonable visitation with the defendant." *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984) ("[T]he best interest of the child is the polar star."); *Wilson v. Wilson*, 269 N.C. 676, 678, 153 S.E.2d 349, 351 (1967) ("The welfare of the child . . . is always to be treated as the paramount consideration[.]").

In the instant case, defendant admits she is still blind, cannot drive and cannot cook, except on "good days." At the 2004 court appearances, defendant could not read and was unable to walk without assistance. Defendant is currently unable to take care of her own needs as well as those of a five-year-old. Defendant's health is uncertain as she attempts to recover from the effects of her stem cell transplant. Consequently, defendant's future plans as to providing care for herself or D.J.E. are unknown. Plaintiff and his mother are presently providing a stable and healthy environment for D.J.E. On this record there is competent evidence to support the trial court's decision to grant plaintiff-father primary physical custody. This assignment of error is overruled.

II

[2] Defendant argues the trial court violated her constitutional rights by approving of D.J.E.'s physical placement with the paternal grandmother. Defendant claims this is a "backdoor" way to grant the paternal grandmother custody of D.J.E. We disagree.

The general standard of proof in a child custody case is by the greater weight of the evidence. *Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001). In a custody proceeding "an order for custody of a minor child entered . . . 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." N.C. Gen. Stat. § 50-13.2(a) (2005). In a custody dispute between two natural parents the "best interest of the child" test must be applied. *Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997). "Where there are unusual circumstances and the best interest of the child justifies such action, a court may refuse to award custody to [a parent.]" *Wilson* at 677, 153 S.E.2d at 351.

Here, the trial court indicated it used the "greater weight of the evidence" standard in reviewing the custodial rights of plaintiff and defendant. We are mindful of our recent and not so recent cases discussing the constitutionally protected status afforded parents in custody suits between **parents** and **nonparents** ("*Peterson* presumption") in which the trial court must use the clear and convincing standard of proof and not the greater weight of the evidence standard. *See, e.g.*, *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994)[3]; *David N. v. Jason N.*, 359 N.C. 303, 608 S.E.2d 751 (2005); *Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (2001); *Bennett v. Hawks*, 170 N.C. App. 426, 613 S.E.2d 40 (2005); *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997); and *Wilson* at 678, 153 S.E.2d at 351. However, we distinguish those cases here.

This custody action was between **both natural parents** and, as the trial court was careful to point out, no evidence was presented

3. In *Petersen*, the North Carolina Supreme Court found that in custody disputes between **parents** and **third parties**, parents have a constitutionally-protected paramount right to the custody, care, and control of their children. *Peterson v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). The Supreme Court based this principle on the presumption that a fit parent will act in the best interest of their child. *Brewer v. Brewer*, 139 N.C. App. 222, 229, 533 S.E.2d 541, 547 (2000). When the *Petersen* presumption is not implicated, the court must use the best interest of the child standard to determine the proper placement of the child. *See Jones v. Patience*, 121 N.C. App. 434, 440, 466 S.E.2d 720, 724 (1996).

nor findings made as to the constitutional presumption both parents enjoyed. The only finding in this regard was that "defendant has not committed any actions to cause her to lose her constitutional presumption for custody and her actions have not been neglectful toward the child." Instead, the trial court, using a best interest analysis, granted legal custody to plaintiff and defendant, granted primary physical custody to plaintiff and "specifically approve[d] the current placement of [D.J.E.] in the home of plaintiff's mother." Plaintiff's mother was not granted any custodial rights. Defendant, in addition to obtaining joint legal custody, was granted liberal visitation privileges: every other weekend, half the holidays and two separate two-week periods in the summer, as well as additional visitations with D.J.E. as agreed upon by the parties. Where, as here, the trial court granted joint legal custody to plaintiff-father and defendant, the natural parents, and primary physical custody to plaintiff-father, defendant has not been deprived of her constitutionally protected right to custody of D.J.E. This assignment of error is overruled.

Affirmed.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA v. NATHANIEL MARK UPSHUR

No. COA04-397

(Filed 21 February 2006)

1. Appeal and Error— writ of certiorari—effective appellate review—no trial transcript

Defendant is not entitled to a new trial on first-degree rape and assault with a deadly weapon inflicting serious injury charges even though he contends he is unable to obtain effective appellate review of the trial proceedings in the absence of the trial transcript, because: (1) defendant's appeal in 2000 is presented by writ of certiorari years after the entry of judgment in 1988 and where a transcript is simply not available due to no fault of the State; (2) neither due process nor equal protection require the granting of a new trial to a defendant when certain factual situations necessitate practical accommodation, including where tran-

scripts are no longer available and where there exists the presumption that he who had a lawyer at the trial had one who could protect his rights on appeal; and (3) defendant has made no assertion on appeal that he received ineffective assistance from his counsel at trial or regarding the steps taken to procure an appeal as of right despite the trial court's conclusion that trial counsel did not inform defendant of his appellate right or relevant time limits to exercise them, and appellate counsel does not fail to render effective assistance simply based on the fact that he cannot examine a transcript that is unavailable.

2. Appeal and Error— preservation of issues—failure to object—failure to argue plain error

The trial court did not err in a first-degree rape and assault with a deadly weapon inflicting serious injury case by transferring defendant's case from juvenile court to superior court even though he contends the probable cause determination was based in part on an alleged improperly admitted custodial statement based on the argument that defendant's stepfather, and not a parent, was present, because: (1) defendant failed to preserve this issue for appeal by presenting no objection to the trial court to the admission of his statement; and (2) a defendant waives plain error review by failing to specifically and distinctly contend the questioned judicial action amounted to plain error.

3. Sentencing— aggravated range—crimes especially heinous, atrocious, or cruel—*Blakely* error

The trial court erred by sentencing defendant in the aggravated range for the assault with a deadly weapon inflicting serious injury charge based upon a finding that the crime was especially heinous, atrocious, or cruel, and defendant is entitled to a new sentencing hearing on this charge, because defendant did not stipulate to the factor nor was it found by a jury beyond a reasonable doubt.

4. Rape— first-degree—short-form indictment—constitutionality

The short-form indictment used to charge defendant with first-degree rape was constitutional.

On writ of certiorari to review the judgments entered 23 February 1988 by Judge Thomas H. Lee in Durham County Superior Court. Heard in the Court of Appeals 14 November 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General William P. Hart, for the State.

Paul Pooley for defendant-appellant.

MARTIN, Chief Judge.

On 23 February 1988, Nathaniel Mark Upshur ("defendant") was sentenced to life imprisonment upon his conviction by a jury of first-degree rape and a consecutive term of ten years upon his conviction by the jury of assault with a deadly weapon inflicting serious injury. He entered a plea of no contest to first-degree murder and was sentenced to a concurrent term of life imprisonment for that offense. On 12 July 2000, this Court allowed defendant's petition for writ of *certiorari* to review his convictions of first-degree rape and assault with a deadly weapon inflicting serious injury. The judgment entered upon defendant's plea of no contest to first-degree murder is not the subject of this appeal.

On 16 May 2001, the court reporter determined that the tapes and notes from the trial, other than the probable cause and sentencing hearings, could not be located. In addition, defendant's trial attorney was unable to reconstruct the trial from his memory or locate his trial notes, the trial judge had passed away in the intervening years and his notes were unobtainable, and the exhibits from trial could not be located either in the Clerk of Superior Court's office or at the Durham Police Department. Defendant subsequently filed a motion in this Court for a new trial on the rape and assault charges. We held the motion in abeyance and remanded the matter to the trial court for a determination of whether trial counsel had informed defendant of his appellate rights and whether defendant had waived those rights.

The trial court conducted a hearing on 7 October 2002 and determined defendant (1) did not waive his right to appeal the rape and assault convictions as a part of his agreement to plead no contest to first-degree murder, and (2) defendant had not been informed by his trial counsel, prior to the entry of the no contest plea, of his appellate rights or the relevant time limits in which to exercise them. On 30 April 2003, this Court denied defendant's motion for a new trial and directed defendant to "set out the facts upon which his appeal is based, any defects appearing on the face of the record, and the errors he contends were committed at the trial" in accordance with this Court's holdings in *State v. Neely*, 21 N.C. App. 439, 440-41, 204 S.E.2d 531, 532 (1974) and *State v. Teat*, 22 N.C. App. 484, 206 S.E.2d 732,

cert. denied, 285 N.C. 667, 207 S.E.2d 765 (1974). On appeal, defendant asserts (I) he is entitled to a new trial on the rape and assault charges because he is unable to obtain effective appellate review of the trial proceedings in the absence of the trial transcript, (II) the trial court erred by transferring defendant's case from juvenile court to superior court because the probable cause determination was based in part on improperly admitted evidence, (III) the trial court erred by sentencing defendant in the aggravated range for the assault charge, and (IV) the short-form indictment used to charge him with first-degree rape was constitutionally infirm. After careful consideration of each of his contentions, we reject them.

I. Lost transcript

[1] In his first assignment of error, defendant asserts that the unavailability of the trial transcript denies him "his statutory right to appeal and his state and federal constitutional due process and equal protection rights to a full and effective appellate review and to the effective assistance of counsel" and that he is, therefore, entitled to a new trial on the rape and assault charges.

Citing *State v. Robinson*, 83 N.C. App. 146, 148, 349 S.E.2d 317, 319 (1986), defendant correctly asserts the general rule that defendants "are entitled to transcripts when appealing to a higher court or upon retrial when necessary for an effective defense." *See also Hardy v. United States*, 375 U.S. 277, 11 L. Ed. 2d 331 (1964) (holding new counsel on appeal cannot faithfully discharge their obligation to their client unless provided the transcript of the trial proceedings). Such cases have typically involved, however, situations where the State is denying defendant a transcript that can be made available, *see, e.g.*, *State v. Reid*, 312 N.C. 322, 321 S.E.2d 880 (1984) or the appeal is taken as a matter of right directly following the trial. *See, e.g. Draper v. Washington*, 372 U.S. 487, 9 L. Ed. 2d 899 (1963).

The foregoing cases, however, are distinguishable from the present case, where the defendant's appeal is presented by writ of *certiorari* years after the entry of judgment and where a transcript is simply not available due to no fault of the State. In *Norvell v. Illinois*, 373 U.S. 420, 10 L. Ed. 2d 456 (1963), Norvell was an indigent defendant represented by counsel at trial who was convicted of murder in 1941. The Supreme Court presumed his attorney had made a timely motion for time within which to prepare and file a bill of exceptions. *Id.* at 420, 10 L. Ed. 2d at 457. Norvell or his attorney attempted to get a transcript but failed for financial inability to pay the associated

costs, and Norvell did not pursue an appeal. *Id.* at 420-21, 10 L. Ed. 2d at 457. In 1956, he sought to be furnished with a transcript of his trial under certain state regulatory provisions. *Id.* at 421, 10 L. Ed. 2d at 458. The transcript was determined to be unavailable due to the death of the court reporter at Norvell's trial, and after an unsuccessful attempt to reconstruct the transcript through witness testimony, the trial court denied Norvell's motion for a new trial. *Id.* at 422, 10 L. Ed. 2d at 458. The practical result of the unavailability of the transcript was that "it was not possible for Illinois to supply petitioner with the adequate appellate review of his 1941 conviction which he failed to pursue at that time." *Id.*

Upon review, the Supreme Court characterized the issue as follows: "whether a State may avoid the obligation [under the Fourteenth Amendment to the United States Constitution to permit an indigent the same rights of appeal afforded all other convicted defendants] where, without fault, no transcript can be made available, the indigent having had a lawyer at the trial and no remedy having been sought at the time." *Norvell*, 373 U.S. at 422, 10 L. Ed. 2d at 458. *Cf. United States v. MacCollom*, 426 U.S. 317, 324-25, 48 L. Ed. 2d 666, 674 (1976) (denying relief on the grounds of due process and equal protection where a respondent "had an opportunity for direct appeal, and had he chosen to pursue it he would have been furnished a free transcript of the trial proceedings. But having forgone that right, and instead some years later having sought to obtain a free transcript in order to make the best case he could in a proceeding under [federal statutory provisions allowing petitions for post-conviction collateral relief], respondent stands in a different position"). In affirming the denial of a new trial to Norvell, the Supreme Court established that neither due process nor equal protection required the granting of a new trial to a defendant when certain factual situations necessitated "practical accommodation," including "where transcripts are no longer available [and where there exists] the presumption that he who had a lawyer at the trial had one who could protect his rights on appeal." *Id.* at 424, 10 L. Ed. 2d at 459-60. This case is sufficiently similar to command the same result as that reached in *Norvell*.

Defendant's trial occurred in 1988; he did not pursue an appeal until 2000. Defendant makes no claim he was not represented by able counsel during trial. Following the trial, the record makes clear that trial counsel maintained some level of contact with defendant and extensive contact with defendant's family, including discussions re-

garding representation of defendant with respect to issues involving the probable cause hearing. Defendant, his family, and his trial counsel's actions, accordingly, were consistent with continued representation of defendant following the termination of the trial proceedings. Moreover, defendant has made no assertion on appeal that he received ineffective assistance from his counsel at trial or regarding the steps taken to procure an appeal as of right, despite the trial court's conclusion that trial counsel "did not inform defendant of his appellate rights [or] relevant time limits to exercise them[.]" Thus, the issue of effective assistance of counsel is not before this Court.

Accordingly, we are confronted with a case in which the operative facts are the same as those found in *Norvell*, where defendant was afforded counsel at trial and sought no appellate review until years later, at which time the transcript of the trial proceedings had been lost without fault of the State.[1] In addition to the compelling precedent of *Norvell*, we are cognizant of the practical effect of adopting a rule granting a defendant an *ipso facto* right to a new trial in a case where a trial transcript is unavailable due to no fault of the State and regardless of the length of time between the defendant's trial and attempted appeal. A defendant without a legitimate expectation of appellate success on the merits would be encouraged by such a holding to seek a new trial if, during a multi-year delay of appeal, the transcript was lost. We find the analysis in *Norvell* dispositive for defendant's federal claims and instructive for his state claims, and we hold accordingly.

Defendant alternatively argues that the lack of the transcript deprives him of his state and federal constitutional rights to effective assistance of counsel on appeal. We disagree. Appellate counsel does not fail to render effective assistance simply because he cannot examine a transcript that is unavailable. Admittedly, defendant's failure to pursue his appeal for twelve years and the loss of the trial transcript limits the errors that may be assigned and reviewed on appeal.

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1. Defendant correctly asserts trials before the superior court are recorded and such recordations are the property of the State kept in the custody of the clerk of the superior court, *see* N.C. Gen. Stat. § 7A-95(c) (2005); however, it does not necessarily follow that the State is at "fault" as contemplated by *Norvell* when the recordation is lost. Such a determination would rest upon the surrounding factual circumstances giving rise to the unavailability of the transcript. Here, defendant has had full opportunity to investigate those circumstances and has proffered no argument concerning fault on the part of the State. Indeed, defendant argued orally to this Court that the transcript was merely lost over the passage of time. We reject equating fault on the part of the State for the lost recordation of defendant's trial some twelve years earlier, nothing else appearing of record.

However, having determined defendant is not entitled, under the facts of the instant case, to a new trial on the grounds of the unavailability of the transcript, it likewise follows that counsel provides effective assistance by determining and appropriately presenting to the appellate court all errors appearing on the remaining record. Defendant makes no argument that counsel has not done so, and this assignment of error is overruled.

II. Probable Cause Hearing

[2] By his second assignment of error, defendant asserts the trial court erroneously transferred his case from juvenile court to superior court because that transfer was based, in part, on evidence introduced from an improperly obtained custodial statement. Specifically, defendant, citing N.C. Gen. Stat. § 7A-595, contends the trial court erred at his probable cause hearing in admitting and relying upon defendant's statement to law enforcement officers because it was taken when his stepfather, and not a parent, was present. However, the transcript of the probable cause hearing reflects that defendant presented no objection to the trial court to the admission of his statement. Accordingly, defendant failed to preserve this issue for appeal. *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"). While a question not preserved by objection noted at trial and not preserved by rule or law may nevertheless be considered on appeal under plain error review, *see* N.C.R. App. P. 10(c)(4), a defendant waives plain error review by failing to specifically and distinctly contend the questioned judicial action amounted to plain error. *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994). Defendant has failed to assert on appeal that the trial court's action amounted to plain error and has, thereby, waived this issue.

III. Sentence

[3] Citing *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), defendant assigns error to the imposition of an aggravated sentence for the assault charge on the grounds that the judge made the finding of aggravation based on a preponderance of the evidence. Defendant petitioned this Court for appellate review of the trial proceedings via *certiorari* on 27 June 2000, and this Court allowed defendant's petition on 12 July 2000. During the time period that defendant's appeal was pending before this Court, the United States

Supreme Court decided and issued the opinion in *Blakely*. Also during the pendency of defendant's appeal, our Supreme Court applied *Blakely* to invalidate the imposition of an aggravated sentence based upon a fact, other than a prior conviction, that increased the penalty for a crime beyond the presumptive range unless that fact was stipulated to by the defendant or found by a jury beyond a reasonable doubt. *State v. Allen*, 359 N.C. 425, 438-39, 615 S.E.2d 256, 265 (2005). Our Supreme Court further held that such error is structural and reversible *per se*. *Id.* at 449, 615 S.E.2d at 272. In the instant case, defendant was sentenced beyond the presumptive range based upon a finding that the crime was "especially heinous, atrocious or cruel." Defendant did not stipulate to the factor nor was it found by a jury beyond a reasonable doubt. Accordingly, defendant is entitled to a new sentencing hearing upon the conviction of assault with a deadly weapon inflicting serious injury.

IV. Short-Form Indictment

[4] Finally, defendant argues the short-form rape indictment utilized in the instant case was constitutionally infirm under our federal and state constitutions. "North Carolina has consistently upheld the constitutionality of the use of the short-form indictment in rape cases as prescribed by N.C. Gen. Stat. § 15-144.1." *State v. Owen*, 159 N.C. App. 204, 208, 582 S.E.2d 689, 692 (2003). Defendant's assignment of error, while preserved for further appellate review, is overruled.

No error, remanded for resentencing in 86 CRS 338.

Judges McGEE and ELMORE concur.

MARTHA RITTER, Plaintiff v. KERFOOT RITTER, Defendant

No. COA05-530

(Filed 21 February 2006)

1. Appeal and Error— preservation of issues—failure to give proper notice of appeal

Although plaintiff's first two assignments of error refer to the trial court's order dated 30 June 2004, these assignments of error are dismissed because plaintiff gave notice of appeal only from

the trial court's orders dated 26 August 2004 and 8 November 2004. N.C. R. App. P. 3(d).

2. Appeal and Error— preservation of issues—failure to timely order transcript—failure to timely file motion for extension of time to serve proposed record

Plaintiff's third assignment of error pertaining to the 26 August 2004 order is dismissed pursuant to Rules 7 and 11 of the Rules of Appellate Procedure, because: (1) plaintiff failed to order the transcript within the requisite time and failed to serve the proper notice upon defendant; and (2) plaintiff did not file a motion for extension of time to serve the proposed record on appeal until more than eighty days after filing the notice of appeal.

3. Appeal and Error— appealability—setting hearing on sanctions—interlocutory order

Plaintiff's fourth and fifth assignments of error pertaining to the 8 November 2004 order setting a hearing on sanctions against plaintiff are dismissed as an appeal from an interlocutory order, because the 8 November 2004 order did not constitute a final judgment as to any of the claims or parties, did not affect a substantial right, and contemplated further action by the trial court.

4. Pleadings— sanctions—appellate rules violations—intent to harass or cause unnecessary delay or needless increase in cost of litigation—attorney fees

Defendant's motion to sanction plaintiff under N.C. R. App. P. 25 and 34 for violations of the rules of appellate procedure and her intent to harass or to cause unnecessary delay or needless increase in the cost of litigation is granted, and the case is remanded to the trial court for a determination of the reasonable amount of attorney fees incurred by defendant in responding to this appeal to be taxed personally to plaintiff along with the costs of this appeal, because: (1) the record contains ample evidence plaintiff attempted to delay the resolution of this litigation by filing numerous nonmeritorious motions in the trial court and the Court of Appeals, forcing defendant and the courts to respond to each of them, and appealing an interlocutory order of the trial court; and (2) plaintiff was cautioned several times by the trial court for ignoring its previous orders, ignoring court rules and procedural requirements, and harassing court personnel.

RITTER v. RITTER

[176 N.C. App. 181 (2006)]

Appeal by plaintiff from orders entered 26 August 2004 and 8 November 2004 by Judge John R. Jolly in Wake County Superior Court. Heard in the Court of Appeals 23 January 2006.

Martha Ritter, pro se, plaintiff.

Bass, Bryant & Fanney, P.L.L.C., by John Walter Bryant and Eva C. Currin, for defendant.

MARTIN, Chief Judge.

Plaintiff appeals from the trial court's order dated 26 August 2004 denying her "Preliminary Motion to Alter/Amend the Order of June 30, 2004," by which the trial court had dismissed her claims for lack of subject matter jurisdiction and as barred by the statute of limitations. Plaintiff also appeals the trial court's order of 8 November 2004 setting a hearing date to consider the issue of whether personal sanctions should be imposed upon plaintiff and denying her pending motions. Defendant has moved to dismiss the appeal and to impose sanctions against plaintiff. For the reasons stated below, we grant defendant's motions.

[1] Plaintiff's appeal contained five assignments of error. Her first two assignments of error refer to the trial court's order dated 30 June 2004. However, plaintiff gave notice of appeal only from the trial court's orders dated 26 August 2004 and 8 November 2004. The North Carolina Rules of Appellate Procedure require the notice of appeal to "designate the judgment or order from which appeal is taken." N.C.R. App. P. 3(d) (2005). Therefore, plaintiff's assignments of error No. 1 and No. 2 are not properly before this Court and are hereby dismissed. *See 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) (stating that the "North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal' ").

[2] Plaintiff's third assignment of error pertains to the trial court's order dated 26 August 2004. The North Carolina Rules of Appellate Procedure require an appellant to order a transcript of the proceedings within fourteen days of filing notice of appeal and to file "written documentation of the transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record, and upon the person designated to prepare the transcript." N.C.R. App. P. 7 (2005). The record before us indicates that plaintiff failed to

order the transcript within the requisite time and failed to serve the proper notice upon defendant. Where no transcript is ordered, North Carolina Rule of Appellate Procedure 11 requires the appellant to serve its proposed record on appeal within thirty-five days of filing the notice of appeal. The record indicates plaintiff did not file a motion for extension of time to serve the proposed record on appeal until 19 November 2004, more than eighty days after filing the notice of appeal. Therefore, we dismiss plaintiff's third assignment of error, pertaining to the 26 August 2004 order, pursuant to Rules 7 and 11 of the Rules of Appellate Procedure. *See Viar*, 359 N.C. at 401, 610 S.E.2d at 360.

[3] Plaintiff's fourth and fifth assignments of error pertain to the trial court's order entered 8 November 2004. This order sets a time and place for a hearing on the issue of whether to impose personal sanctions against plaintiff, overrules any pending objections to the hearing, denies any pending requests for continuance or delay of the hearing, and denies any pending requests for reconsideration of prior orders or rulings of the court related to plaintiff's cause of action. Plaintiff filed notice of appeal to this order, stating "[p]laintiff notes an appeal of the November 8, 2004 order, entered on November 9, 2004."

Appeal from this 8 November 2004 order, however, is clearly interlocutory. "Interlocutory orders and judgments are those 'made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy.' Generally, there is no right of immediate appeal from interlocutory orders." *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 578-79 (1999) (citations omitted). Because the 8 November 2004 order did not constitute a final judgment as to any of the claims or parties, did not affect a substantial right, and contemplated further action by the trial court, there is no right of immediate appeal therefrom. *Id.* Therefore, we dismiss plaintiff's fourth and fifth assignments of error.

[4] Defendant also moves to sanction plaintiff under Rules 25 and 34 of the N.C. Rules of Appellate Procedure for her violations of the rules of appellate procedure and her intent to "harass or to cause unnecessary delay or needless increase in the cost of litigation." N.C.R. App. P. 34 (2005). The record before us contains ample evidence plaintiff attempted to delay the resolution of this litigation by filing numerous non-meritorious motions in the trial court and this Court, forcing defendant and the courts to respond to each of them,

and appealing an interlocutory order of the trial court. She was cautioned several times by the trial court for ignoring its previous orders, ignoring court rules and procedural requirements, and harassing court personnel. We conclude plaintiff needlessly increased the cost of litigation for both defendant and the court system, and we therefore tax plaintiff personally with the costs of this appeal and the attorney fees incurred in this appeal by defendant. Pursuant to Rule 34(c), we remand this case to the trial court for a determination of the reasonable amount of attorney fees incurred by defendant in responding to this appeal.

Dismissed and Remanded.

Judges McGEE and STEELMAN concur.

ALEC WHITTAKER, Plaintiff v. ROBERT W. TODD D/B/A/ SOUTHERN EXTERIORS, Defendants

No. COA05-361

(Filed 21 February 2006)

1. Statutes of Limitation and Repose— roofing work—statute of repose—warranty—pleading for monetary damages only

Plaintiff's action for monetary damages from a roofing job was barred by the statute of repose of N.C.G.S. § 1-50(a)(5)a because it was brought outside the 6 year statutory period. Although plaintiff contended that workmanship on the job was under warranty, his complaint was for monetary damages only and was not for breach of warranty.

2. Statutes of Limitation and Repose— statute of repose not an affirmative defense—pleading not required

The statute of repose in this case, N.C.G.S. § 1-50(a)(5)a, is not an affirmative defense. Defendant was not required to specially plead it and did not waive it by not raising it until the day of trial.

Appeal by plaintiff from judgment entered 7 December 2004 by Judge Addie Harris Rawls in Johnston County District Court. Heard in the Court of Appeals 29 November 2005.

Whittaker Law Firm, by Malcolm E. Whittaker, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

SMITH, Judge.

Alec Whittaker ("plaintiff") appeals the trial court's dismissal of his action for monetary damages for defective installation and workmanship of a porch roof on his residence. For the reasons stated herein, we affirm.

The pertinent factual and procedural history is as follows: On 22 January 1991, plaintiff contracted with Robert W. Todd d/b/a/ Southern Exteriors ("defendant") for defendant to replace the porch roof at Whittaker's home. The written contract provides: "All workmanship guaranteed for as long as you own home; materials as specified by manufacturer." While painting his house in 2003, plaintiff discovered one corner of the seal around his porch roof had failed and water had caused rot. Plaintiff contacted defendant by letter dated 27 August 2003 seeking repair of the roof. Defendant did not provide warranty service. On 11 November 2003, plaintiff commenced this action by filing a complaint for money owed in small claims court. Following an award to plaintiff in small claims court, defendant appealed. The District Court granted defendant's motion to dismiss concluding plaintiff's claim was barred by N.C. Gen. Stat. § 1-50(a)(5)a. Plaintiff appeals.

Plaintiff presents the following issues on appeal: (I) whether N.C. Gen. Stat. § 1-50(a)(5)a limits defendant's express warranty; (II) whether defendant waived the defense of the statute of repose; and (III) whether the trial court abused its discretion by denying plaintiff's motion for change of venue.

[1] N.C. Gen. Stat. § 1-50(a)(5)a (2003) provides in pertinent part:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C. Gen. Stat. § 1-50(a)(5)a "is designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property." *Lamb v.*

Wedgewood South Corp., 308 N.C. 419, 427-28, 302 S.E.2d 868, 873 (1983). The statute is a statute of repose and provides an outside limit of six years for bringing an action coming within its terms. *Id.*

In the instant case, plaintiff contends the statute of repose does not bar this action because defendant provided an express warranty guaranteeing the workmanship for as long as plaintiff owns the home. We disagree.

Plaintiff commenced this action by filing a complaint in the small claims division for "money owed", not breach of warranty. Plaintiff's action is barred by the statute of repose which prohibits an action to recover damages for "the defective or unsafe condition of an improvement to real property" that is not brought within six years of "substantial completion of the improvement." N.C. Gen. Stat. § 1-50(a)(5)a. Plaintiff cites *Haywood Street Redevelopment Corp. v. Peterson Co.*, 120 N.C. App. 832, 463 S.E.2d 564 (1995), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996) in asserting the statute of repose does not bar the instant action. In *Haywood*, the plaintiff sued for negligence, breach of contract, and breach of express and implied warranties. This Court held plaintiff's breach of warranty claims were not barred by the statute of limitations because the warranty was for a specified period of time and each day there was a breach a new cause of action accrued. *Id.* at 836-7, 463 S.E.2d at 566-7. In the instant case, however, plaintiff filed a complaint for monetary damages only and did not sue for breach of warranty. Thus, plaintiff's reliance on *Haywood* is misplaced. We conclude plaintiff's action for monetary damages is barred by the statute of repose, N.C. Gen. Stat. § 1-50(a)(5)a.

[2] Plaintiff next contends defendant waived "his affirmative defense of 'Statute of Repose' under N.C. Gen. Stat. § 1A-1, Rule 8(c) because he did not raise it until the day of trial." We disagree.

In *Tipton & Young Construction Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 446 S.E.2d 603 (1994), *aff'd per curiam*, 340 N.C. 257, 456 S.E.2d 308 (1995), this Court held that a statute of repose "is a condition precedent to a party's right to maintain a lawsuit." *Id.* at 117, 446 S.E.2d at 605. The Court also held that a plaintiff is required to plead and prove that the statute of repose is not a bar to the maintenance of the action. *Id.* Thus, the statute of repose is not an affirmative defense and defendant was not required to specially plead it.

Having concluded the instant action is barred by the statute of repose, N.C. Gen. Stat. § 1-50(a)(5)a, and that the trial court did not err in dismissing the action, we do not address plaintiff's remaining assignment of error. The judgment of the trial court is affirmed.

Affirmed.

Judges WYNN and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 FEBRUARY 2006

HAMMITT v. PETTIT No. 05-648	Gaston (05CVS416)	Affirmed
HARRIS v. MATTHEWS No. 05-28	Mecklenburg (03CVS12251)	Appeal dismissed
HORTON v. NIEBAUER No. 05-110	Guilford (04CVS3371)	Affirmed
HUGHES v. FRITO LAY, INC. No. 04-1503	Ind. Comm. (I.C. #207477)	Affirmed in part; reversed in part and remanded for further findings
HUNT v. APAC CAROLINA, INC. No. 05-512	Ind. Comm. (I.C. #305628)	Affirmed
IN RE A.A. No. 05-383	Lenoir (04J100) (04J101) (04J102)	Affirmed
IN RE A.E. No. 05-615	Beaufort (03J82)	Affirmed
IN RE A.N.L. No. 05-817	Harnett (03J119)	Affirmed
IN RE B.W. No. 05-741	Orange (03J163)	Reversed and remanded
IN RE D.F.-M. No. 05-563	Guilford (04J541)	Remanded
IN RE E.T. No. 05-752	Buncombe (97J265)	Affirmed
IN RE H.S.F. No. 05-586	Cleveland (04J7)	Affirmed
IN RE K.W. No. 05-720	Northampton (90J10)	Affirmed
JOINT REDEVELOPMENT COMM'N OF CTY. OF PASQUOTANK v. JACKSON-HEARD No. 05-676	Pasquotank (00CVS641)	Dismissed
LABRIE v. CORNING, INC. No. 05-130	Ind. Comm. (I.C. #604989)	Affirmed

LEAK v. N.C. DEP'T OF PUB. INSTRUCTION No. 05-941	Wake (04CVS1082)	Affirmed
MILLER v. MILLER No. 05-510	Caldwell (03CVD234)	Affirmed
PEREZ v. PEREZ No. 05-468	Avery (01CVD248)	Reversed and remanded
RAMIREZ v. GOLDEN CORRAL No. 05-587	Ind. Comm. (I.C. #919517)	Affirmed in part and remanded in part
STATE v. AUSTIN No. 05-85	Rowan (02CRS50572) (02CRS001146) (02CRS001147) (02CRS001148)	No error
STATE v. BRADSHAW No. 05-573	Wake (04CRS55431) (04CRS55432) (04CRS55433) (04CRS55434) (04CRS59598)	Remanded for resentencing
STATE v. BRYANT No. 05-514	Durham (02CRS41702) (02CRS49468)	Affirmed in part, remanded in part, vacated in part
STATE v. BULLOCK No. 05-470	Wake (03CRS64722)	No error
STATE v. CRAWFORD No. 05-574	Moore (03CRS6364) (03CRS6365) (03CRS6366)	No error, remanded for resentencing
STATE v. CURTIS No. 05-816	Rutherford (03CRS52373)	No error
STATE v. DAVIS No. 05-552	Mecklenburg (01CRS2156) (01CRS2157)	No error
STATE v. EDWARDS No. 05-785	Cumberland (03CRS71422)	No error
STATE v. GIBBS No. 05-814	Beaufort (03CRS53968)	No error
STATE v. GLADDEN No. 05-174	Cumberland (02CRS65836) (02CRS65837)	No error
STATE v. HARLEY No. 05-575	Rockingham (04CRS3010)	No error

STATE v. HARRIS No. 05-656	Orange (03CRS54518) (03CRS54520) (03CRS54521) (04CRS2039) (04CRS2040) (04CRS2041) (04CRS2042) (04CRS2043) (04CRS2044) (04CRS2045) (04CRS2046) (04CRS2047) (04CRS2048) (04CRS2049) (04CRS2050) (04CRS2051) (04CRS2052) (04CRS2053) (04CRS2054)	Vacated and remanded
STATE v. HERNANDEZ No. 05-475	Harnett (03CRS52894)	Affirmed
STATE v. HINTON No. 05-241	Wake (03CRS39968) (03CRS36217) (03CRS36218)	Affirmed in part, reversed in part, vacated in part and remanded in part
STATE v. HOLDER No. 05-927	Harnett (05CRS50807)	Affirmed
STATE v. HOWELL No. 05-189	Scotland (03CRS51400)	No error
STATE v. JONES No. 05-739	Buncombe (99CRS4926)	Affirmed
STATE v. LEWIS No. 03-785-2	Wake (01CRS108653) (01CRS108654) (01CRS83310)	Remanded for resentencing
STATE v. MATHIS No. 05-454	Haywood (03CRS1763) (03CRS1764)	No error
STATE v. McGEE No. 05-1069	Alamance (04CRS23569) (04CRS23570)	No error
STATE v. MEDLEY No. 05-750	Guilford (03CRS780957) (03CRS780958)	No error

STATE v. RICHARDSON No. 05-215	Nash (02CRS59249) (02CRS59250)	Affirmed in part. Remanded in part.
STATE v. SCOTT No. 05-674	McDowell (01CRS4043) (01CRS4044) (01CRS51659) (02CRS1944)	Reversed and remanded
STATE v. VAREEN No. 05-649	Durham (96CRS30678)	No error
STATE v. WHITEHEAD No. 05-830	Cumberland (03CRS68677)	No error
T-WOL ACQUISITION CO. v. HOUSING AUTH. OF CITY OF DURHAM No. 05-143	Durham (03CVS1894)	Affirmed
TREADWAY v. NEIBAUER No. 05-109	Guilford (03CVS1429)	Affirmed
WATSON v. SNEAD No. 05-813	Johnston (04CVS1660)	Affirmed

PICKARD v. PICKARD

[176 N.C. App. 193 (2006)]

CARL GLENN PICKARD, JR., PLAINTIFF v. JANE EDWARDS PICKARD, DEFENDANT

No. COA05-426

(Filed 21 February 2006)

1. Pleadings— amendment of answer—res judicata and estoppel added—no prejudice

The trial court did not abuse its discretion by permitting defendant to amend her answer to a marriage annulment action to include the defenses of estoppel, collateral estoppel, and res judicata. Allowance of the amendment did not prejudice plaintiff's ability to present evidence related to the additional defenses.

2. Marriage— annulment—judicial estoppel

The trial court correctly concluded that judicial estoppel applies and correctly refused to annul a marriage performed by a Cherokee shaman who was also an ordained minister in the Universal Life Church, even though the marriage was not properly solemnized pursuant to statute. The court had accepted plaintiff's assertion that he was married to defendant when he adopted defendant's daughter, and plaintiff's inconsistent position would impose an unfair detriment on defendant.

Judge TYSON dissenting.

Appeal by plaintiff from judgment entered 27 September 2004 by Judge Mark E. Galloway in the District Court in Caswell County. Heard in the Court of Appeals 17 November 2005.

Hatch, Little & Bunn, L.L.P., by Elizabeth T. Martin, for plaintiff-appellant.

Walker & Bullard, P.A., by Daniel S. Bullard and James F. Walker, for defendant-appellee.

HUDSON, Judge.

Carl Glenn Pickard ("plaintiff") appeals from the trial court's order denying the annulment of his marriage to Jane Edwards Pickard ("defendant"). As discussed below, we affirm.

Hawk Littlejohn ("Littlejohn"), a Cherokee Indian, married plaintiff and defendant in the Native American tradition on 7 June 1991.

Plaintiff is a physician employed by the University of North Carolina at Chapel Hill ("UNC"). Plaintiff had met Littlejohn at the UNC medical school where Littlejohn lectured as a Cherokee shaman or "medicine man." Littlejohn performed healings and conducted ceremonies in accordance with Cherokee traditions. Littlejohn also possessed a certificate stating that he was ordained as a minister in the Universal Life Church.

Defendant initially desired to be married in a traditional Christian ceremony. Plaintiff persuaded defendant to be married in the Cherokee tradition with Littlejohn performing the ceremony. When Littlejohn performed the wedding ceremony, both the parties believed the ceremony was legally sufficient to bind plaintiff and defendant as husband and wife. Littlejohn conducted the parties' ceremony in accordance with the Cherokee marriage tradition. The parties received a North Carolina license and certificate of marriage on 3 December 2002, which was filed in the Caswell County Register of Deeds office.

After the ceremony, and for the next eleven years, the parties lived together and conducted themselves as husband and wife. In 1998, plaintiff initiated proceedings to adopt defendant's adult biological daughter. In his amended petition for adult adoption, and as a requisite of the adoption, plaintiff provided a sworn statement that he was "the stepfather of the adoptee, having married her natural mother." Plaintiff also listed his marital status as "married." The clerk of superior court in Caswell County filed an amended decree of adoption on 9 November 1998, based on plaintiff's assertions.

On 9 April 2002, the parties separated. On 23 April 2002, plaintiff filed a complaint for annulment of his eleven-year marriage to defendant. On 23 May 2002, defendant answered and denied that plaintiff was entitled to an annulment. After plaintiff presented his evidence, defendant moved for a directed verdict. Counsel for both parties argued and briefed defenses of collateral estoppel and *res judicata*. On 3 February 2003, the court informed the parties through correspondence that defendant's motion for directed verdict was denied.

On 28 May 2003, defendant filed a motion to amend the pleadings alleging the defenses of collateral estoppel and *res judicata*. A delay occurred due to the illness of the presiding judge. On 7 May 2004, defendant presented evidence. At the conclusion of defendant's evidence, defendant's motion for a directed verdict was denied.

On 27 September 2004, the trial court filed a judgment concluding that the marriage ceremony was not properly solemnized because Littlejohn was not qualified to perform a marriage ceremony. The court denied plaintiff's claim for annulment because plaintiff had asserted under oath, judicially admitted and proved his marriage to defendant in the adoption proceeding. Plaintiff appeals. Defendant argues cross assignments of error.

[1] Plaintiff first argues that the trial court erred in allowing defendant's motion to amend her answer to include the defenses of estoppel, collateral estoppel and *res judicata*. We disagree.

"The trial court's decision regarding a party's motion to amend the pleadings will not be disturbed on appeal unless an abuse of discretion is shown." *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 30, 598 S.E.2d 570, 589 (2004). After the filing of a responsive pleading, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2003). "Rule 15(a) contemplates liberal amendments to the pleadings, which should always be allowed unless some material prejudice is demonstrated." *Stetser*, 165 N.C. App. at 31, 598 S.E.2d at 590. "Some of the reasons for denying a motion to amend include undue delay by the moving party, unfair prejudice to the nonmoving party, bad faith, futility of the amendment, and repeated failure to cure defects by previous amendments." *Id.* "The objecting party has the burden of satisfying the trial court that he would be prejudiced by the granting or denial of a motion to amend." *Watson v. Watson*, 49 N.C. App. 58, 60, 270 S.E.2d 542, 544 (1980).

Here, the court's allowance of the amendment did not prejudice plaintiff's ability to present evidence related to the additional defenses. The court deferred its ruling on amendment until it had heard evidence on estoppel, and permitted both parties to submit briefs if they desired. Plaintiff never argued at trial that he was prejudiced in his ability to present evidence on these issues; he merely contended that the issues could not be considered because they had not been included in the original answer. We conclude that the court did not abuse its discretion in permitting amendment of defendant's answer.

[2] Plaintiff argues that the trial court erred when it denied the annulment. We do not agree.

A party to a marriage may seek an annulment in accordance with N.C. Gen. Stat. § 50-4 (2003). The statute provides:

> The district court, during a session of court, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the Chapter entitled Marriage, or declared void by said Chapter, may declare such marriage void from the beginning, subject, nevertheless, to G.S. 51-3.

N.C. Gen. Stat. § 50-4 (2003). This Court stated in *Geitner v. Townsend*, "[a] voidable marriage is valid for all civil purposes until annulled by a competent tribunal in a direct proceeding, but a void marriage is a nullity and may be impeached at any time." 67 N.C. App. 159, 161, 312 S.E.2d 236, 238, *disc. review denied*, 310 N.C. 744, 315 S.E.2d 702 (1984). N.C. Gen. Stat. § 51-1 (1977) was the statute in effect that governed marriage ceremonies when plaintiff and defendant were married. The statute required the parties to "express their solemn intent to marry in the presence of (1) an ordained minister of any religious denomination, or (2) a minister authorized by his church or (3) a magistrate." *State v. Lynch*, 301 N.C. 479, 487, 272 S.E.2d 349, 354 (1980) (internal quotation marks omitted).

Our Supreme Court has stated: "[u]pon proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage." *Kearney v. Thomas*, 225 N.C. 156, 163, 33 S.E.2d 871, 876 (1945). The burden of proof rests upon plaintiff to prove by the greater weight of the evidence grounds to void or annul the marriage to overcome the presumption of a valid marriage. *Townsend*, 67 N.C. App. at 163, 312 S.E.2d at 239.

We begin by noting that the dissent states that Littlejohn was an ordained minister. However, although the trial court found that Littlejohn possessed a certificate stating that he was ordained by the Universal Life Church, "[t]hat at no time was Hawk Littlejohn a minister of the gospel licensed to perform marriages." The court also found and concluded that Littlejohn's ordination was not cured by N.C. Gen. Stat. § 50-1.1. Because these findings have not been challenged, they are conclusive on appeal. *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 22, 411 S.E.2d 645, 650 (1992).

"The well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (citing *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991)). "As to findings in a bench trial, we review matters of law de novo." *State Farm*

Fire & Cas. Co. v. Darsie, 161 N.C. App. 542, 548-49, 589 S.E.2d 391, 397 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 194 (2004) (citing *Graham v. Martin*, 149 N.C. App. 831, 561 S.E.2d 583 (2002)), *disc. rev. denied*, 358 N.C. 241, 594 S.E.2d 194 (2004).

In its judgment, the trial court concluded as law that although the parties' marriage was not properly solemnized pursuant to statute, plaintiff was estopped from obtaining an annulment on several grounds, including judicial estoppel, quasi-estoppel, collateral estoppel and *res judicata*. As discussed below, we conclude that judicial estoppel applies here and affirm the trial court's judgment on that basis.

"[J]udicial estoppel seeks to protect courts, not litigants, from individuals who would play 'fast and loose' with the judicial system." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 26, 591 S.E.2d 870, 887 (2004). In addition, "because of its inherent flexibility as a discretionary equitable doctrine, judicial estoppel plays an important role as a gap-filler, providing courts with a means to protect the integrity of judicial proceedings where doctrines designed to protect litigants might not adequately serve that role." *Id.* In adopting the framework of the United States Supreme Court as stated in *New Hampshire v. Maine*, 532 U.S. 742, 149 L. Ed. 2d 968 (2001), the North Carolina Supreme Court has set forth three factors to be considered in applying judicial estoppel:

> First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 29, 591 S.E.2d at 888-89 (internal quotation marks and citations omitted). Here, plaintiff takes the position that his marriage is voidable, a position clearly inconsistent with his sworn statements in the adoption proceedings. The court initially accepted plaintiff's earlier assertion that he was married to defendant in permitting his adoption of defendant's daughter. Although the second adoption order did not explicitly so find, it was based nonetheless on plaintiff's sworn asser-

tion that he was married to defendant. Finally, plaintiff would impose an unfair detriment on defendant by undoing an eleven-year marriage were he allowed to proceed with his inconsistent position here. The trial court's application of judicial estoppel was proper, and we affirm its denial of plaintiff's petition for annulment.

This opinion does not address and certainly does not validate any form of "common law marriage." Neither party here claimed to have a common law marriage, and no such issue has been raised before this Court. Our decision is based only upon the application of judicial estoppel to the case before us.

Because we conclude that the trial judge properly denied annulment on grounds of judicial estoppel, we need not address plaintiff's other arguments or defendant's cross-assignment of error.

Affirmed.

Judge LEVINSON concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion holds plaintiff-husband is judicially estopped from obtaining an annulment and denying his eleven-year marriage to defendant-wife because he asserted in a sworn statement that he and defendant were married during the adoption proceeding of defendant's daughter. Defendant's cross assignments of error and appeal from the trial court's conclusion that the wedding ceremony was not properly solemnized and failed to comply with North Carolina's marriage statutes has merit. That portion of the trial court's order should be reversed, and plaintiff's complaint should be dismissed. I respectfully dissent.

I. Background

In 1991, plaintiff's and defendant's wedding was celebrated on Sourwood Farm, where solemn Cherokee ceremonies regularly occurred. Littlejohn, the shaman and minister performing the marriage, wore a ceremonial ribbon shirt. Defendant wore white. A ceremonial fire burned throughout the ceremony. Littlejohn addressed and hailed, "the creator, ancestors, four-legged creatures, two-legged creatures, creatures without legs, and winged creatures." Plaintiff

and defendant exchanged blankets to symbolize their sexual fidelity. Defendant gave plaintiff poached corn to symbolize her commitment to maintain her husband's home. Plaintiff gave defendant beef jerky to symbolize that he would provide for her as his wife. The parties exchanged wedding rings, and Littlejohn publicly pronounced them as man and wife. Littlejohn presented plaintiff and defendant with a marriage stick and a marriage certificate. The parties had applied for and received a North Carolina Marriage License and Certificate of Marriage in June 1991, which was filed with the Caswell County Register of Deeds Office.

After the ceremony, and for the next eleven years, the parties lived together and held themselves out as husband and wife in the following ways: (1) they visited friends and introduced themselves as husband and wife; (2) they purchased property in Caswell County, as tenants by the entirety, and the deed recited plaintiff and defendant as the grantees and as married; (3) the parties borrowed money as husband and wife; (4) the parties each contributed funds to purchase their marital home; (5) defendant left her profession to remain at home as plaintiff's wife; (6) the parties filed joint tax returns as husband and wife; (7) the parties slept together in a common marital bed and engaged in sexual relations; (8) the parties attended church together and participated in community events as husband and wife; (9) the parties served as guardians for foster children and asserted on the applications they were husband and wife; (10) plaintiff initiated and completed adoption proceedings in Caswell County for a stepparent adoption of defendant's daughter; (11) plaintiff filed a sworn statement in the amended petition for adult adoption that he was the stepfather of the adoptee and was married to her biological mother who gave her consent for the adoption; and (12) following the parties' separation, plaintiff continued to provide defendant with dependant health insurance coverage listing her as his wife.

II. Issues

Defendant-wife cross assigns as error the trial court's ruling that the parties' marriage was not properly solemnized. I agree with defendant.

The majority's opinion holds because the trial court found "[t]hat at no time was Hawk Littlejohn a minister of the gospel licensed to perform marriages," and "these findings have not been challenged on appeal, they are conclusive on appeal." This "finding of fact" is a "conclusion of law." Defendant assigned error to the trial court's conclu-

sion of law, which stated, "[t]hat the marriage was not properly solemnized in that the person performing the marriage ceremony was not an ordained minister, nor qualified to perform the marriage ceremony." Defendant challenged this conclusion on appeal and properly preserved this issue for appellate review.

III. Solemnization

A party to a marriage may seek an annulment under North Carolina law. N.C. Gen. Stat. § 50-4 (2003) provides:

> The district court, during a session of court, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the Chapter entitled Marriage, or declared void by said Chapter, may declare such marriage void from the beginning, subject, nevertheless, to G.S. 51-3.

"In North Carolina, only bigamous marriages have thus far been declared absolutely void. 1 R. Lee, *North Carolina Family Law* Sec. 18 (4th ed. 1979); *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980). All other marriages are voidable." *Fulton v. Vickery*, 73 N.C. App. 382, 387, 326 S.E.2d 354, 358, *cert. denied*, 313 N.C. 599, 332 S.E.2d 178 (1985). No issue of bigamy is present before us.

Plaintiff asserts his marriage to defendant is voidable because the marriage ceremony was not solemnized in compliance with North Carolina law. Plaintiff argues Littlejohn was not "an ordained" minister and could not legally pronounce plaintiff and defendant to be husband and wife. Plaintiff also argues the trial court should have granted an annulment because Littlejohn did not qualify as a licensed "minister authorized by his church." Plaintiff's argument fails.

N.C. Gen. Stat. § 51-1 (1977) was the statute governing marriage ceremonies when plaintiff and defendant were married. The statute required the parties to "express their solemn intent to marry in the presence of (1) an ordained minister of any religious denomination, or (2) a minister authorized by his church or (3) a magistrate." *State v. Lynch*, 301 N.C. 479, 487, 272 S.E.2d 349, 354 (1980).

The majority's opinion cites *Kearney v. Thomas*, for the proposition that "[u]pon proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage." 225 N.C. 156, 163, 33 S.E.2d 871, 876 (1945). A plaintiff bears the burden to overcome the presumption of a valid marriage to void or annul the marriage. *Geitner v. Townsend*, 67 N.C. App. 159, 163,

312 S.E.2d 236, 239, *disc. rev. denied*, 310 N.C. 744, 315 S.E.2d 702 (1984); *see also Jackson v. Rhem*, 59 N.C. 141, 143 (1860) (evidence to support an annulment "ought to be so overwhelming as to leave not a doubt about the facts thus declared.").

1. Solemn Intent to Marry

Plaintiff and defendant "express[ed] their solemn intent to marry" in 1991 at a traditional Cherokee wedding ceremony attended by many witnesses before an "ordained minister." N.C. Gen. Stat. § 51-1. The trial court stated in finding of fact number seventeen that the parties' wedding ceremony was "conducted in the 'Cherokee way' and [performed] in accordance with the Cherokee marriage ceremony." The ceremony was held at a location where Cherokee ceremonies and marriages take place. The parties dressed in traditional Cherokee clothing. A ceremonial fire burned throughout the ceremony. Littlejohn conducted a Cherokee spiritual wedding ceremony as he addressed and hailed the Creator and creatures in nature. Plaintiff and defendant exchanged traditional Cherokee marriage symbols. Plaintiff and defendant exchanged wedding rings, and Littlejohn publicly pronounced them to be husband and wife. Littlejohn presented plaintiff and defendant with a marriage stick and a North Carolina marriage license, which was subsequently filed with the Caswell County Register of Deeds. The statute's requirement of the parties to express a solemn intent to marry is satisfied.

North Carolina acknowledges and celebrates the solemnity of a native tribal wedding ceremony and validates the ceremony as a recognized marriage as evidenced in the General Assembly's passage of N.C. Gen. Stat. § 51-3.2 (2003). The statute provides:

> (a) Subject to the restriction provided in subsection (b), a marriage between a man and a woman licensed and solemnized according to the law of a federally recognized Indian Nation or Tribe shall be valid and the parties to the marriage shall be lawfully married.
>
> (b) When the law of a federally recognized Indian Nation or Tribe allows persons to obtain a marriage license from the register of deeds and the parties to a marriage do so, Chapter 51 of the General Statutes shall apply and the marriage shall be valid only if the issuance of the license and the solemnization of the marriage is conducted in compliance with this Chapter.

N.C. Gen. Stat. § 51-3.2.

While this statute was enacted after plaintiff and defendant were married, the statute illustrates North Carolina's legislative intent to uphold marriages celebrated and solemnized "according to the law of a federally recognized Indian Nation or Tribe." *Id.*

2. In the Presence of a Minister

Plaintiff asked Littlejohn, an ordained minister, to perform the ceremony. Littlejohn had performed other weddings in the Cherokee tradition. Neither plaintiff nor defendant questioned Littlejohn's credentials or authority to perform the wedding ceremony for over eleven years until after the parties separated on 9 April 2002. It is undisputed that a solemn wedding ceremony occurred. The parties publicly consented to be married and both believed Littlejohn was an ordained minister authorized to perform weddings and legally qualified to pronounce them as husband and wife. Plaintiff and defendant obtained a North Carolina Marriage License, which states Littlejohn was an ordained minister.

For eleven years, the parties held themselves out to be legally married, and conducted all their business and personal affairs as husband and wife. Before plaintiff and defendant separated, plaintiff requested a divorce from defendant.

Plaintiff entered into evidence a copy of Littlejohn's ordination of ministry from the Universal Life Church. Plaintiff argues these credentials were insufficient to comply with the marriage statute. He asserts Littlejohn did not possess the legal authority to validly perform the parties' wedding ceremony in North Carolina and contends the marriage is voidable.

In *Lynch*, a criminal prosecution for bigamy, our Supreme Court stated:

> "[A] marriage pretendedly celebrated before a person not authorized would be a nullity." *State v. Wilson*, 121 N.C. 650, 656-57, 28 S.E. 416, 418 (1897). A ceremony solemnized by a Roman Catholic layman in the mail order business who bought for $ 10.00 a mail order certificate giving him "credentials of minister" in the Universal Life Church, Inc.—whatever that is—is not a ceremony of marriage to be recognized *for purposes of a bigamy prosecution* in the State of North Carolina. The evidence does not establish—rather, it negates the fact—that Chester A. Wilson was authorized under the laws of this State to perform a marriage ceremony.

301 N.C. at 488, 272 S.E.2d at 354-55 (1980) (emphasis supplied).

Following the Court's decision in *Lynch*, the General Assembly enacted N.C. Gen. Stat. § 51-1.1, which provides:

> Any marriages performed by ministers of the Universal Life Church prior to July 3, 1981, are validated, unless they have been invalidated by a court of competent jurisdiction, provided that all other requirements of law have been met and the marriages would have been valid if performed by an official authorized by law to perform wedding ceremonies.

This statute rendered the marriage performed by an ordained minister of the Universal Life Church valid in *Fulton*. 73 N.C. App. at 387, 326 S.E.2d at 358. In *Fulton*, the parties married in 1972. 73 N.C. App. at 384, 362 S.E.2d at 356. Charles E. Vickery performed the marriage ceremony as an ordained minister by the Universal Life Church. *Id*. at 385, 362 S.E.2d at 356. In 1979, the Fultons entered into a separation agreement that stated that the parties were married in Chapel Hill in 1972. *Id*. The agreement provided that the plaintiff would deed her interest in the marital residence to the defendant. *Id*. The plaintiff filed suit against defendant in 1980 to enforce the agreement. *Id*. While the suit was pending, our Supreme Court issued the *Lynch* decision. *Id*. The defendant Fulton moved for summary judgment and argued the marriage was voidable because the marriage ceremony was performed by an ordained minister in the Universal Life Church. *Id*. Summary judgment was granted, and the plaintiff appealed. *Id*. In 1981, the General Assembly passed N.C. Gen. Stat. § 51-1.1. The plaintiff withdrew her appeal. *Id*. The plaintiff filed the later action in 1983. This Court stated, "[a]s the marriage between plaintiff and defendant Fulton was never invalidated, then G.S. Sec. 51-1.1 (1984) applies to validate the marriage. The net effect of the statute is to render the marriage valid from its inception." *Id*. at 387, 362 S.E.2d at 358.

Here, plaintiff and defendant were married in 1991. Littlejohn was licensed by the Universal Life Church on 4 June 1985 as an "ordained minister." Our Supreme Court stated in *Lynch*, "[i]t is not within the power of the State to declare what is or is not a religious body or who is or is not a religious leader within the body." 301 N.C. at 488, 272 S.E.2d at 354 (citing *State v. Bray*, 35 N.C. 289 (1852)). Unlike the Universal Life minister in the criminal bigamy prosecution in *Lynch*, Littlejohn had performed many wedding ceremonies as a Cherokee Indian in the Cherokee tradition. Littlejohn was known throughout North Carolina as a Cherokee shaman and medicine man who performed various Cherokee rituals, including wedding cere-

monies. Littlejohn's death certificate listed his profession as a "craftsman/medicine man."

Also, in *Lynch*, the State had the highest burden to prove the defendant had committed bigamy. The Court stated, "the State is required to establish beyond a reasonable doubt that Chester A. Wilson was an ordained minister of a religious denomination or a minister authorized by his church." *Id.* at 487, 272 S.E.2d at 354. The Court held that the State failed to meet their burden to prove the minister was legally ordained. *Id.*

In the present case, the burden of proof rests upon plaintiff to prove the invalidity or voidability of the marriage. *Geitner*, 67 N.C. App. at 163, 312 S.E.2d at 239. Plaintiff carries a heavy burden. *Jackson*, 59 N.C. at 143. The only evidence plaintiff offered to prove the invalidity of his marriage to defendant was that Littlejohn was ordained and licensed by the Universal Life Church. The presumption remains that plaintiff and defendant were married in accordance with N.C. Gen. Stat. § 51-1. They "express[ed] their solemn intent to marry in the presence of an ordained minister." *Lynch*, 301 N.C. at 487, 272 S.E.2d at 354.

Plaintiff failed to produce any evidence or offer any controlling law that Littlejohn was not an "ordained minister" or not "authorized by his church" to perform weddings in accordance with the traditions of the Cherokee Nation or in accordance with our applicable statute. N.C. Gen. Stat. § 51-1. Undisputed evidence in the record shows Littlejohn was ordained as a minister by the Universal Life Church to perform weddings and performed weddings and other solemn ceremonies in the Cherokee tradition. *State v. Lynch*, 301 N.C. at 488, 272 S.E.2d at 354. Defendant's cross assignment of error is meritorious.

The trial court erred in holding the parties' wedding was not properly solemnized under our statute. Because plaintiff failed to overcome the presumption of a valid marriage, we do not need to wade into the murky waters of a case-by-case, *ad hoc*, factual analysis under an equitable remedy of estoppel to uphold the validity of the parties' marriage. Because plaintiff failed to overcome his burden to show the plain requirements of the statute were not satisfied, it is wholly unnecessary to reach plaintiff's assignments of error, and his complaint should be dismissed.

By affirming the trial court's order on the basis of estoppel, the majority effectively validates common law marriages in North Carolina. Our Supreme Court has held:

> A common law marriage or marriage by consent is not recognized in this State. *State v. Alford*, 298 N.C. 465, 259 S.E.2d 242 (1979); *State v. Samuel*, 19 N.C. 177 (1836). Consent is just one of the essential elements of a marriage. The marriage must be acknowledged in the manner and before some person prescribed in G.S. 51-1.

Id.

IV. Conclusion

The parties obtained a valid North Carolina marriage license and expressed their intent to marry in the presence of witnesses and an "ordained minister" who was "authorized by his church" in a solemn Cherokee ceremony. N.C. Gen. Stat. §§ 51-1 and 51-3.2. The plain language of the statute was satisfied. The latest legislative expressions were to validate marriages performed by ordained ministers of the Universal Life Church and marriages performed in the Cherokee tradition. *Id.*

Because plaintiff failed to overcome his "heavy burden" to annul his marriage, the trial court's order ruling the parties' ceremony was not legally solemnized should be reversed, and plaintiff's complaint should be dismissed. *Jackson*, 59 N.C. at 143. In light of this error, it is unnecessary to, and we should not, reach plaintiff's assignments of error. I respectfully dissent.

JOHN B. WOODLIEF AND WIFE, CYNTHIA M. WOODLIEF, PLAINTIFFS v. MECKLENBURG COUNTY, A BODY POLITIC AND CORPORATE OF THE STATE OF NORTH CAROLINA, CITY OF CHARLOTTE, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA, CHARLOTTE ZONING BOARD OF ADJUSTMENT, INSITE ENGINEERING AND SURVEYING, PLLC, E.C. GRIFFITH COMPANY, DORSETT HITCHENS PROPERTIES, LLC, AND JOEL MADDEN, DEFENDANTS

No. COA05-564

(Filed 21 February 2006)

1. Zoning— revision of application for floodlands development permit—considered under original ordinance

The trial court did not err by granting summary judgment for defendants in a declaratory judgment action arising from an application to develop property next to that of plaintiffs in an

area that frequently flooded. Plaintiffs contended that the court erred by allowing defendants to revise their application under the ordinance in effect when the original application was filed (the 2000 ordinance), rather than a new ordinance (the 2003 ordinance). Both ordinances were silent about grandfathering, and the practice of the Planning Commission was to evaluate subdivision ordinances under the regulatory rules existing at the time of the application. Land development is a process that occurs over time, and a request for further information by a reviewing agency does not require that the process begin anew.

2. Zoning— development within floodway—permit not improperly allowed

Plaintiffs did not show that the Board of Adjustment acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law by concluding that defendant's street and utility development within a FEMA floodway did not constitute an impermissible encroachment. Summary judgment was correctly granted for defendants.

3. Zoning— floodway development—application to proper entity

Defendants applied to the proper entity to obtain a development permit in an area subject to flooding when it applied to the Floodplain Administrator for Storm Water rather than directly to the Board of Adjustment. The Board of Adjustment did in fact conclude that the development was in accord with the applicable ordinance and approved the issuance of the permit.

Judge HUDSON concurring in the result.

Appeal by plaintiffs from order entered 5 May 2004 by Judge James W. Morgan and order entered 17 December 2004 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 December 2005.

Smith Moore LLC, by Thomas E. Terrell, Jr. and Laurie D. Clark, for plaintiffs-appellants.

Charlotte City Attorney, by Senior Assistant City Attorney Robert E. Hagemann, for petitioner-appellees Mecklenburg County, City of Charlotte and Charlotte Zoning Board of Adjustment.

Shumaker, Loop & Kendrick, LLP, by William H. Sturges, for petitioners-appellees Insite Engineering and Surveying, PLLC, E.C. Griffith Company, Dorsett Hitchens Properties, LLC, and Joel Madden.

TYSON, Judge.

John B. Woodlief and Cynthia M. Woodlief ("plaintiffs") appeal from the trial court's 17 December 2004 order granting summary judgment in favor of Mecklenburg County, the City of Charlotte, the Charlotte Zoning Board of Adjustment, Insite Engineering and Surveying, PLLC, E.C. Griffith Company, Dorsett Hitchens Properties, LLC, and Joel Madden (collectively, "defendants"). We affirm.

I. Background

Plaintiffs are the owners of a parcel of land used for residential purposes located in Charlotte. Defendant, E.C. Griffith Company ("Griffith"), owns approximately 6.4 acres of undeveloped woodland property abutting plaintiff's parcel. Both properties adjoin the Briar Creek floodway, an area regulated by the federal and local governments to control flooding. This area has experienced significant flooding in past years.

The Federal Emergency Management Agency ("FEMA") regulates uses of land that are subject to flooding. FEMA requires states and local communities to adopt standards equal to or more restrictive than the federal criteria in order to qualify for federal disaster relief and insurance.

Prior to 2000, the City of Charlotte regulated the 1.0 foot surcharge FEMA floodway, as required by FEMA's flood insurance program. In the late 1990s, the City of Charlotte and Mecklenburg County began to develop and adopt more restrictive flood protection regulations. On 28 February 2000, the Charlotte City Council established a more restrictive floodway using a 0.5 foot surcharge instead of the 1.0 foot FEMA surcharge to locate the floodway encroachment line. The City Council also established a 0.1 foot surcharge local floodway known as the FLUM (Floodplain Land Use Map) floodway. The FLUM floodway further limits uses and development than what is permitted within the FEMA floodway.

Griffith and defendant, Dorsett Hitchens Properties, LLC. ("Dorsett"), decided to jointly develop the 6.4 acre parcel into a resi-

dential subdivision. Griffith and Dorsett employed defendant, Insite Engineering and Surveying, PLLC ("Insite"), to apply for a floodlands development permit. Insite's employee, defendant Joel Madden ("Madden"), filed an application for a permit with the Mecklenburg County Storm Water Services Department ("Storm Water") on Griffith's and Dorsett's behalf on 3 March 2003. Storm Water issued Permit Number 917 on 27 March 2003.

In May 2004, Storm Water determined it had mistakenly issued the permit. The Charlotte City Council adopted new floodway regulations on 12 May 2003, after Permit Number 917 was issued. Storm Water sent Griffith and Madden a letter stating Permit Number 917 had been "revoked." The letter also advised the applicant could revise its application to comply with the 2000 ordinance in effect at the time the original application was filed.

Griffith, through Insite, submitted a revised flood study in June 2004. Storm Water found the revised flood study complied with the City of Charlotte's floodplain regulations in effect at the time of the application. Storm Water "reissued" Permit Number 917. This permitting decision was affirmed and adopted by the Charlotte Zoning Board of Adjustment on 4 November 2003.

Plaintiffs filed a complaint for declaratory judgment in Mecklenburg County Superior Court challenging the validity of Permit Number 917. On 5 May 2004, the trial court granted defendant's motion for partial judgment on the pleadings. On 17 December 2004, the trial court granted summary judgment in favor of defendants. Plaintiff appeals.

II. Issues

Plaintiffs contend the trial court erred in granting summary judgment for defendants and argue: (1) the flood permit was issued under a repealed ordinance; (2) the flood permit was issued in violation of the 2000 ordinance; and (3) the flood permit was issued by an entity that lacked the legal authority to issue it. Plaintiffs also assigned error to the trial court's 5 May 2004 order. Plaintiffs failed to argue their assignment of error to the order entered 5 May 2004 on appeal. N.C.R. App. P. 28(b)(6) (2005) ("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."). This assignment of error is dismissed.

III. Standard of Review

A. Summary Judgment

In a motion for summary judgment, the movant has the burden of establishing that there are no genuine issues of material fact. The movant can meet the burden by either: "1) Proving that an essential element of the opposing party's claim is nonexistent; or 2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim." *Price v. Davis*, 132 N.C. App. 556, 559, 512 S.E.2d 783, 786 (1999) (citing *Messick v. Catawba County*, 110 N.C. App. 707, 712, 431 S.E.2d 489, 492-93, *disc. rev. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993)).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. N.C. Gen. Stat. § 1A-1, Rule 56(e) (2003).

Hines v. Yates, 171 N.C. App. 150, 157, 614 S.E.2d 385, 389 (2005).

B. Statutory Construction

We review an issue of statutory construction *de novo*. *A&F Trademark, Inc. v. Tolson*, 167 N.C. App. 150, 153-54, 605 S.E.2d 187, 190 (2004). The primary goal of statutory construction is to effectuate the legislature's purpose and intention. *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973). " 'The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances.' " *Id.* (quoting *Cogdell v. Taylor*, 264 N.C. 424, 142 S.E.2d 36 (1965)).

When reviewing a board of adjustment's interpretation of an ordinance, " 'our task on appeal is not to decide whether another interpretation of the ordinance might reasonably have been reached by the board,' but to decide if the board 'acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law' in interpreting the ordinance." *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999) (quoting *Taylor Home v. City of Charlotte*, 116 N.C. App. 188, 193, 447 S.E.2d 438, 442, *disc. rev. denied*, 338 N.C. 524, 453 S.E.2d 170 (1994)).

IV. Issuance of the Flood Permit

A. Evaluation Under the 2000 Ordinance

[1] Plaintiffs argue the trial court erred in granting summary judgment to defendants because Storm Water evaluated the June 2004 revised flood study under the 2000 floodplain ordinance instead of the 2003 ordinance. We disagree.

The original application was submitted on 3 March 2003 when the 2000 ordinance controlled the conditions of the permit. The City amended the flood way regulations in May 2003. Insight's revised flood study was submitted in June 2004. The 2003 ordinance is silent on allowing filed flood lands development permit applications to be evaluated under standards in effect when filed. Plaintiffs argue the trial court erred in applying a "grandfather provision" when the 2003 ordinance contains no such provision.

The letter from Storm Water to Griffith and Madden stated:

> If you wish to submit a *revised model* or models still showing the fill within the FEMA floodway line or *a revised application* with different fill parameters and revised models for our review using the ordinance that was in effect at the time of your original submittal (March 3, 2003), please do so no later than July 12, 2004. Failure to submit by that date will result in *your original application* being deemed to have been abandoned.

(Emphasis supplied). An inter-office memorandum within the Planning Commission stated:

> We have been informed that Mecklenburg County Storm Water Services has revoked the Floodlands Development Permit necessary for the development of Eastover Woods after determining that it was mistakenly issued. However, Mecklenburg County Storm Water Services has given the developer until July 12, 2004 to *re-submit information in support of their original Floodland Development Permit application.*

(Emphasis supplied).

Storm Water considered the following factors in determining whether the revised flood study would be evaluated under the 2000 ordinance: (1) both the 2000 and 2003 ordinances are silent on the issue of evaluating permit applications submitted and filed prior to the adoption of the 2003 ordinance; and (2) the Charlotte

Mecklenburg Planning Commission had a prior pattern and practice of evaluating subdivision applications under the regulatory rules existing at the time of the application for preliminary subdivision approval, where the subsequently adopted regulations are silent on the issue of grandfathering.

In *Northwestern Financial Group v. County of Gaston*, our Supreme Court addressed an explicit grandfathering provision. 329 N.C. 180, 405 S.E.2d 138 (1991). Gaston County adopted a mobile home park ordinance on 1 July 1986. *Id.* at 182, 405 S.E.2d at 139. Gaston County amended the ordinance in September 1987. *Id.* The amended ordinance contained the following language: "[t]he provisions of the Gaston County Mobile Home Park Ordinance Dated July 1, 1986, shall apply to those . . . plans . . . submitted to the Gaston County Division of Planning after July 1, 1986 and prior to the effective date of this ordinance." *Id.* The plaintiff submitted a plan for a mobile home park in June 1987 prior to the effective date of the ordinance's amendment. *Id.* The plaintiff submitted a revised plan shortly before the ordinance was amended. *Id.* at 183, 405 S.E.2d at 140. In response to requests from Gaston County, the plaintiff further revised and resubmitted the plans three times after the 1987 ordinance became effective. Gaston County refused to accept the fifth set of revised plans under the 1986 ordinance. 329 N.C. at 185, 405 S.E.2d at 141.

In *Northwestern Financial Group*, our Supreme Court determined whether the plaintiff waived its right to have the plan reviewed under the 1986 ordinance by either an affirmative act or a failure to act. *Id.* at 188, 405 S.E.2d at 143. The Court stated:

> The Court of Appeals held that the revised plans submitted after the enactment of the new ordinance did not "relate back" to plans submitted prior to the enactment of that ordinance. We do not agree. We conceive *the issue* to be not so much whether the plans relate back, as it *is whether the submission of the subsequent revised plans in response to the requirements or recommendations of regulatory bodies resulted in a waiver or abandonment of Northwestern's right to review under the 1986 ordinance. The more pertinent inquiry as to whether such right is waived or abandoned is through examination of the question of whether the subsequent plans were made in a good faith effort to bring its application into compliance* with the 1986 ordinance. We hold, based on the findings by the trial court, which are amply supported by the evidence, that Northwestern *submitted*

> *the revised plans in response to the modifications recommended by a regulatory agency, proceeded in good faith to comply with the requirements of the 1986 ordinance*, and did not waive or abandon its right to review under that ordinance. *The revised plans were essentially a part of the normal give and take between the applicant and the regulatory authorities.*

Id. at 188-89, 405 S.E.2d at 143 (emphasis supplied). "Good faith efforts to comply with the recommendations of the reviewing agencies should not prejudice the applicant." *Id.* at 190, 405 S.E.2d at 144.

Here, the Griffith application was submitted and filed when the 2000 ordinance controlled the development. Griffith submitted additional information in connection with the original application after the ordinance was amended. Storm Water considered the revised flood study to be part of the original application process and not a new and separate permit application. The submission of the revised flood study was "part of the normal give and take between the applicant and the regulatory authorities." *Id.* at 189, 405 S.E.2d at 143. In submitting the revised flood study, Griffith was making a "good faith [effort] to comply with requirements of the . . . ordinance" in effect at the time the application was filed. *Id.* at 190, 405 S.E.2d at 144. Defendants "[were] entitled to rely upon the language of the ordinance in effect at the time [Griffith] applied for the permit." *Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 351, 578 S.E.2d 688, 690 (2003) (citing *Northwestern Financial Group*, 329 N.C. 180, 405 S.E.2d 138).

Land development is somewhat analogous to litigation. Neither is a snapshot, a freeze in time, but rather a process that occurs over time, sometimes months and years. Once a claimant timely files a lawsuit, the claimant tolls the statute of limitations for those claims. The claimant may amend his pleadings, dismiss without prejudice and refile, or add parties or claims to the original action. N.C. Gen. Stat. § 1A-1, Rule 15(a) (2003); N.C. Gen. Stat. § 1A-1, Rule 41(a) (2003); N.C. Gen. Stat. § 1A-1, Rule 14(a) (2003); N.C. Gen. Stat. § 1A-1, Rule 18(a) (2003). Both land development and litigation hold the potential for multiple sequences and paths. The outcome depends upon numerous dependent and independent, but correlated, variables. The design and construction of a project is specifically tailored to comply with the regulations in effect at the time of application for permits. A request for further information or clarification of an existing application by a reviewing agency or board does not

require the entire application and permitting process to begin anew. To hold otherwise would allow compliance with regulations and permitting to become a moving target to ever changing revisions or amendments.

Although our review is *de novo*, we give deference to the agency's interpretation of the ordinance in issue. *County of Durham v. N.C. Dept. of Env't and Natural Resources*, 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998) ("[E]ven when reviewing a case *de novo*, courts recognize the long-standing tradition of according deference to the agency's interpretation." The agency's past pattern and practice in similar applications also supports upholding the agency's decision in the absence of other controlling authority. This assignment of error is overruled.

B. Issuance in Accordance with the 2000 Ordinance

[2] Plaintiffs contend the trial court erred in granting summary judgment in favor of defendants because Permit Number 917 was issued in violation of Section 9-21(4)(a) of the 2000 ordinance. We disagree.

The 2000 ordinance restricts development within both the FEMA and FLUM floodways. Section 9-21(4)(a) of the 2000 ordinance addresses the FEMA floodway and provides:

> With the exception of stream crossings which shall not raise the base flood elevation more than one foot, no encroachments, including fill, new construction, substantial improvements and other developments shall be permitted within the FEMA floodway, unless it has been demonstrated through hydrologic and hydraulic analysis performed in accordance with standard engineering practice that such encroachment would not result in any increase in flood level during occurrence of a FLUM base flood discharge, changes in FEMA floodway elevations, or FEMA floodway width.

(Emphasis supplied).

The revised floodplain study shows development occurring inside the FEMA floodway. The proposed subdivision plan shows construction of a cul-de-sac, driveway connections to the road, utility installations, and land clearing activities located within the FEMA floodway. Plaintiffs assert Griffith failed to demonstrate the encroachment will cause no rise in the flood level to occur during a FLUM base flood discharge as required by Section 9-21(4)(a).

The term "encroachment" is not defined in the 2000 ordinance. Section 9-21(4)(c) provides:

> The *following uses shall be permitted by right within the floodway district* to the extent that they are otherwise permitted by the zoning ordinance, and provided they do not employ structures, fill or storage of materials or equipment except as provided herein:
>
> . . . .
>
> 2. Loading areas, parking areas, rotary aircraft ports and other similar uses, provided they are no closer than twenty-five (25) feet to the stream bank;
>
> . . . .
>
> 5. *Streets*, bridges, overhead utility lines, creek and storm drainage facilities . . . and other *similar public community or utility uses*[.]

(Emphasis supplied).

The Board of Adjustment concluded the revised flood study "did not propose any encroachment or activity that would trigger the application of Former Regulations Sec. 9-21(4)a." The Board also concluded the proposed activities that will occur in conjunction with the development "are not encroachments under Sec. 9-21(4)a and are uses permitted by right pursuant to Sec. 9-21(4)c of the Former Regulations." Plaintiffs have failed to show the Board of Adjustment " 'acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law' " by concluding the street and utility development within the FEMA floodway is "permitted by right", does not constitute an impermissible encroachment, and is exempt. *Whiteco Outdoor Adver.*, 132 N.C. App. at 470, 512 S.E.2d at 74. This assignment of error is overruled.

C. Authority of Storm Water

[3] Plaintiffs argue Griffith did not apply to the proper entity for purposes of obtaining the permit. We disagree.

Permit Number 917 was sought and obtained from the Floodplain Administrator for Storm Water. Section 9-19(a) of the 2000 ordinance, entitled, "Variance Procedures," states, "The zoning board of adjustment . . . shall hear and decide . . . any proposed encroachment

requests that would result in an increase in the floodway elevations or floodway widths during the occurrence of a base flood."

Plaintiffs assert Griffith should have applied directly to the Board of Adjustment because it sought permission to place encroachments in restricted areas and evidence shows the encroachments would raise the base flood elevation. The Zoning Board of Adjustment concluded the proposed development was in accordance with the 2000 ordinance and the proposed construction in the floodway was exempt from the ordinance. The ordinance expressly provides for exemptions for development such as utilities, public roads, and parking areas in the restricted areas.

The Zoning Board of Adjustment also expressly stated in its decision: "To the extent . . . that approval of the Charlotte Zoning Board of Adjustment is necessary, this decision on appeal shall constitute such approval and issuance of permit #917." This assignment of error is overruled.

V. Conclusion

The trial court did not err in granting summary judgment in favor of defendants. No error of law was committed by the superior court in ruling the proposed development inside the FEMA floodway did not constitute an impermissible encroachment under Section 9-21(4)(a) of the 2000 City of Charlotte Floodway Regulations and defendant's development is "permitted by right" under Section 9-21(4)(c) of the City of Charlotte Floodway Regulations. The trial court's order is affirmed.

Affirmed.

Judge LEVINSON concurs.

Judge HUDSON concurs in result with a separate opinion.

HUDSON, Judge, concurring in result.

While I concur in the result reached by the majority, I believe that its discussion of grandfathering provisions, particularly the analogy to litigation, is misplaced. The primary case cited by the majority, *Northwestern Fin. Group, Inc. v. County of Gaston*, concerns a change to an ordinance which explicitly provided that the old version applied to plans submitted before the effective date of the change.

329 N.C. 180, 405 S.E.2d 138 (1991). The Court in *Northwestern* notes that the Board found that this explicit provision applied, then focuses on whether Northwestern had waived its application. *Id.* at 188, 405 S.E.2d at 143. The language quoted in the majority opinion immediately follows this statement:

> Having decided that Northwestern is entitled to have its application reviewed under the 1986 ordinance, we must next determine whether Northwestern waived that right by affirmative acts, that is, by abandonment of the first plans through the submission of the other revised plans, or by a failure to act, that is, the passage of time.

Id. Thus, the language discussed by the majority is focused on waiver by affirmative acts, which is not the issue before this Court. In addition, neither party cites a case in which our Courts have approved grandfathering in the absence of an explicit authorization, nor have we found one. I do not believe that creating a process of implicit grandfathering is appropriate here.

The law regarding vesting of a right to proceed under the prior version of an amended ordinance is well-established:

> A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building; (2) the obligations and/or expenditures are incurred in good faith; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party; and (4) the amended ordinance is a detriment to the party. The burden is on the landowner to prove each of the above four elements.

Browning-Ferris Industries v. Guilford County Bd. of Adj., 126 N.C. App. 168, 171-72, 484 S.E.2d 411, 414 (1997) (internal quotation marks and citations omitted).

Here, plaintiffs made expenditures in reliance on the original permit and the May 2003 letter from Storm Water, and thus acted in good faith, satisfying the third of the *Browning-Ferris Industries* elements. The amended ordinance tightened the floodplain development restrictions to the detriment of plaintiffs, thus satisfying the fourth.

However, "[p]ermits unlawfully or mistakenly issued do not create a vested right." *Clark Stone Co. v. N.C. Dep't of Env't & Natural Res.*, 164 N.C. App. 24, 40, 594 S.E.2d 832, 842, *disc. appeal dismissed*, 358 N.C. 731, 603 S.E.2d 878 (2004). Accordingly, defendants cannot prevail under a theory of vested rights.

Nevertheless, Storm Water first issued a permit to plaintiffs on 27 March 2003. In May 2003, Storm Water determined they had issued the permit in error, and sent plaintiffs a letter revoking the permit, but advising that the application could be revised and resubmitted under the 2000 ordinance. Storm Water did not notify defendants about the error issuing the original permit until early May; the amendment was adopted 12 May 2003. Because Storm Water erred in issuing the original permit and did not catch its mistake in time for defendants to make the necessary revisions, Storm Water treated this process as a revision and reissue, rather than as a new submission. Given our deference to an agency's interpretation of its own ordinance, I conclude that this process was proper, and would affirm on that basis.

NAVISTAR FINANCIAL CORPORATION, PLAINTIFF/APPELLANT v. E. NORRIS TOLSON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF REVENUE OF THE STATE OF NORTH CAROLINA, DEFENDANT/APPELLEE

No. COA05-352

(Filed 21 February 2006)

1. Taxation— wholesale and retail financing business—liens on property in North Carolina

There is no distinction in the statute imposing a tax on installment paper dealers, N.C.G.S. § 105-83, as to whether a business is of the wholesale, retail or hybrid variety, and the statute was applicable to a wholesale and retail business which engaged in the business of buying installment paper reserving liens on property located in North Carolina. Summary judgment was properly granted for defendant.

2. Taxation— installment notes with liens on North Carolina property—due process

Plaintiff has the substantial connections necessary for the State to legitimately levy taxes upon its business and the application of N.C.G.S. § 105-83 did not violate the Due Process Clause

of the Fourteenth Amendment. The activity being taxed is not the transfer of promissory notes, but the business of dealing in installment paper for which liens are reserved upon personal property located in North Carolina.

3. Taxation— wholesale and retail financing—Commerce Clause—no violation

N.C.G.S. § 105-83 does not violate the Commerce Clause of the United States Constitution. A state tax will be sustained as constitutional so long as the tax is applied to an activity with a substantial nexus within the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. This statute meets those criteria.

Appeal by plaintiff from judgment entered 17 November 2004 by Judge John R. Jolly, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 October 2005.

Bell, Davis & Pitt, P.A. by D. Anderson Carmen and John W. Babcock for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

CALABRIA, Judge.

Navistar Financial Corporation ("plaintiff") appeals the order denying its motion for summary judgment and granting E. Norris Tolson ("defendant") summary judgment. We affirm.

Plaintiff, a Delaware corporation authorized to conduct business in North Carolina, is a subsidiary of International Truck and Engine Corporation ("International"), also a Delaware corporation. Although plaintiff's truck sales finance business is not located in North Carolina, plaintiff extends credit to North Carolina truck dealers as well as third persons. Dealers acquire inventory such as commercial medium and heavy duty trucks, tractors, and related equipment through "wholesale financing." The second type of financing plaintiff provides is "retail financing" for third persons purchasing trucks from dealers or directly from the manufacturer of the trucks.

In addition to direct loans, plaintiff purchases promissory notes and retains liens on personal property to secure payment of the obligation in the notes. Specifically, as promissory notes are executed by

both North Carolina dealerships and third persons, plaintiff retains a security interest in each customer's personal property located in North Carolina. The wholesale financing branch of the business reserves liens on the current and after-acquired inventory of the dealer, however in the retail financing branch, liens are reserved on the financed equipment.

From 1 January 2000 through 31 March 2003, plaintiff engaged in business with twenty-eight North Carolina dealerships. Over that same time period, plaintiff paid over seven hundred thousand dollars in North Carolina installment paper dealer taxes pursuant to N.C. Gen. Stat. § 105-83.

On 19 June 2003, plaintiff filed a complaint alleging the following: "taxes paid by [plaintiff] . . . pursuant to N.C. Gen. Stat. § 105-83 which result from [plaintiff's]" wholesale and retail financing business "during the period of 1 January 2000 through 31 March 2003 were overpayments;" taxes assessed pursuant to § 105-83 were invalid because plaintiff did not "engage in North Carolina in the business of dealing in . . . installment paper . . . in connection with" either its wholesale or retail business "within the meaning of N.C. Gen. Stat. § 105-83;" "[a]ll material activities incident to the assignment of promissory notes between International and [plaintiff] took place outside of North Carolina;" and, plaintiff "is entitled to a judgment against the [North Carolina] Department of Revenue refunding $693,788.79 . . . respect[ing] its wholesale financing operations" and "$14,830.62 . . . respect[ing] its retail financing operations."

Cross motions for summary judgment were heard on 27 October 2004. The court determined there was no genuine issue as to any material fact with regard to the claims stated in plaintiff's complaint and granted defendant's motion for summary judgment on 17 November 2004. Plaintiff appeals.

I. *Summary Judgment*:

[1] Plaintiff first argues the trial court erred by denying their summary judgment motion and granting defendant the same due to the following assertions: N.C. Gen. Stat. § 105-83 is not applicable to either plaintiff's wholesale or retail financing business; that North Carolina precedent requires a refund of taxes paid; and that material issues of fact remain rendering summary judgment inappropriate. We disagree.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "[B]efore summary judgment will be properly entered, the *moving party* has the *burden* to show the lack of a triable issue of fact and . . . that he is entitled to judgment as a matter of law." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 441 (1982) (emphasis added). The movant carries this burden "by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *Zimmerman v. Hogg & Allen, Prof'l. Ass'n.*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974). "[A]ll inferences of fact from the proofs proffered at the hearing 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) (internal quotations and citation omitted).

I(a). *Applicability of N.C. Gen. Stat. § 105-83*:

N.C. Gen. Stat. § 105-83, in pertinent part, provides

> *Every person* engaged *in the business of dealing in*, *buying*, or discounting *installment paper*, notes, bonds, contracts, or evidences of debt for *which*, *at the time of* or in connection with *the execution of the instruments*, *a lien is reserved or taken upon personal property located in this State to secure the payment of the obligations*, *shall submit* to the Secretary . . . *a full . . . statement . . . of the total face value of the obligations dealt in*, bought, or discounted within the preceding three calendar months *and*, at the same time, *shall pay a tax* of two hundred seventy-seven thousandths of one percent (.277%) *of the face value of these obligations.*

N.C. Gen. Stat. § 105-83(a) (2005) (emphasis added). Plaintiff contends that "because they do not in North Carolina carry on the business of an installment dealer," N.C. Gen. Stat. § 105-83 does not apply to either its wholesale or retail financing business.

"Statutory interpretation properly begins with an examination of the plain words of the statute." *State ex rel. Banking Comm'n v. Weiss*, 174 N.C. App. 78, 83, 620 S.E.2d 540, 543 (2005) (quoting *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d

681, 683 (1997)). Consequently, "[w]here 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." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). According to Black's Dictionary, "plain meaning" is "[t]he meaning attributed to a document by giving the words their ordinary sense, without referring to extrinsic indications of the author's intent." Black's Law Dictionary 1002 (8th ed. 2004). Thus, the statute "must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977).

N.C. Gen. Stat. § 105-83 applies to any individual "dealing in" or buying installment paper obligations secured by personal property located in North Carolina. Simply put, there is no requirement in N.C. Gen. Stat. § 105-83 limiting the liability for this tax provision to individuals in the installment paper business only located in North Carolina. The essential nexus for application of the statute's tax provision is that the individual "dealing in" or buying installment paper secures repayment of the obligation by attaching a lien to personal property located in North Carolina. Thus, when appellant secured repayment of promissory notes by attaching liens on personal property located in North Carolina, N.C. Gen. Stat. § 105-83 became applicable. Consequently, appellant's assertion that the activities directly related to the actual transfer of the obligation—the execution, payment, and assignment of the promissory note—must occur within North Carolina to incur tax liability are unavailing. Therefore, because appellant engaged in the business of buying installment paper reserving liens on property located in North Carolina, appellant was properly assessed tax under N.C. Gen. Stat. § 105-83 since this statute imposes a tax for the privilege of carrying on business in the State of North Carolina. Furthermore, according to the plain language of the statute, there is no differentiation or distinction to be made as to whether the business is of the wholesale, retail or hybrid variety. Thus, based upon the above analysis, N.C. Gen. Stat. § 105-83 is applicable to both appellant's wholesale and retail financing business.

I(b). *Precedent*:

Plaintiff further contends *Chrysler Fin. Co., LLC v. Offerman*, 138 N.C. App. 268, 531 S.E.2d 223 (2000), is controlling precedent and consequently, necessitates a refund. This Court addressed two essential questions in *Chrysler* based upon an old version of N.C. Gen. Stat.

§ 105-83[1]: "whether: (I) Chrysler Financial is engaged in the business of dealing in . . . installment paper within the meaning of N.C. Gen. Stat. § 105-83 and, if so; (II) [whether] Chrysler Financial engaged in this business in the State of North Carolina within the meaning of N.C. Gen. Stat. § 105-83." *Id.*, 138 N.C. App. at 272, 531 S.E.2d at 225. This Court read the old statutory language to require that "both the assignment of a receivable take place in North Carolina and that a lien be reserved or taken upon property located in North Carolina." *Id.* Because the old version of N.C. Gen. Stat. § 105-83 required any person engaging in the business of dealing in installment paper to procure a state license if "purchasing such obligations *in this State*," this Court correctly ascertained in *Chrysler* that plaintiff had to engage in North Carolina in the business of an installment paper dealer for the tax to apply. However, in the instant case, there is no statutory command requiring a state license to buy obligations in this State as part of N.C. Gen. Stat. § 105-83. Thus, absent such a requirement, N.C. Gen. Stat. § 105-83 is applicable whether or not individuals engage in the business of an installment paper dealer in North Carolina as long as they reserve liens on property located in North Carolina to secure the obligation. Therefore, *Chrysler* is not controlling precedent and plaintiff is not entitled to a refund under its rationale.

I(c). *Material Issues of Fact*:

Plaintiff finally contends material issues of fact exist which precluded the trial court granting summary judgment for defendant. Plaintiff expressly contends the question before this Court is "whether there is a material issue of fact that [plaintiff] conducts activity in North Carolina which is sufficiently incident to the receipt of promissory notes from [International] to justify taxation. In section I(a). of this opinion, "*Applicability of N.C. Gen. Stat. § 105-83*," we determined "when appellant secured repayment of promissory notes by attaching liens on personal property located in North Carolina, N.C. Gen. Stat. § 105-83 became applicable." Because we have already determined plaintiff engaged in activity warranting application of the § 105-83 tax, there is no genuine issue of material fact regarding plaintiff's actions within North Carolina as it relates to justification of

1. The old version of N.C. Gen. Stat. § 105-83, applicable in *Chrysler*, 138 N.C. App. at 272, 531 S.E.2d at 225-26, included the following pertinent language absent from the current version applicable in the instant case: "Every person . . . shall apply for and obtain from the Secretary a State license for the privilege of *engaging in such business or for the purchasing of such obligations in this State* . . . ." (emphasis added).

the assessed tax under § 105-83. "When any . . . activity incident to . . . [the] business [of dealing in, buying and/or discounting installment paper] occurs in North Carolina, G.S. 105-83 applies." 17 NCAC 4B.2905 (June 2002). The assignments of error relating to summary judgment, numbers one through five and eight through ten, are overruled.

II. Due Process and Commerce Clauses:

II(a). *Due Process Clause*:

[2] Plaintiff argues application of N.C. Gen. Stat. § 105-83 violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. We disagree. The United States Supreme Court has held "[t]he Due Process Clause 'requires some definite link, some *minimum connection*, *between a state and the person*, *property* or *transaction it seeks to tax*[.]' " *Quill Corp. v. North Dakota*, 504 U.S. 298, 306, 119 L. Ed. 2d 91, 102 (1992) (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45, 98 L. Ed. 744, 748 (1954)). Further, " 'income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.' " *Id.* (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273, 57 L. Ed. 2d 197, 204 (1978)). Since "[d]ue process centrally concerns the fundamental fairness of governmental activity . . . due process . . . analysis requires that we ask whether an *individual's connections* with a State are *substantial enough* to legitimate the State's exercise of power over him." *Id.*, 504 U.S. at 312, 119 L. Ed. 2d at 106.

Plaintiff asserts there must be a *sufficient* nexus between the activity taxed and the activity of the taxpayer within the taxing statute for the application of the tax to be constitutional and not offend due process. Plaintiff contends the transfer of promissory notes from International to them is the activity being taxed and moreover, because this activity occurred exclusively in Illinois, they lack the necessary connections with North Carolina to justify imposition of the § 105-83 tax. Plaintiff's argument is unavailing.

In the instant case, plaintiff has *substantial* connections necessary for the State to legitimately levy taxes upon its business and not violate the Due Process Clause. Plaintiff executed promissory notes with North Carolina dealerships as well as third persons and further, purchased contracts from International which had reserved liens upon each customer's personal property located in North Carolina. Numerous liens secured payments to the plaintiff for obli-

gations in promissory notes. Thus, from 1 January 2000 through 31 March 2003, plaintiff engaged in wholesale and retail transactions with a variety of North Carolina businesses and individuals. In fact, plaintiff admits "[they] do[] business in North Carolina." Furthermore, the activity being taxed is not, as plaintiff believes, the specific transfer of promissory notes, but rather, according to the express language of § 105-83, the business of "dealing in" installment paper for which liens are reserved upon personal property located in North Carolina. Accordingly, N.C. Gen. Stat. § 105-83 taxes business activities rationally related to values connected with North Carolina. Thus, according to *Quill*, *supra*, there exists (1) plentiful minimum connections between the plaintiff's wholesale and retail business and North Carolina and (2) a rational relationship between the business activity taxed and values associated with North Carolina to justify the State's imposition of the § 105-83 tax. Consequently, plaintiff has "purposefully avail[ed] itself of the benefits of an economic market in [North Carolina]." *Id.*, 504 U.S. at 307, 119 L. Ed. 2d at 103. This assignment of error is overruled.

II(b). *Commerce Clause*:

[3] The plaintiff next argues application of N.C. Gen. Stat. § 105-83 violates the Commerce Clause, Article I, Section 8 of the United States Constitution. We disagree. The Constitution expressly grants to Congress the power to "regulate [c]ommerce with foreign [n]ations, and among the several [s]tates[.]" U.S. Const. art. I, § 8, cl. 3. Moreover, "the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well" in that " 'by its own force' [it] prohibits certain state actions that interfere with interstate commerce." *Quill*, 504 U.S. at 309, 119 L. Ed. 2d at 104 (quoting *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 185, 82 L. Ed. 734, 739 (1938)). This notion of a "dormant" Commerce Clause means "[a] State is . . . precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278, 51 L. Ed. 2d 326, 330 n.7 (1977) (citations and internal quotation marks omitted).

Under the *Complete Auto* test, a state tax will be sustained as constitutional under the Commerce Clause so long as the "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the

State." *Id.*, 430 U.S. at 279, 51 L. Ed. at 331. In *Quill*, the United States Supreme Court described the effect of the *Complete Auto* test in the following manner:

> The second and third parts of that analysis, which require fair apportionment and non-discrimination, prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. The first and fourth prongs, which require a substantial nexus and a relationship between the tax and state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce.

Quill, 504 U.S. at 313, 119 L. Ed. 2d at 107. A thorough analysis of each prong of the *Complete Auto* test reveals N.C. Gen. Stat. § 105-83 does not violate the Commerce Clause.

First, as to the initial prong of the *Complete Auto* test, that the tax is applied to an activity with a substantial nexus to the taxing state, plaintiff merely reasserts their due process argument. This argument was refuted above and is equally unavailing here. In the instant case, plaintiff's business of dealing in installment paper has a substantial nexus with North Carolina. Plaintiff purchased installment paper from North Carolina wholesale and retail businesses and individuals and secured the multiple obligations to repay the promissory notes by reserving liens upon personal property located in North Carolina. Thus, application of N.C. Gen. Stat. § 105-83 to plaintiff's business complies with the first prong of *Complete Auto*.

The second prong of the *Complete Auto* test requires an answer to whether the tax is fairly apportioned. "[T]he central purpose behind the apportionment requirement is to ensure that each State *taxes* only its *fair share* of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61, 102 L. Ed. 2d 607, 616 (1989) (emphasis added). "[W]e determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent." *Id.*, 488 U.S. at 261.

> The first . . . component of fairness in an apportionment formula is what might be called *internal consistency*—that is the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the . . . business's income being taxed. The second and more difficult requirement is what might be called *external consistency*—the factor or factors used in the appor-

> tionment formula must actually reflect a reasonable sense of how income is generated.

Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 169, 77 L. Ed. 2d 545, 556 (1983) (emphasis added). Consequently, "[t]o be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, 488 U.S. at 261, 102 L. Ed. 2d at 617. Conversely, "[t]he external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.*, 488 U.S. at 262. Importantly, "[t]he Constitution does not invalidat[e] an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing State." *Container Corp.*, 463 U.S. at 169-70, 77 L. Ed. 2d at 556 (citation and internal quotation marks omitted). However, the United States Supreme Court "will strike down the application of an apportionment formula if the *taxpayer can prove by clear and cogent evidence* that the income attributed to the State is in fact out of all appropriate proportions to the business transacted . . . in that State, or has led to a grossly distorted result." *Id.*, 463 U.S. at 170 (citations and internal quotation marks omitted).

Plaintiff failed to prove by "clear and cogent evidence" the revenue paid to North Carolina through application of the § 105-83 tax is either out of reasonable proportion to the business transacted by plaintiff or has led to a grossly distorted result. First, plaintiff renews their argument that the activity subject to the tax occurred outside of North Carolina and thus there was no apportionment provision in the statute. In fact, as to the "external consistency" branch of the apportionment prong, this is plaintiff's entire argument. This argument was dismissed under our analysis regarding due process and remains unavailing here as well for the activities taxed under § 105-83, including transacting with North Carolina wholesalers and retailers for installment paper and securing those debt obligations through liens reserved on personal property located in North Carolina, were certainly, according to *Goldberg*, *supra*, in-state components of the activity being taxed.

Second, plaintiff contends the tax violates the "internal consistency" branch of the apportionment prong in that they would be subject to multiple taxation were another state to enact identical legislation to N.C. Gen. Stat. § 105-83. However, "[i]nternal consistency is preserved when the imposition of a tax identical to the one in ques-

tion by every other State would *add no burden to interstate commerce* that intrastate commerce would not also bear." *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 185, 131 L. Ed. 2d 261, 271 (1995) (emphasis added). Consequently, "[t]his test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.*, 131 L. Ed. 2d at 271-72.

In the instant case, if any other state passed a statute identical to N.C. Gen. Stat. § 105-83, that state would tax the following business activity: the purchase of installment paper when, at the time of the execution of the instrument, to secure that obligation, a lien was reserved upon personal property located within the taxing state. Practically speaking then, if Virginia passed such a statute, it would tax such business only if liens were reserved upon personal property located in Virginia, not North Carolina. Consequently, according to *Goldberg*, *supra*, there is no danger of multiple taxation because as to that individual business transaction only the state where liens are reserved could impose the tax. Thus, N.C. Gen. Stat. § 105-83 complies with the second prong of *Complete Auto*.

The third prong of the *Complete Auto* test requires an answer to whether the state tax discriminates against interstate commerce. "A State may not impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Jefferson Lines*, 514 U.S. at 197, 131 L. Ed. 2d at 279 (citation and internal quotation marks omitted). Consequently, "States are barred from discriminating against foreign enterprises competing with local businesses and from discriminating against commercial activity occurring outside the taxing State[.]" *Id.* (citations omitted).

In the instant case, N.C. Gen. Stat. § 105-83 does not discriminate against foreign enterprises competing with local businesses as each must pay the privilege tax if they purchase installment paper reserving liens upon property located in North Carolina. This in no way limits interstate commercial activity for no advantage is given to in-state businesses liable under N.C. Gen. Stat. § 105-83 for taxes due when compared to out-of-state businesses engaged in the identical practice. Thus, N.C. Gen. Stat. § 105-83 complies with the third prong of the *Complete Auto* test.

The fourth prong of the *Complete Auto* test requires an answer to whether the tax is fairly related to the services provided by the State. "The purpose of this test is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." *Goldberg*, 488 U.S. at 266-67, 102 L. Ed. 2d at 620. Moreover,

> [t]he fair relation prong . . . requires *no detailed accounting of the services provided to the taxpayer on account of the activity being taxed* . . . [for] [i]f the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be made to pay its fair share of state expenses and contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct benefit.

Jefferson Lines, 514 U.S. at 199-200, 131 L. Ed. 2d at 281 (emphasis added) (citation and internal quotation marks omitted). Consequently, "the measure of the tax [need only] be reasonably related to the taxpayer's presence or activities in the State." *Id.*, 514 U.S. at 200.

The tax is reasonably related to plaintiff's presence and activities in North Carolina. Specifically, plaintiff executed promissory notes with North Carolina dealerships as well as third persons and further, retained liens through customers upon personal property located in North Carolina. Numerous liens secured payments on obligations in promissory notes. Thus, from 1 January 2000 through 31 March 2003, plaintiff engaged in wholesale and retail transactions with a variety of North Carolina businesses and individuals. Under the rationale provided in *Jefferson Lines*, *supra*, the tax was fairly related to the services provided by North Carolina. Thus, N.C. Gen. Stat. § 105-83 complies with the fourth and final prong of the *Complete Auto* test. This assignment of error is overruled.

In sum, we affirm the trial court's grant of defendant's motion for summary judgment and further find N.C. Gen. Stat. § 105-83 does not violate either the Due Process Clause or Commerce Clause of the United States Constitution.

Affirmed.

Judges HUDSON and BRYANT concur.

GILBERT SILVA, EMPLOYEE, PLAINTIFF-APPELLEE v. LOWE'S HOME IMPROVEMENT, EMPLOYER, SPECIALTY RISK SERVICES, CARRIER, DEFENDANTS-APPELLANTS

No. COA04-1678

(Filed 21 February 2006)

1. Workers' Compensation— lifting restrictions—accommodations

Although there was conflicting evidence in a workers' compensation case about defendant's accommodation of plaintiff's lifting restrictions, there was competent evidence to support the Industrial Commission's finding that the restrictions were not accommodated. The Commission is the sole judge of the weight and credibility of the evidence.

2. Workers' Compensation— disability—reason for termination

There was evidence in a workers' compensation case that plaintiff sought a meeting with his manager to discuss his work restrictions, a meeting which became heated and was followed by his termination. The Commission weighed the reasons for the termination and did not err by finding that plaintiff was terminated for the stated reason of being insubordinate without acknowledging evidence that plaintiff told his manager to "shut up."

3. Workers' Compensation— disability—termination—purpose of meeting

There was no error in a workers' compensation case in the Industrial Commission finding that plaintiff's manager planned to discipline plaintiff at a meeting at which she had requested a witness, although there was testimony that the additional person was requested because plaintiff was agitated. Evidence tending to support a plaintiff's claim is to be viewed in the light most favorable to plaintiff.

4. Workers' Compensation— disability—termination for work restrictions—findings

The findings supported the Industrial Commission's determination in a workers' compensation case that plaintiff's termination was directly related to his work restrictions rather than insubordination for which any non-disabled employee would have been terminated. The Commission found testimony by defendant's witnesses to be less credible than plaintiff's testimony; moreover, defendants did not present evidence from the district manager who told plaintiff the reason for his termination.

5. Workers' Compensation— disability—findings not sufficient for review

There was insufficient evidence to allow judicial review of Industrial Commission findings about whether plaintiff had suffered a disability where there were no findings about medical evidence, evidence of reasonable efforts to find employment, or evidence of futility in seeking employment. Defendant's admission of compensability did not relieve plaintiff of his burden of proving the existence and extent of his disability, nor did it relieve the Commission of its duty to make specific findings.

6. Workers' Compensation— disability—constructive refusal of employment—not found

Although termination of employment for misconduct may constitute constructive refusal of employment, there was no error here in the opposite conclusion. The Commission, as sole judge of credibility, did not find defendant's explanation of the termination credible and did find that plaintiff's termination was related to his work restrictions.

Appeal by defendants from opinion and award entered 28 September 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 October 2005.

The Kilbride Law Firm, PLLC, by Terry M. Kilbride and Nina G. Kilbride, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Meredith T. Black, for defendants-appellants.

McGEE, Judge.

Gilbert Silva (plaintiff) was employed by Lowe's Home Improvement (Lowe's) in the plumbing department at a Lowe's store in Henderson. Plaintiff was fifty-eight years old at the time of the hearing of his claim. Prior to his employment at Lowe's, plaintiff had worked as an engineer for Lockheed Martin and had also owned, operated, and managed his own business. Plaintiff's primary function at Lowe's was to write special orders for customers, attend to customers, stock shelves, and clean. Plaintiff was using a cherry picker to stock shelves on 26 May 2001 when he lost his footing and hit the edge of the shelving with his upper chest. Plaintiff was seen by a physician, who instructed plaintiff not to lift items exceeding twenty

pounds. Plaintiff returned to work at Lowe's. Plaintiff suffered a second injury on 23 November 2001 while guiding a shower door onto a cart. Plaintiff again saw a physician and was instructed not to lift items over twenty-five pounds continuously, or over forty pounds on occasion. Plaintiff returned to work at Lowe's following this second incident.

At a plumbing department staff meeting in April 2002, plaintiff's immediate supervisor, Clint Francis (Mr. Francis), reminded employees that they were responsible for "zoning" their respective areas within the plumbing department. "Zoning" involved walking down the aisles and straightening items. Mr. Francis reminded plaintiff about plaintiff's zoning duties. Mr. Francis also asked the assistant store manager, Kyndall McNair (Ms. McNair), to remind plaintiff. Ms. McNair approached plaintiff on 9 April 2002 to discuss his zoning duties. Plaintiff testified that some of Ms. McNair's concerns involved duties that plaintiff was incapable of performing because of plaintiff's lifting restrictions. Ms. McNair denied asking plaintiff to perform any duties beyond plaintiff's lifting restrictions, and testified she thought the meeting had gone well.

Plaintiff testified that on 15 April 2002, he arrived at work earlier than usual to "get some closure" with Ms. McNair regarding their previous conversation about plaintiff's zoning duties. Ms. McNair asked the store's training and personnel coordinator, Audra Benfield (Ms. Benfield), to join the meeting. Ms. McNair testified that during the meeting, a "heated" exchange took place between plaintiff and Ms. McNair. Plaintiff became upset, raised his voice, and told Ms. McNair to "shut up." Following this incident, Lowe's district manager, Jeff Sain, terminated plaintiff's employment by telephone. Thereafter, plaintiff requested a hearing before the Industrial Commission (the Commission) alleging entitlement to continuing disability compensation.

After a hearing, a deputy commissioner entered an opinion and award on 20 August 2003, concluding that: (1) plaintiff was terminated for insubordination, (2) any other employee of Lowe's would have been terminated for the same action, and (3) plaintiff constructively refused to perform the work provided. The deputy commissioner denied plaintiff's claim for temporary total disability compensation. Plaintiff appealed to the full Commission, which reversed the deputy commissioner. The Commission entered an opinion and award on 28 September 2004 finding that Lowe's and its insurance carrier, Specialty Risk Services, (collectively defendants), failed to

show that plaintiff was terminated for misconduct for which a non-disabled employee would have been terminated. The Commission awarded plaintiff ongoing total disability compensation from 16 April 2002 until plaintiff returned to work, as well as medical expenses incurred as a result of the 26 May 2001 injury. Defendants appeal.

Appellate review of an award from the Commission is limited to two inquiries: (1) whether the findings of fact are supported by any competent evidence in the record, and (2) whether the conclusions of law are justified by the findings of fact. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345 (internal citation omitted), *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68-69 (1996). If supported by competent evidence, the Commission's findings are conclusive even if the evidence might also support a contrary finding. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995).

Defendants assign error to seven findings of fact, arguing the findings are not supported by competent evidence. Defendants also assign error to three conclusions of law, arguing the conclusions are not supported by competent findings of fact. Defendants further assign error to three paragraphs of the award, arguing that those paragraphs are not supported by the findings and conclusions.

I.

[1] Defendants argue that finding of fact number five is not supported by competent evidence. Finding of fact number five provides:

> Regarding plaintiff's restrictions and the requirements of his "light duty job," defendants assert that his restrictions were accommodated. However, there is no credible evidence of record . . . relating to any specific modifications or purported accommodations made by defendants. Moreover, plaintiff, whose testimony is accepted as credible, testified that his supervisors and co-workers often complained and expressed frustration regarding his lifting restrictions following his return to work.

Defendants argue there is no evidence in the record to support a finding that plaintiff's lifting restrictions were not accommodated. However, we find no evidence of specific accommodations or modifications made to suit plaintiff's lifting restrictions. Moreover, there is conflicting evidence over whether plaintiff was asked to do work beyond his restrictions. Plaintiff testified that on occasion he refused

to do assigned work that was beyond his restrictions, and that such refusals appeared to cause "grief" for Ms. McNair and the store manager, John Blankenship (Mr. Blankenship). Plaintiff also testified that "at times there was agitation" over his restrictions and that Ms. McNair asked plaintiff to perform tasks beyond his restrictions. Ms. McNair testified that she never asked plaintiff to perform any activities beyond his restrictions, and that her concern about plaintiff's work was that plaintiff was not zoning items within his restrictions, such as faucets, towel bars, and filters.

It is well settled that the Commission is the "sole judge of the weight and credibility of the evidence." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). On appeal, this Court may not re-weigh evidence or assess credibility of witnesses. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). In the present case, the Commission afforded greater weight to plaintiff's testimony than to the testimony of defendants' witnesses. Although the testimony is conflicting, there is competent evidence to support the Commission's finding.

[2] Defendants next assign error to finding of fact number six:

> On 15 April 2002, plaintiff reported to work . . . [and] approach[ed] Ms. Kyndall McNair, defendant-employer's assistant manager, to discuss his concerns regarding his restrictions not being complied with and the problems this was creating. Ms. McNair then asked Ms. Audra Benfield, defendant-employer's personnel training coordinator, to join the discussion. During the meeting, plaintiff testified that Ms. McNair was rude and that she thrust her hand into his face. Ms. McNair testified that it was plaintiff who was rude and that he also displayed threatening behavior. Following this meeting, plaintiff was terminated for the stated reason of being insubordinate.

Defendants argue there is no evidence that plaintiff intended to discuss his restrictions with Ms. McNair or that he in fact did so during the meeting. Again, while the evidence is somewhat conflicting, there is competent evidence in the record to support this finding of fact. Plaintiff testified that on 9 April 2002, he and Ms. McNair had a meeting to discuss zoning. According to plaintiff, Ms. McNair was "upset" because he was not zoning properly. Plaintiff explained to Ms. McNair that he was unable to do certain zoning tasks because of his lifting restrictions. Plaintiff further testified he sought the 15 April 2002 meeting with Ms. McNair to "get some closure to some statements

that were made . . . by [Ms.] McNair the week earlier [at the 9 April 2002 meeting]." This testimony supports the Commission's finding that plaintiff sought to meet with Ms. McNair on 15 April 2002 to discuss his restrictions.

Defendants also argue the Commission erred in not acknowledging, in finding number six, the undisputed evidence that plaintiff told Ms. McNair to "shut up." Defendants contend that plaintiff's telling Ms. McNair to "shut up" was "clearly" the reason for his termination, i.e., insubordination, and that the Commission erred in ignoring this evidence. However, defendants presented no direct evidence of plaintiff's termination. Jeff Sain, the district manager who fired plaintiff, was not present for the hearing, nor was any deposition testimony presented. As a result, the Commission weighed the explanations given for plaintiff's termination by plaintiff and Ms. McNair. The Commission found only that plaintiff was terminated for the "stated reason" of being insubordinate. We find no error.

[3] Defendants next assign error to finding of fact number seven:

> Pursuant to the credible evidence of record, it is defendant-employer's policy to have a witness present when disciplinary action is taking place. Therefore, the reasonable inference from Ms. McNair securing a witness prior to the meeting, which was requested by plaintiff, is that she planned to discipline plaintiff even before the meeting commenced. Based upon this and the entire record of credible evidence, the Full Commission gives great weight to plaintiff's testimony regarding the circumstances of his termination as opposed to that of Ms. McNair, which is given less weight.

In support of this finding, Ms. McNair testified that Lowe's does have a policy of having a witness present if an employee is to be reprimanded. However, Ms. McNair also testified that she asked Ms. Benfield to be present because plaintiff was visibly agitated. Ms. Benfield confirmed that plaintiff had an aggressive attitude, and that she was not directed to attend the meeting for the purpose of witnessing plaintiff's termination.

Evidence tending to support a plaintiff's claim is to be viewed in the light most favorable to the plaintiff, who is "entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Although it is reasonable to infer from the evidence that Ms. Benfield was present only because

of a concern about plaintiff's agitation, it is also reasonable to infer that Ms. Benfield was present to witness disciplinary action. Since plaintiff is entitled to the benefit of every reasonable inference, we find no error in the Commission's finding that Ms. McNair planned to discipline plaintiff.

[4] Defendants next assign error to finding of fact number eight:

> Based upon the credible evidence of record, defendants have failed to prove that plaintiff's termination was for misconduct or fault for which a non-disabled employee would also have been terminated. In fact, the credible evidence of record supports a finding that plaintiff's termination was directly related to his assigned light duty work restrictions and defendant-employer's inability to reasonably accommodate those restrictions. Accordingly, plaintiff did not constructively refuse suitable work.

The Commission's finding, that plaintiff's termination was directly related to plaintiff's assigned light-duty work restrictions, is supported by plaintiff's testimony that he sought to meet with Ms. McNair on 15 August 2002 to discuss issues related to zoning and plaintiff's lifting restrictions. Defendants again argue that the Commission's finding is erroneously void of any mention of the undisputed evidence that plaintiff told Ms. McNair to "shut up" during the meeting. Defendants point out that plaintiff admitted to doing so in a letter to Bob Tillman, C.E.O. of Lowe's, and testimony by Ms. McNair and Ms. Benfield confirmed plaintiff's behavior at the meeting. Ms. Benfield further testified that, under Lowe's disciplinary policy, telling a supervisor to "shut up" would constitute insubordinate conduct, a Class A offense that could result in an employee's immediate termination. Mr. Blankenship further testified that he called Jeff Sain, who ultimately terminated plaintiff, to report on the meeting and "to discuss what needed to be done to make sure we were following [Lowe's] policy and procedure." From this evidence, defendants argue, and we agree, it is reasonable to infer that plaintiff's termination was for insubordination, misconduct for which a non-disabled employee would also have been terminated, and that plaintiff's termination was unrelated to plaintiff's lifting restrictions. However, the Commission found the testimony by defendants' witnesses to be less credible than plaintiff's testimony. Accordingly, and giving plaintiff the benefit of every reasonable inference, the Commission found that plaintiff was not terminated for insubordination, but rather because of plaintiff's lifting restrictions, and found

that the termination was related to plaintiff's injury. Moreover, as previously discussed, defendants presented no testimony or evidence from Jeff Sain, who had communicated to plaintiff the reason for plaintiff's termination.

The final sentence of finding number eight, that "plaintiff did not constructively refuse suitable work[,]" is actually a conclusion of law, and we will address it as such in section II of this opinion. *See McRae v. Toastmaster, Inc.*, 358 N.C. 488, 499, n.3, 597 S.E.2d 695, 703, n.3 (2004) (noting the determination that a plaintiff has constructively refused suitable employment is a conclusion of law and that the distinction between a finding of fact and a conclusion of law is "significant, as an appellate court's standard of review of the Commission's findings of fact is markedly different from its standard for reviewing the Commission's conclusions of law.").

[5] We next review the Commission's finding of fact number nine, that "[a]s the result of his 26 May 2001 injury by accident, plaintiff has been unable to earn any wages in any employment[.]" We hold that this finding is insufficient. While the Commission "is not required to make specific findings of fact on every issue raised by the evidence, it is required to make findings on crucial facts upon which the right to compensation depends." *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5, 613 S.E.2d 715, 719, *aff'd* 360 N.C. 169, 622 S.E.2d 492 (2005). Here, the Commission "failed to make specific findings of fact as to the crucial questions necessary to support a conclusion as to whether plaintiff had suffered any disability as defined by G.S. 97-2(9)." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982).

An employee seeking compensation under the Workers' Compensation Act (the Act) bears the burden of proving the existence of a disability and its extent. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005). The Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2003). Disability, therefore, is "the impairment of the injured employee's earning capacity rather than physical disablement." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). In order to award compensation to a claimant, the Commission must find that the claimant has shown disability. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. An employee may meet this burden of proof in four ways: (1) medical evidence that, as a consequence of the work-related injury, the employee is incapable

of work in any employment; (2) evidence that the employee is capable of some work, but has been unsuccessful, after reasonable efforts, in obtaining employment; (3) evidence that the employee is capable of some work, but that it would be futile to seek employment because of preexisting conditions, such as age or lack of education; or (4) evidence that the employee has obtained employment at a wage less than that earned prior to the injury. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

In the present case, the Commission made only one finding about the existence and extent of plaintiff's disability: "As the result of his 26 May 2001 injury by accident, plaintiff has been unable to earn any wages in any employment for the period of 16 April 2002 through the present and continuing." Nominally, this finding satisfies the *Hilliard* test and the Act's definition of disability. However, the finding is insufficient to allow this Court to review the legal basis for this ultimate finding of fact. There are no findings of fact as to medical evidence, evidence of reasonable efforts to obtain employment, or evidence of the futility of plaintiff's seeking employment. As a result, we are unable to determine which of the four *Russell* prongs the Commission has relied on in coming to the ultimate factual finding that plaintiff has carried his burden of proving disability. Because the Commission's findings of fact are insufficient to enable this Court to determine plaintiff's right to compensation, this matter must be remanded for proper findings on this issue. *See Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (holding that where the findings are insufficient to enable the reviewing court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact).

We note defendants stipulated to the compensability of plaintiff's injury. However, defendants' admission of compensability did not relieve plaintiff of his burden of proving the existence and extent of his alleged disability. *See Clark*, 360 N.C. at 44, 619 S.E.2d at 493 ("[T]he law in North Carolina is well settled that an employer's admission of the 'compensability' of a workers' compensation claim does not give rise to a presumption of 'disability' in favor of the employee."). Nor did defendants' stipulation relieve the Commission of its duty " 'to make specific findings regarding the existence and extent of any disability suffered by plaintiff.' " *Id.* (quoting *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 707, 599 S.E.2d 508, 512-13 (2004)). Accordingly, we remand to the Commission for adequate findings on the existence and extent of plaintiff's disability.

II.

[6] We now address the Commission's conclusion of law, embedded in finding of fact number eight, that "plaintiff did not constructively refuse suitable work." The conclusion is supported by the Commission's factual findings that plaintiff was fired not for misconduct, but rather for reasons directly related to plaintiff's lifting restrictions. Accordingly, we find no error in this conclusion. Moreover, the conclusion results from the correct application of the *Seagraves* test for constructive refusal. *See Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996).

N.C. Gen. Stat. § 97-32 (2003) provides that an injured employee is not entitled to any compensation if the employee refuses employment suitable to the employee's capacity, unless the Industrial Commission finds that such refusal was justified. A refusal of employment may be actual or constructive. *Seagraves*, 123 N.C. App. at 233-34, 472 S.E.2d at 401. Where an injured employee is terminated for misconduct, such termination may constitute constructive refusal. *Id.* at 230, 472 S.E.2d at 399. To establish that an injured employee has constructively refused employment, the employer must show "that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated." *Seagraves* at 234, 472 S.E.2d at 401.

Defendants also assign error to the Commission's conclusion of law number two, that "[b]ased upon the credible evidence of record, defendants have failed to prove that plaintiff's termination was for misconduct or fault for which a non-disabled employee would also have been terminated." This conclusion is based on the Commission's finding number eight, that plaintiff's termination was directly related to his assigned light-duty work restrictions. The Commission did not find defendants' explanation, that plaintiff was terminated for insubordination, to be credible. Because the Commission is the sole judge of the credibility of witnesses, we find no error.

Finally, defendants assign error to those paragraphs of the Commission's conclusions and award that state that plaintiff is entitled to payment of ongoing disability compensation and medical expenses. As discussed above, the Commission's order and award contain insufficient findings as to whether plaintiff, in fact, suffered any disability. Accordingly, we affirm that part of the Commission's order that provides, under *Seagraves*, that plaintiff is not barred from compensation because of constructive refusal of suitable employ-

ment. *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401. We remand for further findings on the threshold issue of whether plaintiff has proved the existence of a disability that would entitle him to compensation under the Act.

Defendants' assignments of error numbers one and two, not argued in defendants' brief on appeal, are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

Affirmed in part; remanded.

Judges WYNN and GEER concur.

STATE OF NORTH CAROLINA v. JAMES W. DURHAM, DEFENDANT

No. COA05-272

(Filed 21 February 2006)

1. Constitutional Law— right to confrontation—expert testimony based on report

The introduction of an autopsy report by a non-testifying pathologist did not violate defendant's confrontation rights under *Crawford v. Washington*, 541 U.S. 36, and was not plain error. The pathologist who testified was accepted as an expert, had observed the autopsy, and relied on the report of the pathologist who performed the autopsy (who has since taken employment outside North Carolina). The report was tendered as evidence of the basis of the expert witness's opinion, and defendant was given the opportunity to cross-examine the expert.

2. Homicide— lesser included offense—sufficiency of evidence

The evidence at trial could not have supported a verdict of voluntary manslaughter and the trial court did not err by not instructing the jury on that lesser included offense in a prosecution for second-degree murder. Although defendant contended that the shooting occurred during a struggle after an earlier confrontation, there was evidence that defendant initiated the confrontation, evidence that tended to show an unlawful killing with malice, and the defense was that defendant did not shoot the victim.

3. Evidence— exhibit excluded—two dimensional

The exclusion of a defense exhibit showing the trajectory of the bullets that hit the victim was not an abuse of discretion where the trial court stated that the exhibit was two dimensional, and possibly misleading, as opposed to the pathologist's three dimensional testimony.

4. Sentencing— aggravating factor—not submitted to jury—no stipulation

Finding an aggravating factor (using a weapon hazardous to more than one person) without submitting it to the jury or a stipulation from defendant resulted in the remand of sentences for second-degree murder and discharging a weapon into occupied property.

Appeal by Defendant from convictions and sentences entered 19 August 2003 by Judge Robert H. Hobgood in Superior Court, Vance County. Heard in the Court of Appeals 24 January 2006.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

M. Gordon Widenhouse, Jr., for defendant-appellant.

WYNN, Judge.

The admission of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment right of confrontation where the expert is available for cross-examination.[1] Here, Defendant contends that expert testimony based on an autopsy conducted by someone other than the testifying expert violated his right to confrontation under the rationale of the *Crawford* decision.[2] Because Defendant had an opportunity to cross-examine the expert, and the autopsy report on which the expert testimony was based was not hearsay, we affirm the admission of the expert testimony.

We further find no error in the remaining assignments of error except that we must remand for resentencing under the *Blakely* decision.[3]

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1. *See State v. Huffstetler*, 312 N.C. 92, 108, 322 S.E.2d 110, 120 (1984).

2. *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

3. *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004).

The record reflects that during the late afternoon of 18 May 2001, cousins Rickie and Charles Downey were at their grandmother's house when Defendant James W. Durham beckoned Rickie to come over to the house next door. The two men then argued about drugs that Defendant thought Rickie had stolen from him. When Charles heard Defendant say, "I'll beat your ass, boy," he pulled Rickie back to their grandmother's front porch.

Late that evening, Charles and Rickie rode to a local nightclub—Charles drove because Rickie was drunk and asleep during the drive. When Charles pulled into the parking lot of the nightclub, he saw a white Jeep belonging to Kip Hargrove, Defendant's cousin. Charles tried to turn around but the car stalled almost directly in front of Hargrove's Jeep. While Charles attempted to restart the car, Defendant reached inside the car with a revolver in his hand.

According to Charles, Defendant put the revolver in Rickie's face, and said, "[w]hat's up now, n—ger." Defendant then opened the door and got into the car. Rickie awoke, grabbed Defendant's gun and struggled over the gun with Defendant. Meanwhile, Charles opened the driver's door, rolled out of the car, ducked behind the back seat door, raised up to look into the car, and saw Defendant shooting Rickie in the chest.

After the shooting, Charles got back into the car, moved Rickie's leg off the gear shift, reached over Rickie to shut the passenger side door, took a fully loaded revolver from under the passenger's seat and threw it out of the car window from the driver's side. The gun was later retrieved with no rounds fired. Charles then drove Rickie to the hospital, but Rickie died before they arrived.

Other State witnesses included Hargrove who agreed to testify under a plea agreement with the State, whereby he pled guilty to accessory after the fact to voluntary manslaughter. The State also presented expert testimony from Dr. Deborah Radisch of the Office of the Chief Medical Examiner. Dr. Radisch testified that she was present and observed the victim's autopsy, but that the autopsy was actually performed by Dr. Karen Chancellor, a forensic pathologist who had since left North Carolina for employment elsewhere.

Defendant presented evidence at trial tending to indicate that he was standing near or inside the nightclub when the gunshots were fired and that he did not have a gun that evening. Defendant also presented expert testimony from Michael Grissom, an independent

crime scene investigator. Grissom testified that he examined the car where the victim was sitting when he was shot. He observed that the right front passenger seat was reclined, but that he found no bullet holes in the seat or in the front right door. Grissom attempted to testify using a diagram that he drew to illustrate the victim's body in the car, however, the trial court excluded the diagram from evidence.

Defendant was convicted of one count of second degree murder and one count of discharging a weapon into occupied property. The trial court sentenced Defendant to a term of 237 to 294 months for the second degree murder conviction and thirty-six to fifty-three months for the discharging a weapon into occupied property conviction, to run consecutively. Defendant appeals.

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[1] On appeal, Defendant argues that the trial court committed plain error by allowing the prosecution to introduce evidence of an autopsy report performed by a non-testifying pathologist because the admission of that evidence violated his confrontation rights under the rationale of *Crawford*, 541 U.S. 36, 158 L. Ed. 2d 177. We disagree.

In *Crawford*, the United States Supreme Court held that a witness's recorded out-of-court statement to the police regarding the defendant's alleged stabbing of another was testimonial in nature and thus inadmissible due to Confrontation Clause requirements. *Id*. However, the Supreme Court stated: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 68, 158 L. Ed. 2d at 203. *Crawford* made explicit that its holding does not apply to evidence admitted for reasons other than proving the truth of the matter asserted. *Id.* at 60 n.9, 158 L. Ed. 2d at 198 n.9 (stating that the Confrontation "Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (citation omitted)).

In North Carolina, our Supreme Court has held that "testimony as to information relied upon by an expert when offered to show the basis for the expert's opinion is not hearsay, since it is not offered as substantive evidence." *Huffstetler*, 312 N.C. at 107, 322 S.E.2d at 120 (citing *State v. Wood*, 306 N.C. 510, 294 S.E.2d 310 (1982)). Indeed, "it is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence[,]" and that "[a]n expert may properly base his or her opinion on tests performed by another person, if the

tests are of the type reasonably relied upon by experts in the field." *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002) (citation omitted).

As it relates to expert testimony and the Confrontation Clause, our Supreme Court held that "[t]he admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination." *Huffstetler*, 312 N.C. at 108, 322 S.E.2d at 120 (citation omitted).

In this case, after a recitation of her credentials, Dr. Radisch was tendered and accepted, without objection by Defendant, as an expert in forensic pathology. Dr. Radisch relied on the autopsy report in forming her opinion that the cause of the victim's death was due to a gunshot wound to the right of the abdomen into the chest, and her opinion was based on data reasonably relied upon by others in the field. *See Fair*, 354 N.C. at 162, 557 S.E.2d at 522. It is clear that Dr. Radisch's testimony was expert testimony as to the cause of Rickie's death. We therefore hold that the autopsy report was not tendered to prove the truth of the matter asserted therein, but to demonstrate the basis of Dr. Radisch's opinion.

Since it is well established that an expert may base an opinion on tests performed by others in the field and Defendant was given an opportunity to cross-examine Dr. Radisch on the basis of her opinion, we conclude that *Crawford* does not apply to the circumstances presented in this case. *See Huffstetler*, 312 N.C. at 108, 322 S.E.2d at 120; *State v. Delaney*, 171 N.C. App. 141, 143, 613 S.E.2d 699, 700 (2005) (holding that expert testimony regarding the chemical analysis of drugs which was based on analyses conducted by someone other than the testifying expert did not violate defendant's right of confrontation); *State v. Walker*, 170 N.C. App. 632, 635-36, 613 S.E.2d 330, 333 (2005) (holding that the expert ballistics testimony of an agent that included a non-testifying agent's report did not violate the Confrontation Clause); *State v. Lyles*, 172 N.C. App. 323, 325, 615 S.E.2d 890, 894 (2005) (holding that a drug lab report of non-testifying analyst was properly admitted as the basis of expert opinion testimony by analyst's supervisor and did not violate the confrontation clause). Thus, we reject this assignment of error.

[2] Defendant next contends that because the State's evidence did not unequivocally show the greater offense of second degree murder,

the trial court erred by failing to instruct the jury on the lesser included offense of voluntary manslaughter. We disagree.

Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Jenkins*, 300 N.C. 578, 591, 268 S.E.2d 458, 466-67 (1980). "[T]o reduce second degree murder to voluntary manslaughter, there must be some evidence that the defendant killed his victim in the heat of passion engendered by provocation which the law deems adequate to depose reason." *State v. Burden*, 36 N.C. App. 332, 334-35, 244 S.E.2d 204, 205, *disc. review denied*, 295 N.C. 468, 246 S.E.2d 216 (1978) (internal citation and quotation omitted). Words alone are never sufficient provocation to mitigate second degree murder to voluntary manslaughter. *State v. Watson*, 287 N.C. 147, 156, 214 S.E.2d 85, 91 (1975).

Defendant argues that the evidence at trial would have supported a reasonable finding by the jury that, assuming he shot the victim, he did not act with malice. Defendant contends there was evidence to show that when he allegedly shot the victim, it occurred during a struggle and after the two had been involved in a confrontation earlier that day. However, the amount of time that elapsed between the earlier confrontation and the time of the shooting does not support an argument that Defendant acted in the heat of passion upon provocation thus entitling him to a jury instruction on voluntary manslaughter.

To the contrary, the State presented evidence through Charles's testimony that Defendant initiated the confrontation with the victim. Charles testified that Defendant approached the car while the victim was asleep in the passenger's seat, reached into the car with a chrome, silver revolver, and put the revolver in the victim's face and said, "[w]hat's up now, n—ger[.]" After Defendant opened the passenger's car door, the victim and Defendant struggled over Defendant's gun inside the car. Charles then opened the driver's car door, rolled out of the car and ducked behind the back door. Charles further testified that he raised up to look into the car and saw Defendant shooting Rickie in the chest. Dr. Radisch, the expert forensic pathologist, testified that the victim had ten bullet wounds, and died as a result of a gunshot wound to the chest. Such evidence unequivocally tends to show an unlawful killing with malice.

Defendant, on the other hand, presented testimony through several witnesses that he did not have a gun on the night of the shoot-

ing, and that he was standing in the doorway of the building, not beside the car in which the victim was killed, when the gunshots were fired. "[A] defendant is not entitled to have the jury consider a lesser offense when his sole defense is one of alibi[.]" *State v. Corbett*, 339 N.C. 313, 335, 451 S.E.2d 252, 264 (1994). Indeed, our Supreme Court has held:

> where a defendant's sole defense is one of alibi, he is not entitled to have the jury consider a lesser offense on the theory that jurors may take bits and pieces of the State's evidence and bits and pieces of defendant's evidence and thus find him guilty of a lesser offense not positively supported by the evidence.

State v. Brewer, 325 N.C. 550, 576, 386 S.E.2d 569, 584 (1989). Here, Defendant's sole defense was simply that he did not shoot the victim at all. Defendant did not concede in any way that he may have been near the car where the victim was shot, or that he shot him in a heat of passion or in self-defense. Because the evidence presented at trial would not have supported a verdict finding Defendant guilty of voluntary manslaughter, and Defendant's only defense to the murder charge was that he was not present at the time of the shooting, the trial court did not err in failing to submit the lesser included offense to the jury.

[3] Defendant next contends the trial court improperly excluded from evidence an exhibit prepared by Defendant's expert that purported to show the trajectory of the ten bullets that hit the victim. Defendant argues that the trial court's exclusion of this evidence deprived him of his constitutional right to present evidence at his trial. We disagree.

The admissibility of evidence is governed by Rule 403 of the North Carolina Rules of Evidence, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, Rule 403 (2005).

Rulings under North Carolina Rule of Evidence 403 are discretionary, and a trial court's decision on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the

trial court abused its discretion. *State v. Garcia*, 358 N.C. 382, 417, 597 S.E.2d 724, 749 (2004), *cert. denied*, —— U.S. ——, 161 L. Ed. 2d 122 (2005). A trial court abuses its discretion when the "ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)) (alteration in original).

In the instant case, the trial court, after conducting a *voir dire* of Defendant's expert, listening to counsel's arguments, and reviewing the exhibit, ruled on the admissibility of the evidence, stating:

> The Court makes the following ruling under Rule 403. First of all, the exhibit may be relevant; it may be probative; however, the exhibit is two-dimensional. The testimony of Dr. Radisch was three-dimensional. Therefore, the Court does not find that even if relevant and probative, Defendant's Exhibit 18, its probative value is substantially outweighed by the danger of misleading the jury in that it is a two-dimensional exhibit and does not show what Dr. Radisch testified to in three-dimensional form. So the [State's] objection is sustained on that ground.

In light of this explanation, we find no abuse of discretion by the trial court in excluding Exhibit 18. Accordingly, Defendant's assignment of error is without merit.

[4] In his final argument on appeal, Defendant contends that the trial court erred in finding an aggravating factor and sentencing him within the aggravated range in violation of his Sixth Amendment right to a jury trial. *See Blakely*, 542 U.S. 296, 159 L. Ed. 2d 403. We agree.

In *State v. Allen*, 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." *State v. Allen*, 359 N.C. 425, 437, 615 S.E.2d 256, 265 (2005); *see also State v. Speight*, 359 N.C. 602, 606, 614 S.E.2d 262, 264 (2005). 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 factors by a preponderance of the evidence violate the Sixth Amendment to the United States

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

In this case, the trial court found the following aggravating factor in Defendant's convictions: "The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." The facts for this aggravating factor were neither presented to a jury nor proved beyond a reasonable doubt. Nor did Defendant stipulate to this aggravating factor. *Allen*, 359 N.C. at 439, 615 S.E.2d at 265. Under *Allen* and *Speight*, we must remand this matter for resentencing.

No error in part, remanded for resentencing.

Judges HUNTER and JACKSON concur.

STRATEGIC OUTSOURCING, INC., PLAINTIFF v. JOHN STACKS, ARKANSAS TRAVEL SENTERS, INC., AND HOMEBANK OF ARKANSAS, DEFENDANTS

No. COA05-47

(Filed 21 February 2006)

1. Appeal and Error— appealability—denial of motion to dismiss—personal jurisdiction—presumed findings

A party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person. The review is to determine whether the trial court's findings are supported by competent evidence; if no findings are made, proper findings are presumed and the record is reviewed for supporting evidence.

2. Jurisdiction— minimum contacts—agreement to jurisdiction

Minimum contacts analysis was not necessary where defendant Stacks consented to personal jurisdiction in North Carolina in the agreement in question.

3. Contracts— agreement on enforcement—arbitration or litigation

An agreement which provided for enforcement by arbitration or litigation was not ambiguous or unreasonable for lack of mutuality, and did not limit plaintiff to arbitration.

4. Corporations— piercing the corporate veil—choice of law—reverse piercing

The question of whether to apply North Carolina or Arkansas law on corporate veil-piercing was not reached because plaintiff's allegations were sufficient to confer jurisdiction under the law of either state. As to reverse veil piercing, used here to obtain jurisdiction over a corporation where there was jurisdiction by agreement over the individual, the corporate veil may be pierced to treat two entities as the same where one is the alter ego of the other.

Appeal by defendants from order entered 4 October 2004 by Judge Timothy S. Kincaid in Superior Court in Mecklenburg County. Heard in the Court of Appeals 15 September 2005.

Hamilton Gaskins Fay & Moon, PLLC, by David G. Redding & Adrienne M. Huffman, for plaintiff-appellee.

Thomas C. Ruff, Jr. and Associates, by Thomas C. Ruff, Jr., and Davidson Law Firm, Ltd., by Matthew D. Wells, for defendant-appellants.

HUDSON, Judge.

Plaintiff filed suit against defendants in 2004 for claims arising from a contract between the parties. Defendants filed motions to dismiss for lack of personal and subject matter jurisdiction. On 4 October 2004, the trial court denied defendants' motions to dismiss. Defendants appeal.

Plaintiff, Strategic Outsourcing Inc. ("SOI"), is a corporation organized and existing under Delaware law, with its principal place of business in North Carolina. SOI provides employment-related services, such as payroll, to other businesses. Defendant Arkansas Travel Senters, Inc. (ATS), is an Arkansas corporation with its principal place of business in Arkansas. Defendant Stacks, an Arkansas resident, is president of ATS, and also of defendant Homebank, an Arkansas banking corporation, with its principal place of business in

Arkansas. On 12 July 2001, SOI and ATS entered into a service agreement whereby SOI agreed, in pertinent part, to issue payroll for ATS. Stacks signed the contract as president of ATS and as guarantor. On 25 November 2003, Stacks sent a letter to SOI terminating the contract, effective 31 December 2003. Before the termination, in December of 2003, ATS sent SOI a cashier's check drawn on Homebank in the amount of $29,136.00, allegedly for a final payroll to be issued by SOI. Thereafter, SOI allegedly forwarded the final payroll checks to ATS, which distributed them to ATS employees, who cashed them. Plaintiff alleges that it then presented the cashier's check to Homebank, but Homebank refused to pay it. In March 2004, plaintiff sued for breach of contract, *quantum meruit*, refusal to pay the cashier's check, disregard of corporate entity, conversion, fraud and punitive damages, and unfair trade practice.

Defendants argue that the trial court erred in denying its motions to dismiss, as there was no personal jurisdiction over Stacks or Homebank. We disagree.

[1] Although the denial of a motion to dismiss is generally interlocutory and not immediately appealable, a party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person. N.C. Gen. Stat. § 1-277(b) (2004). On appeal, we review an order determining personal jurisdiction to ascertain whether the trial court's findings of fact are supported by competent evidence; if so, we must affirm the trial court. *Cooper v. Shealy*, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000). "Either party may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Id.*, 138 N.C. App. at 615, 532 S.E.2d at 217-18.

> Upon a defendant's personal jurisdiction challenge, the plaintiff has the burden of proving prima facie that a statutory basis for jurisdiction exists. Where unverified allegations in the plaintiff's complaint meet plaintiff's initial burden of proving the existence of jurisdiction and defendant does not contradict plaintiff's allegations in its sworn affidavit, such allegations are accepted as true and deemed controlling.

Wyatt v. Walt Disney World, Co., 151 N.C. App. 158, 162-63, 565 S.E.2d 705, 708 (2002) (internal citations, quotation marks and ellipses omitted). Here, neither party requested any findings of fact and the trial court did not make any enumerated findings of fact, but did state in its order that

> [i]t appearing to the Court from the pleadings, arguments and materials presented by counsel for the parties that the Court has subject matter jurisdiction of this action, that Stacks consented to the personal jurisdiction of the Court, [and] that there are specific allegations of contact between Homebank and the State of North Carolina to support this Court's exercise of personal jurisdiction.

Thus, taking plaintiff's allegations as true, we must determine whether the record and plaintiff's allegations support the trial court's presumed findings supporting its order.

To determine whether our courts have personal jurisdiction, the court must engage in a two-part analysis:

> [t]he trial court first must examine whether the exercise of jurisdiction over the defendant falls within North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, and then must determine whether the defendant has sufficient minimum contacts with North Carolina such that the exercise of jurisdiction is consistent with the due process clause of the Fourteenth Amendment to the United States Constitution.

Better Business Forms, Inc. v. Davis, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995) (internal citation omitted). Here, as in *Better Business Forms*, defendants do not contest that our long-arm statute confers jurisdiction on North Carolina courts, but claim that they lack sufficient minimum contacts with North Carolina to satisfy due process. "Whether minimum contacts are present is determined not by using a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable under the circumstances." *Id.* "[T]here must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* (internal citation omitted).

[2] Regarding defendant Stacks, we need not conduct a minimum contacts analysis, since we conclude, as did the trial court, that Stacks consented to *in personem* jurisdiction in North Carolina.

Paragraph 8 (entitled "Guarantee") of the contract between SOI and ATS, which was signed by Stacks, provides that "[t]he individual signing this Agreement on behalf of Client (Guarantor) . . . personally guarantees all obligations of Client under this Agreement," and allows SOI to "enforce this guarantee by arbitration or suit in North Carolina as provided elsewhere herein and Guarantor consents to personal jurisdiction and venue accordingly." It is well-established that in North Carolina a consent-to-jurisdiction provision "does not violate the Due Process Clause and is valid and enforceable unless it is the product of fraud or unequal bargaining power or unless enforcement of the provision would be unfair or unreasonable." *Retail Investors, Inc. v. Henzlik Inv. Co.*, 113 N.C. App. 549, 552, 439 S.E.2d 196, 198 (1994) (internal citation omitted).

[3] Stacks does not allege that the guarantee provision is unenforceable or invalid, but rather, asserts that he only consented to arbitration, but not litigation, in North Carolina. He contends that the following paragraph of the contract limited resolution of any dispute between the parties to arbitration:

> All disputes arising in connection with this Agreement will be submitted solely to arbitration in Charlotte, North Carolina under the commercial arbitration rules of the American Arbitration Association . . . However, SOI may at its option, commence a civil action in the state or federal courts sitting for Charlotte, North Carolina to obtain equitable relief . . . or to enforce a monetary obligation and the parties consent to such jurisdiction and venue.

Stacks contends that because this provision required ATS and Stacks to arbitrate, but allowed SOI the option of litigation, that it is ambiguous and must be construed against the drafting party: SOI. However, Stacks cites no law in support of his argument that the provision is ambiguous and we conclude that the plain language of the provision clearly gave SOI the option of litigation. Stacks also contends that a provision allowing one party to exempt its claims from arbitration would be unreasonable and unconscionable for want of mutuality. Again, Stacks cites no law in support of his position. We conclude that this argument lacks merit, and accordingly, we conclude that the trial court did not err in failing to dismiss SOI's claims against Stacks for lack of personal jurisdiction.

[4] Defendants next argue that North Carolina courts do not have personal jurisdiction over Homebank. Homebank contends that it

lacks sufficient minimum contacts with North Carolina, as the only action allegedly taken by Homebank was that it dishonored a cashier's check in Arkansas, Homebank conducts no operations in North Carolina, and Homebank does not have any agents in North Carolina. However, plaintiff does not allege that Homebank had such contacts, but rather, asserts jurisdiction based on disregard of the corporate entity, or veil-piercing. Plaintiff contends that because Stacks manipulated Homebank's corporate form for his own benefit and for the benefit of ATS, the corporate form should be disregarded and because the court has jurisdiction over Stacks, it would thus have jurisdiction over Homebank.

In its complaint, SOI alleged, in pertinent part, that: Homebank wrongfully refused to pay the cashier's check (citing N.C. Gen. Stat. § 25-3-411 (2003), U.C.C. section governing refusal to pay cashier's checks); that Stacks is the officer of Homebank and ATS; that Stacks "controlled ATS' conduct with respect to ATS' obligations under the Agreements [with SOI] such that ATS had no separate will or existence of its own; that Stacks "controlled Homebank's conduct with respect to Homebank's wrongful refusal to honor the cashier's check such that Homebank had no separate will or existence of its own"; that Homebank's actions, including but not limited to its failure to pay the cashier's check, were directed by Stacks; and that SOI is entitled to have Homebank's corporate identity disregarded. Although Homebank submitted an affidavit by Stacks with its motion to dismiss, the Stacks affidavit does not contradict, or even address, SOI's allegations regarding Homebank being under the control of Stacks such that it had no will of its own. As Homebank "[did] not contradict plaintiff's allegations in its sworn affidavit, such allegations are accepted as true and deemed controlling." *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 218 (internal citation and quotation marks omitted).

Homebank argues that we must apply Arkansas law on corporate veil-piercing, as Homebank is an Arkansas corporation. Homebank cites no law in support of this assertion. Although a federal court opined that "if the North Carolina Supreme Court were faced with a choice of law question for piercing the corporate veil, it would adopt the internal affairs doctrine and apply the law of the state of incorporation," *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345, 349 (M.D.N.C. 1995), North Carolina courts have not ruled definitively. *See Copley Triangle Associates v. Apparel America, Inc.*, 96 N.C. App. 263, 385 S.E.2d 201 (1989) (court applied North Carolina

law to pierce corporate veil of Florida corporation doing business in North Carolina to achieve personal jurisdiction, but did not discuss choice of law issue, nor explain why it used North Carolina law). We conclude that this unresolved choice-of-law issue, while important, need not be decided here, as it has not been adequately briefed by the parties and does not affect the outcome of this case. Although there are differences in Arkansas and North Carolina law on veil-piercing, we conclude that plaintiff's allegations are sufficient to confer jurisdiction over Homebank under the law of either state.

In North Carolina, the corporate veil may be pierced to "prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985). Our Courts follow the instrumentality rule, which requires the following three elements for disregard of the corporate entity:

> (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.

Id. at 455, 329 S.E.2d at 330 (emphasis added). Similarly, Arkansas courts allow corporate veil-piercing where "the privilege of transacting business in a corporate form has been illegally abused to the injury of a third person," *Fausset Co. v. Rand*, 619 S.W.2d 683, 686 (Ark. App. 1981), and "where it is necessary to prevent wrongdoing and where the subsidiary is a mere tool of the parent." *Winchel v. Craig*, 934 S.W.2d 946, 950 (Ark. App. 1996). Here, plaintiff's uncontroverted allegations in its complaint included that plaintiff has a claim against Homebank, pursuant to N.C. Gen. Stat. § 25-3-411, for wrongfully refusing to pay the cashier's check, that "Stacks controlled Homebank's conduct with respect to Homebank's wrongful refusal to honor the Cashier's Check such that Homebank had no separate will or existence of its own," and that "Homebank's actions, including but not limited to its failure to pay the Cashier's Check,

were directed by Stacks in violation of SOI's rights." We conclude that these allegations establish a *prima facie* case for veil-piercing under *Glenn* or under the applicable Arkansas caselaw.

Homebank contends that plaintiffs cannot gain jurisdiction over Homebank by veil-piercing "in reverse," to make Homebank liable for Stacks' actions (rather than piercing the veil to make Stacks personally liable for Homebank's obligations). Generally, under the "alter ego" or "instrumentality" theory, "a corporate entity may be disregarded where there is such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist." 18 Am. Jur. 2d Corporations § 45. We conclude that here, where one entity is the alter-ego, or mere instrumentality, of another entity, shareholder, or officer, the corporate veil may be pierced to treat the two entities as one and the same, so that one cannot hide behind the other to avoid liability. *See Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1350 (2d Cir. 1974).

In the final argument in their brief, defendants Stacks and ATS argue that the trial court erred in refusing to stay the case and order arbitration of the claims against them. However, defendants only assigned error to the trial court's denial of their motion to dismiss plaintiff's claims for lack of subject matter jurisdiction. Regardless of how defendants state this alleged error, we conclude that this argument lacks merit. Again without citing any authority, defendants suggest that the contractual provision regarding arbitration and litigation was ambiguous and unreasonable, and that the contract thus requires all claims to be arbitrated. For the reasons discussed earlier with regard to this provision, we overrule these assignments of error.

Affirmed.

Judges ELMORE and LEWIS concur.

A.R. HAIRE, INC., PLAINTIFF v. THOMAS J. ST. DENIS, AND PANTERRA ENGINEERED PLASTICS, INC., DEFENDANTS

No. COA05-727

(Filed 21 February 2006)

1. Appeal and Error— appealability—denial of motion to dismiss—personal jurisdiction—substantial right

Motions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable, as here.

2. Appeal and Error— findings neither requested nor made—presumed—record reviewed for supporting evidence

Where there was neither a request for findings nor findings, the Court of Appeals reviewed the record for competent evidence supporting presumed findings which in turn supported the ruling that defendants were subject to personal jurisdiction.

3. Jurisdiction— personal—minimum contacts—not sufficient

A finding of in personam jurisdiction violated defendants' due process rights where defendants' contacts with the state consisted of telephone calls and a few proposed contracts, although no contract was ever entered into. Defendants performed no act to purposefully avail themselves of the privilege of conducting activities within North Carolina.

Appeal by Defendants from order entered 15 March 2005 by Judge L. Todd Burke in Superior Court, Guilford County. Heard in the Court of Appeals 10 January 2006.

Womble Carlyle Sandridge & Rice, PLLC, by Charles A. Burke, Robert D. Mason, Jr., and Alison R. Bost, for plaintiff-appellee.

Kilpatrick Stockton LLP, by Richard J. Keshian and William M. Bryner, for defendant-appellants.

WYNN, Judge.

To establish in personam jurisdiction over non-resident defendants, there must be "certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citations omitted). Plaintiff argues that

Defendants' telephone calls, negotiations, and document exchange of a proposed contract are sufficient to establish the required "minimum contacts" required by due process. As we find the quantity and quality of Defendants' contacts with North Carolina were insufficient to support the necessary due process requirements, we reverse the trial court's denial of Defendants' motion to dismiss for lack of personal jurisdiction.

Innovative Materials and Technologies, Inc. ("IM&T"), a corporation headquartered in North Carolina, produced plastic materials for the construction of a variety of products under two operating divisions—Millennium/AR Haire located in Thomasville, North Carolina, and PEP Division located in Danbury, Connecticut. The company was forced into an involuntary bankruptcy, and an auction of its assets was scheduled to take place in July 2004.

Before the auction, A. Ralph Haire, president and chief executive officer of IM&T, established A.R. Haire, Inc. in North Carolina. The officers of the new company included Haire as chief executive officer and chairman of the board of the new company, Lawrence Lansford as president and Darryl Heffline as vice president.

In March 2004, the three officers of A.R. Haire, Inc. were introduced to Defendant Thomas St. Denis, a resident of Connecticut and president and secretary of Defendant Panterra Engineered Plastics, Inc., a Delaware corporation with its principal place of business in Connecticut. The three officers also met Mark Austin who represented that he was St. Denis's business partner.

St. Denis, Haire, and Lansford communicated numerous times, primarily by telephone, from March to June 2004, regarding a joint venture or business opportunities. The primary goal of the proposed joint venture was for A.R. Haire, Inc. and St. Denis to purchase all the assets of IM&T at the bankruptcy auction and split the assets. On three separate occasions, St. Denis, Haire, and Lansford met in person in Connecticut. On 30 April 2004, Haire sent St. Denis a joint venture agreement; however, the agreement was never signed and negotiations continued.

At the time of the auction on 8 July 2004, there was no joint venture agreement and no agreement to bid cooperatively. At the auction, A.R. Haire, Inc. purchased several Core formers and associated equipment, including aluminum platens that were needed to operate the Core formers. Saugatuck Land Trust Company (Defendant

Panterra's predecessor-in-interest) purchased the intellectual property assets of IM&T.

On 12 July 2004, St. Denis informed A.R. Haire, Inc. through a conference call with its principals that its operation of the Core formers could potentially infringe Saugatuck's newly acquired patents. St. Denis suggested a license agreement between A.R. Haire, Inc. and Saugatuck. Discussions continued in another conference call between the parties on 14 July 2004. On 15 July 2004, representatives for St. Denis and A.R. Haire, Inc. began exchanging written proposals for a licensing agreement. On 20 July 2004, Saugatuck and St. Denis's attorney, Stephen Geissler, sent a letter to A.R. Haire, Inc. addressing infringement of intellectual property rights, threatened legal action, and questioned the employment by A.R. Haire, Inc. of Ralph Eighmie and Luis Soto, former employees of IM&T.

On 30 July 2004, A.R. Haire, Inc. brought an action in Superior Court, Guilford County seeking a declaratory judgment that it could lawfully operate the equipment purchased at the bankruptcy auction and could lawfully employ Soto and Eighmie. The action also sought damages for trespass to chattels, tortious interference with contract, and unfair or deceptive acts and practices. On 22 October 2004, Defendants filed a Motion to Dismiss the Complaint on the grounds of lack of personal jurisdiction, insufficient service of process, and failure to state a claim upon which relief can be granted. On 4 February 2005, A.R. Haire, Inc. filed a Motion for Leave to File a Second Amended Complaint to reflect A.R. Haire, Inc.'s name change to Transportation System Solutions, LLC. By order entered 15 March 2005, the trial court granted A.R. Haire, Inc.'s motion to amend the Complaint and denied Defendants' Motion to Dismiss. From that order, Defendants appeal the trial court's denial of their Motion to Dismiss for lack of personal jurisdiction.

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[1] Although this appeal is interlocutory, we note that it affects a substantial right which is one of the exceptions to the rule barring an immediate appeal from an interlocutory order.[1] Indeed, motions to dismiss for lack of personal jurisdiction affect a substantial right and

1. An appeal is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all parties involved in the controversy. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002). Generally, there is no right to immediate appeal from an interlocutory order. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381.

are immediately appealable. N.C. Gen. Stat. § 1-277(b) (2005) ("Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]"); *Retail Investors, Inc. v. Henzlik Inv. Co.*, 113 N.C. App. 549, 552, 439 S.E.2d 196, 198 (1994) (holding that immediate right to appeal lies from denial of motion to dismiss for lack of personal jurisdiction). Accordingly, this appeal affects a substantial right and is immediately appealable.

[2] On appeal, Defendants argue that the trial court erred in denying their Motion to Dismiss for lack of personal jurisdiction because (1) there is no statutory authority for personal jurisdiction and (2) an exercise of personal jurisdiction violates due process of the law.

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. Midwesterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999) (citing *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 462 S.E.2d 832 (1995)). Here, the trial court did not make findings of fact in its order. However, absent a request by the parties, which does not appear in the record, the trial court is not required to find the facts upon which its ruling is based. N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2005). " 'In such case, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment.' " *City of Salisbury v. Kirk Realty Co., Inc.*, 48 N.C. App. 427, 429, 268 S.E.2d 873, 875 (1980) (quoting *Haiduven v. Cooper*, 23 N.C. App. 67, 69, 208 S.E.2d 223, 225 (1974)). Therefore, we must review the record to determine whether it contains competent evidence to support the trial court's presumed

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There are two instances where a party may appeal interlocutory orders: (1) when there has been a final determination as to one or more of the claims and the trial court certifies that there is no just reason to delay the appeal, and (2) if delaying the appeal would prejudice a substantial right. *See Liggett Group Inc. v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993). Here, the trial court made no such certification. Thus, Defendants are limited to the second route of appeal, namely where "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). In such cases, we may review the appeal under sections 1-277(a) and 7A-27(d)(1) of the North Carolina General Statutes. N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2005). "The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party." *Flitt*, 149 N.C. App. at 477, 561 S.E.2d at 513. "Whether an interlocutory appeal affects a substantial right is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002).

findings to support its ruling that Defendants were subject to personal jurisdiction in the courts of this state. *See Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18 (2000).

A two-step analysis applies when determining whether a court may exercise in personam jurisdiction over a non-resident defendant. First, is there statutory authority that confers jurisdiction on the court? *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977). This is determined by looking at North Carolina's "long arm" statute, section 1-75.4 of the North Carolina General Statutes. *Id.* at 675-76, 231 S.E.2d at 630. Second, if statutory authority confers in personam jurisdiction over the defendant, does the exercise of in personam jurisdiction violate the defendant's due process rights? *Id.* at 675, 231 S.E.2d at 630.

[3] A.R. Haire, Inc. alleges personal jurisdiction over Defendants under North Carolina's long-arm statute under section 1-75.4 of the North Carolina General Statutes. As the trial court did not specify which part of section 1-75.4 under which it found personal jurisdiction, we will examine the relevant portion set out as follows:

> (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> ***
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

N.C. Gen. Stat. § 1-75.4(1)(d) (2005).

In *Dillon*, 291 N.C. at 676, 231 S.E.2d at 630-31, our Supreme Court stated that "G.S. 1-75.4(1)(d) . . . grants the courts of North Carolina the opportunity to exercise jurisdiction over defendant to the extent allowed by due process." When evaluating the existence of personal jurisdiction under section 1-75.4(1)(d), "the question of statutory authority collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Sherlock v. Sherlock*, 143 N.C. App. 300, 303, 545 S.E.2d 757, 760 (2001) (citation omitted).

To satisfy the requirements of the due process clause, there must exist "certain minimum contacts [between the non-resident defend-

ant and the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (citations omitted). There must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Dillon*, 291 N.C. at 679, 231 S.E.2d at 632 (citation omitted). In determining minimum contacts, the court looks at several factors, including: (1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state; and (5) the convenience to the parties. *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 530-31, 265 S.E.2d 476, 479 (1980). These factors are not to be applied mechanically; rather, the court must weigh the factors and determine what is fair and reasonable to both parties. *Id.* at 531, 265 S.E.2d at 479 (citation omitted). No single factor controls; rather, all factors "must be weighed in light of fundamental fairness and the circumstances of the case." *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986).

We first look at the quantity and quality of the contacts. It is undisputed that from mid-March 2004 until the Complaint was filed on 30 July 2004, St. Denis communicated with Haire and Lansford (principals of A.R. Haire, Inc.) by telephone, e-mail, and fax. It is unclear who initiated the communication. In attachments to their affidavits, Haire and Lansford assert that during this period St. Denis called them a total of six times. Also, St. Denis participated in twelve other phone calls. There were also two faxes and two e-mails. The phone calls, e-mails, and faxes consisted of negotiations to enter into a joint venture. However, no joint venture was ever established, and no contracts were signed either by St. Dennis or Panterra.

We review these facts in light of those set forth in *Tutterrow v. Leach*, 107 N.C. App. 703, 709, 421 S.E.2d 816, 820 (1992), where the plaintiff solicited business with the nonresident defendant. A contract was created over the telephone and was later memorialized by a letter drafted by the plaintiff. *Id.* The only contacts between the parties other than telephone conversations consisted of a handful of letters. *Id.* This Court held that a "finding of *in personam* jurisdiction in the case at bar would clearly violate defendants' due process rights." *Id.*

Here, the only contacts are telephone calls and a few proposed contracts, one sent by Haire. Defendants never entered into a con-

tract with A.R. Haire, Inc. either in or out of the State of North Carolina. Defendants performed no act which would purposefully avail themselves of the privilege of conducting activities within this State. *See Dillon*, 291 N.C. at 679, 231 S.E.2d at 632. Based on Defendants' relationship with Plaintiff in North Carolina, they could not "reasonably anticipate being haled into court" here. *Tom Togs, Inc.*, 318 N.C. at 365-66, 348 S.E.2d at 786 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)).

Accordingly, the finding of in personam jurisdiction in this case violates Defendants' due process rights, as the contacts were insufficient to support the necessary due process requirements. *See Tutterrow*, 107 N.C. App. at 709, 421 S.E.2d at 820 (handful of telephone calls and letters were insufficient to support the necessary due process "minimum contacts" requirements); *Stallings v. Hahn*, 99 N.C. App. 213, 216, 392 S.E.2d 632, 633-34 (1990) (placement of an advertisement in a national magazine, a few telephone calls, and a check sent by the plaintiff to the defendant were insufficient to support the necessary due process "minimum contacts" requirements).

As we find that the quality and quantity of the contacts are insufficient to support the necessary due process requirements, the trial court erred in denying Defendants' motion to dismiss for lack of personal jurisdiction.

Reversed and remanded.

Judges HUNTER and JACKSON concur.

IN THE MATTER OF: K.D.L.

No. COA05-773

(Filed 21 February 2006)

1. Termination of Parental Rights— incarcerated father—deposition denied—no prejudice

There was no prejudice in the denial of respondent's motion to be deposed in a termination of parental rights proceeding where respondent was incarcerated in Tennessee. The findings of

fact from a prior child custody and equitable distribution proceeding were binding by collateral estoppel and respondent would thus be precluded from challenging the factual allegations made by the mother in this proceeding. The father's interest is outweighed by the absence of any indication that his deposition would have led to a different result.

2. Termination of Parental Rights— order not timely reduced to writing—no prejudice

There was no prejudice in a termination of parental rights proceeding from the court's failure to reduce its order to writing within the statutory thirty-day time frame.

Appeal by respondent father from judgment entered 9 June 2004 by Judge Kyle Austin in Watauga County District Court. Heard in the Court of Appeals 26 January 2006.

Eggers, Eggers, Eggers & Eggers, by Stacy C. Eggers, IV, for petitioner mother-appellee.

Don Willey, for respondent-appellant.

TYSON, Judge.

Shawn Lambert ("respondent") appeals from an order terminating his parental rights to his minor child K.D.L. We affirm.

I. Background

K.D.L.'s mother filed a petition to terminate respondent's parental rights on 11 February 2004. Respondent filed a *pro se* answer on 1 March 2004 and denied the allegations raised in the petition. Counsel was appointed for respondent on 3 March 2004. Respondent, through counsel, filed a motion for funds to depose respondent due to his being incarcerated in Tennessee and for a continuance of the hearing to allow time for the deposition on 15 April 2004. The district court denied respondent's motions and terminated his parental rights on 19 April 2004. The court reduced its order to writing on 9 June 2004. Respondent appeals.

II. Issues

Respondent argues the trial court erred when it: (1) denied respondent's motion to be deposed because of his incarceration and inability to be present for the proceedings; and (2) failed to reduce its order to writing within the statutory thirty-day time frame.

III. Standard of Review

> On appeal, our standard of review for the termination of parental rights is whether the trial court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law.

In re Baker, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations and internal quotations omitted).

"[T]he trial court's conclusions of law are reviewable de novo." *In re Pope*, 144 N.C. App. 32, 40, 547 S.E.2d 153, 158, *aff'd*, 354 N.C. 359, 554 S.E.2d 644 (2001).

IV. Respondent's Testimony

[1] Respondent argues the trial court erred when it denied respondent's motion to be deposed because of his incarceration and inability to be present for the proceedings.

Respondent was incarcerated in Washington County, Tennessee at the time of the 19 April 2004 hearing. Respondent, through his attorney, requested a continuance of the case and funds to obtain respondent's deposition. The trial court denied respondent's request. Respondent contends the trial court failed to provide him with "fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982) (stating, "forced dissolution of [a parent's] parental rights have a more critical need for procedural protection than do those resisting state intervention into ongoing family affairs.").

In *Santoksy v. Kramer*, the United States Supreme Court ruled on the degree of process constitutionally due to a natural parent in a termination of parental rights ("TPR") hearing. *Id.* The Court stated:

> the nature of the process due in parental rights termination proceedings turns on a balancing of the "three distinct factors" specified in *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged process.

Id. at 754, 71 L. Ed. 2d at 607.

The Court stated, "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth

Amendment." *Id.* at 753, 71 L. Ed. 2d at 606. "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 754, 71 L. Ed. 2d at 606.

This Court held in *In re Murphy* that due process does not provide an incarcerated parent "an absolute right to be transported to a termination of parental rights hearing in order that he may be present under either statutory or constitutional law." 105 N.C. App. 651, 652-53, 414 S.E.2d 396, 397, *aff'd*, 332 N.C. 663, 422 S.E.2d 577 (1992). In that case, this Court relied on *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 68 L. Ed. 2d 640 (1981). In *Lassiter*, the United States Supreme Court affirmed a North Carolina Supreme Court ruling that the appointment of counsel is not constitutionally required in every TPR proceeding. This Court stated in *In re Murphy*, "a parent's absence from a termination proceeding is of similar import." 105 N.C. App. at 654, 414 S.E.2d at 398. "Fundamental fairness" does not require the State to transport an incarcerated parent to a termination proceeding. *Id.*

The Court found the governmental interest equal to that of the parent because transporting the father to the hearing from his place of incarceration "would have worked more than a mere financial burden on the State." 105 N.C. App. at 655, 414 S.E.2d at 398. The Court observed that, given that the respondent had been incarcerated for sexual abuse of his children, "[r]espondent's presence at the hearing combined with his parental position of authority over his children may well have intimidated his children and influenced their answers if they had been called to testify." *Id.* at 655, 414 S.E.2d at 398-99. Further, the Court pointed out that transportation of the father would create a risk of escape jeopardizing the safety of the public and the officers assigned to transport him. *Id.* at 655, 414 S.E.2d at 399.

The Court also stated, "[d]uring the hearing, respondent's attorney did not argue that his client would be able to testify concerning any defense to termination, nor did he indicate how his client would be prejudiced by not being present." *Id.* at 655, 414 S.E.2d at 399.

Neither of those concerns exist in this case. Since the father was proposing a deposition, his daughter would have no contact with him, and he presented no escape risk. Apart from the expense, the only other possible governmental interest that we have been able to identify is the desire to expedite the proceedings in order to resolve matters for the child. Yet, in this case, the petition was filed 11 February 2004, counsel was appointed 3 March 2004, the motion for funds was

filed 15 April 2004, and the TPR hearing was held 19 April 2004. The State's interest in prompt resolution of these proceedings would not have been significantly affected by a brief continuance to allow the taking of the father's deposition.

In short, the sole governmental interest affected by the taking of a deposition and the granting of a continuance is monetary. Since the mother, and not the State, filed the TPR petition, the State would only have had to pay the father's costs for the deposition. Such a deposition could have been done telephonically, resulting in a relatively modest expense. For these reasons, the father's interest substantially outweighs any interest of the State.

However, with regard to the second *Eldridge* factor, no risk of error was created by the denial of the father's motion. With respect to this factor, the father argues that his testimony could have "denied point by point the allegations made by the mother in her petition." According to the father, "[t]he only real means by which this father could defend himself was to be able to present his side of the story." The doctrine of collateral estoppel, however, would have precluded the father from challenging the factual allegations made by the mother.

The mother alleged as a basis for her petition that the father had neglected the child by (1) being "in and out of jail for the last several years," (2) by "having committed acts of domestic violence against the petitioner and in the presence of the minor child," as found by the court in prior proceedings, and (3) the father "also threatened the minor child." She further alleged that the father "threatened abuse toward the minor child and the minor child has been abused by respondent father pursuant to N.C. Gen. Stat. § 7B-101(1)." In addition, the mother relied upon a willful failure to pay child support and willful abandonment of the child.

In an Order for Child Custody and Equitable Distribution, entered more than eight months before the TPR hearing and apparently not appealed, the district court made the following findings of fact:

> 10. After supervised visits with the [father] the child would be upset and crying. The child experienced nightmares, was nervous and refused to sleep by herself because she was fearful. The minor child required counseling.
>
> 11. That the defendant has violated the Domestic Violence Protective Order on a regular basis by sending numerous letters

> to the [mother] and in that he has possessed a firearm in violation of the order. That since [father] has been incarcerated and not visiting with the minor child, the child has been more calm and less nervous.
>
> . . . .
>
> 14. That the [father] is not fit and proper to have visitation with the minor child in that he has been mentally and emotionally abusive and violent to the minor child and has in fact threatened the minor child's life in the past. That the [father] had a gun and threatened to kill the child and all the family in the presence of the minor child.

Since the father did not appeal this order, these findings of fact were binding in the TPR hearing under the doctrine of collateral estoppel. *See In re Murphy*, 105 N.C. App. at 655, 414 S.E.2d at 399 ("Indeed, [counsel for the father] could point to no reason that the respondent should be transported to the hearing other than for respondent to contest his sexual assault convictions, an impermissible reason."); *In re Wilkerson*, 57 N.C. App. 63, 70, 291 S.E.2d 182, 186 (1982) (holding that collateral estoppel properly applied to findings made in a custody review hearing and rendered those findings binding in a subsequent TPR hearing).

Further, the father has not argued his testimony would be necessary to address the petition's other allegations. He does not contest his criminal record, which was admitted at the TPR hearing. His answer admitted that he had not paid child support, but asserted no payments had been made because he was incarcerated and no payment plan had been established. In addition, the father claimed that he had not abandoned his child, but rather was barred from seeing her because of a restraining order entered against him. The father has not offered any explanation why these arguments regarding child support and abandonment could not have been fully made by his counsel without his testimony.

Thus, as in *In re Murphy*, "[t]he record before us is devoid of anything which would indicate any risk of error to the respondent caused by" the trial court's denial of his motion. 105 N.C. App. at 656, 414 S.E.2d at 399. Given the absence of any indication that the father's deposition testimony could have led to a different result in the TPR hearing, the second *Eldridge* factor outweighs the father's interest. This assignment of error is overruled.

V. Order in Writing

[2] Respondent argues the trial court erred when it failed to reduce its order to writing within the statutory thirty-day time frame.

The trial court entered the order fifty days after the deadline. N.C. Gen. Stat. § 7B-1109(e) (2003) provides, "[t]he adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing."

> This Court has previously stated that absent a showing of prejudice, the trial court's failure to reduce to writing, sign, and enter a termination order beyond the thirty day time window may be harmless error. *See In re J.L.K.*, 165 N.C. App. 311, 315, 598 S.E.2d 387, 390 (2004) (order entered eighty-nine days after the hearing), *disc. rev. denied*, *Beatenhead v. Lincoln County*, *Lincoln County Board of Education*, 359 N.C. 177, 604 S.E.2d 914 (2004).

In re L.E.B., *K.T.B.*, 169 N.C. App. 375, 378, 610 S.E.2d 424, 426, *disc. rev. denied*, 359 N.C. 632, 616 S.E.2d 538 (2005).

Respondent failed to argue how the twenty-day delay prejudiced him. Respondent admits, "[t]his Court has not previously found prejudice to exist from this short of a time violation." This Court does not condone the late entry of orders beyond the required statutory periods in any action. Late entry orders in a TPR proceedings is particularly troubling due to the denial of finality for all parties involved. In light of respondent's failure to show any prejudice, this assignment of error is overruled.

VI. Conclusion

The trial court did not err when it denied respondent's motion to be deposed because of his incarceration and inability to be present for the proceedings. Respondent has failed to show prejudice when the trial court failed to reduce its order to writing and file within the statutory thirty-day time frame. The trial court's order is affirmed.

Affirmed.

Judges HUDSON and GEER concur.

ROBERT ERNEST WILLETT, PLAINTIFF v. THE CHATHAM COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA05-607

(Filed 21 February 2006)

1. Immunity— participation in School Board Trust—no waiver of governmental immunity

Binding precedents bar the argument that defendant school board waived governmental immunity by entering into a general trust fund agreement with the North Carolina School Board Trust.

2. Immunity— school board—basketball game with charged admission—not a proprietary function—not a waiver

Defendant school board did not waive its governmental immunity by operating a basketball game for which admission was charged. The operation of an athletic program is an authority conferred on the school board by the legislature and did not involve a proprietary operation.

3. Immunity— school board—failure to maintain school property

N.C.G.S. § 115C-24 does not implicitly create a private right of action against a local board of education for injuries arising from the board's alleged failure to maintain school property in proper condition for use.

Appeal by Plaintiff from judgment entered 13 December 2004 by Judge James M. Webb in Superior Court, Chatham County. Heard in the Court of Appeals 24 January 2006.

Staton, Doster, Post, & Silverman, Norman C. Post, Jr., for plaintiff-appellant.

Cranfill, Sumner & Hartzog, LLP, Stephanie Hutchins Autry and Alycia S. Levy; and Allison B. Schafer, for defendant-appellant.

Tharrington Smith, LLP, Deborah Stagner, for the North Carolina School Boards Association, amicus curiae.

WYNN, Judge.

School boards enjoy the right of governmental immunity absent waiver or a statute to the contrary.[1] In this case, Plaintiff Robert Ernest Willett argues that a school board's participation in the North Carolina School Board Trust Fund and performance of a proprietary function constituted waivers; he also asserts the existence of a statutory cause of action. Because his arguments are not supported by North Carolina law, we reject Plaintiff's appeal.

On 9 February 2000, while attending a middle school basketball game at Moncure Elementary School (a public school in Chatham County), Mr. Willett allegedly suffered injuries when the bleachers in the gymnasium folded, caught his ankle and caused him to fall. Mr. Willett brought an action for damages alleging that Defendant Chatham County Board of Education ("Chatham School Board") waived its governmental immunity by participating in the North Carolina School Board Trust Risk Management Program, and by engaging in a proprietary function. Mr. Willett further alleged that section 115C-524(b) of the North Carolina General Statutes implicitly creates a cause of action, not barred by governmental immunity, for injuries arising from the failure to maintain all school buildings in good repair and proper condition. Nonetheless, the trial court granted summary judgment in favor of the Chatham School Board on sovereign immunity grounds. Mr. Willett appeals to this Court.

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[1] On appeal, Mr. Willett first argues that the Chatham School Board waived governmental immunity under section 115C-42 of the North Carolina General Statutes by entering into a general trust fund agreement with the North Carolina School Board Trust. We need not further consider this argument because in *Lucas v. Swain County Bd. of Educ.*, 154 N.C. App. 357, 365, 573 S.E.2d 538, 543 (2002), this Court specifically rejected it. *See also Ripellino v. North Carolina Sch. Bd.'s Ass'n*, 158 N.C. App. 423, 429, 581 S.E.2d 88, 92-93 (2003) (holding that the Johnston County Board of Education's participation in the North Carolina School Board Trust did not constitute a waiver of immunity for claims up to $ 100,000.00), *cert. denied*, 358 N.C. 156, 592 S.E.2d 694 (2004). Accordingly, we reject this assignment of error as barred by binding precedents. *See In re 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 sub-

1. *See Smith v. Hefner*, 235 N.C. 1, 68 S.E.2d 783 (1952); *Lindler v. Duplin County Bd. of Educ.*, 108 N.C. App. 757, 425 S.E.2d 465 (1993).

sequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

[2] Mr. Willett further contends the Chatham School Board waived its governmental immunity by engaging in a proprietary function. Specifically, he argues that by operating a basketball game and charging admission, the Chatham School Board profited and therefore waived its governmental immunity. This argument is also without merit.

Governmental immunity shields a state entity in the performance of governmental functions, but not proprietary functions. *Hickman v. Fuqua*, 108 N.C. App. 80, 82-83, 422 S.E.2d 449, 451 (1992), *disc. review denied*, 333 N.C. 462, 427 S.E.2d 621 (1993). Our Supreme Court distinguished governmental functions from proprietary functions by stating, "If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing." *Britt v. City of Wilmington*, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952).

In applying the *Britt* test, this Court has held, "[c]harging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary." *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). However, "a 'profit motive' is not the sole determinative factor when deciding whether an activity is governmental or proprietary." *Hickman*, 108 N.C. App. at 84, 422 S.E.2d at 451-52 (citation omitted); *see also State Art Museum Bldg. Comm'n v. Travelers Indem. Co.*, 111 N.C. App. 330, 335, 432 S.E.2d 419, 422 ("the mere receipt of private funds does not render the State's actions proprietary"), *disc. review denied*, 335 N.C. 181, 438 S.E.2d 208 (1993); *McCombs v. City of Asheboro*, 6 N.C. App. 234, 241, 170 S.E.2d 169, 174 (1969) ("actual profit is not the test, and the city will not lose its government immunity solely because it is engaged in an activity which makes a profit."). Instead, "courts look to see whether an undertaking is one 'traditionally' provided by the local governmental units." *Hickman*, 108 N.C. App. at 84, 422 S.E.2d at 452.

In this case, Mr. Willett contends that the Chatham School Board's operation of a competitive basketball team is not within the purview of traditional government activities. However, section 115C-47(4) of the North Carolina General Statutes confers exclusive

authority on all local school boards to operate an athletic program. Section 115C-47(4) provides in pertinent part:

> In addition to the powers and duties designated in G.S. 115C-36, local boards of education shall have the power or duty:
>
> (4) To Regulate Extracurricular Activities. Local boards of education shall make all rules and regulations necessary for the conducting of extracurricular activities in the schools under their supervision, *including a program of athletics*, *where desired*, *without assuming liability therefor;* provided, that all interscholastic athletic activities shall be conducted in accordance with rules and regulations prescribed by the State Board of Education.

N.C. Gen. Stat. § 115C-47(4) (2005). The General Assembly's mandate in section 115C-47(4) leaves little room for doubt as to whether the school board's operation of an athletic program is a traditional government function. The fact that section 115C-47(4) grants all local boards of education across the state the exclusive authority to control the interscholastic athletic program for the county's public schools renders this function traditionally governmental in nature. The statute further provides that the local boards shall not incur liability by virtue of its control over activities of the athletic program, making it clear that the local boards are not waiving their governmental immunity. *See North Carolina Utilities Comm'n v. McKinnon*, 254 N.C. 1, 11, 118 S.E.2d 134, 142 (1961) ("In our opinion, the phrase 'without assuming liability therefor' was inserted for the purpose of making it clear that such governing authorities were not waiving governmental immunity.").

Moreover, the Chatham School Board's charging admission to the basketball game is not conclusive in determining that it engaged in a proprietary activity. In *McIver v. Smith*, this Court rejected the assertion that "one of the major tests in labeling a government activity proprietary is whether a monetary fee is involved." *McIver v. Smith*, 134 N.C. App. 583, 586, 518 S.E.2d 522, 525 (1999), *disc. review improvidently allowed*, 351 N.C. 344, 525 S.E.2d 173 (2000). In that case, we held that the county's ambulance service was not a proprietary activity, stating "[t]he fact that [the county] charged a fee for its ambulance service does not alone make it a proprietary operation." *Id.* at 587, 518 S.E.2d at 525. Likewise, the fees charged in this case do not make the basketball game held at the public school a proprietary operation. The admission fee of $1.00 for students and $2.00 for par-

ents was hardly "substantial," and there is no evidence in the record to show that the basketball admission charges generated enough revenue to pay for anything other than the school's athletic program. Because the operation of an athletic program is an authority conferred on the school board by the legislature, and the Chatham School Board did not engage in a proprietary operation, we conclude that the Chatham School Board did not waive its governmental immunity.

[3] Mr. Willett next contends that the trial court erred in granting summary judgment because section 115C-524(b) of the North Carolina General Statutes implicitly creates a cause of action—not barred by governmental immunity—for injuries arising from the failure to maintain all school buildings in good repair and proper condition. We disagree.

School boards enjoy the right of sovereign immunity absent a statute to the contrary. *Smith*, 235 N.C. at 7, 68 S.E.2d at 787 ("a subordinate division of the state, or agency exercising statutory governmental functions like a city administrative school unit, may be sued only when and as authorized by statute"); *Lindler*, 108 N.C. App. at 761, 425 S.E.2d at 468 ("schools enjoy the right of sovereign immunity absent a statute to the contrary."). North Carolina General Statute section 115C-524(b) provides:

> It shall be the duty of local boards of education and tax-levying authorities, in order to safeguard the investment made in public schools, to keep all school buildings in good repair to the end that all public school property shall be taken care of and be at all times in proper condition for use . . .
>
> Notwithstanding the provisions of G.S. 115C-263 and 115C-264, local boards of education may adopt rules and regulations under which they may enter into agreements permitting non-school groups to use school real and personal property, except for school buses, for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. No liability shall attach to any board of education, individually or collectively, for personal injury suffered by reason of the use of such school property pursuant to such agreements.

N.C. Gen. Stat. § 115C-524(b) (2005). Generally, a statute allows for a private cause of action "only where the legislature has expressly pro-

vided a private cause of action within the statute." *Lea v. Grier*, 156 N.C. App. 503, 508, 577 S.E.2d 411, 415 (2003) (quoting *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 339, 511 S.E.2d 41, 44 (1999)).

Here, section 115C-24 does not expressly create a basis for an individual to bring a claim against a local board of education for its alleged failure to maintain school property in proper condition for use. Indeed, the plain language of the statute provides that the local boards and tax-levying authorities must keep all school buildings in good repair "*in order to safeguard the investment made in public schools*." N.C. Gen. Stat. § 115C-524(b) (emphasis added). While Mr. Willett argues that section 115C-524(b) *implicitly* creates a private right of action for individuals, our courts have declined to infer or imply an abrogation of a school board's immunity. *See Ripellino*, 158 N.C. App. at 428, 581 S.E.2d at 92 (rules of strict construction apply to interpretation of statutes dealing with curtailment of board's governmental immunity); *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 26, 348 S.E.2d 524, 527 (1986) ("[f]ollowing the rule of strict construction, we decline to impose any further waiver not created by the statute."). Accordingly, absent express language in section 115C-524 indicating that the statute curtails the school board's governmental immunity, that immunity cannot be curtailed.

Affirmed.

Judges HUNTER and JACKSON concur.

J.W. WALTON, PETITIONER v. N.C. STATE TREASURER, RETIREMENT SYSTEMS DIVISION, RESPONDENT

No. COA05-546

(Filed 21 February 2006)

Administrative Law— untimely written order—nunc pro tunc

A final agency decision is clearly required to be in writing and to include findings and conclusions under N.C.G.S. § 150B-36(d), and an administrative agency cannot enter a decision under Chapter 150B nunc pro tunc. In this case, concerning the computation of petitioner's retirement benefits, the Board of Trustees of the Local Government Employees' Retirement System informed

the parties of its vote but entered the written order beyond the sixty-day limitation "nunc pro tunc." That order was untimely and the Board is considered to have adopted the ALJ's recommended decision.

Appeal by petitioner from judgment entered 11 January 2005 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 January 2006.

The Cummings Law Firm, P.A., by Humphrey S. Cummings, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for respondent-appellant.

STEELMAN, Judge.

J.W. Walton was employed by the City of Charlotte (City) and was a member of the North Carolina Local Governmental Employees' Retirement System. In March 2002, the City informed him his position would be eliminated and he would lose his job. The parties entered into a settlement agreement whereby Walton agreed to terminate his employment "by retirement or otherwise" on or before 30 April 2003. The City agreed to pay him $60,000.00 within ten days of his termination, compensate him at his base rate of salary for a certain amount of unused sick and vacation leave, and pay $2,000.00 for legal expenses. Effective 1 May 2003, Walton retired and all sums were paid to him according to the agreement. The N.C. State Treasurer, Retirement System Division, determined the $60,000.00 payment should not be included as "compensation" in the computation of Walton's retirement benefits.

Walton filed a petition for a contested case hearing with the Office of Administrative Hearings. The administrative law judge (ALJ) issued a decision on 30 January 2004, concluding the $60,000.00 payment to Walton following his retirement was "compensation" and should be used in computing his average final compensation for retirement purposes. Respondent excepted to the ALJ's decision. The matter came before the Board of Trustees for the Local Governmental Employees' Retirement System (Board) at its next regularly scheduled meeting on 22 April 2004. The Board orally announced it was adopting the ALJ's decision in part and rejecting it in part. Specifically, it rejected the ALJ's holding that the $60,000.00 payment was compensation for retirement purposes.

Although the record is unclear, it appears respondent submitted a proposed draft of the final agency decision to the Chairman of the Board on 4 June 2004. The Chairman signed the final agency decision on 13 August 2004, "*nunc pro tunc* to 4 June 2004." Walton sought judicial review in Mecklenburg County Superior Court alleging the decision of the Board was not timely entered, and as a result, the ALJ's decision became the final decision. The trial court found that the Board had failed to render a final decision within sixty days as required by N.C. Gen. Stat. § 150B-44 and ordered that the ALJ's decision was the final decision in this matter. Respondent appeals.

In respondent's sole argument, it contends the trial court erred in concluding the Board did not render a final decision within the time required by N.C. Gen. Stat. § 150B-44 and ruling that the ALJ's decision became the final decision in the matter. We disagree.

On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error controls the standard of review. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004). Since respondent asserts the trial court improperly interpreted a statute and committed an error of law, we review this under a *de novo* standard of review. *Id.* at 659, 599 S.E.2d at 894. Under this standard, we consider the matter anew and may freely substitute our own judgment for that of the agency's judgment. *Id.* at 660, 599 S.E.2d at 895.

The Administrative Procedure Act (APA) prescribes the time in which an agency must make its final decision.

> An agency that is subject to Article 3 of this Chapter and is a board or commission has 60 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 60 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 60 days. If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's decision as the agency's final decision.

N.C. Gen. Stat. § 150B-44 (2005). The Board concedes it is an agency subject to Article 3 of the APA. Thus, it had sixty days from its 22 April 2004 regularly scheduled meeting to make its final decision.

There was no extension of the sixty-day time period. Since the Board's written decision clearly fell outside of the sixty-day time period, the questions presented are: (1) whether the oral announcement on 22 April 2004 constituted a "final decision;" and, if not, (2) whether an administrative agency can make a decision "*nunc pro tunc.*"

Respondent argues the Board "rendered" its decision when it orally announced it at the 22 April 2004 regularly scheduled meeting. This is incorrect. N.C. Gen. Stat. § 150B-36(b) provides that "a final decision in a contested case shall be made by the agency *in writing* after review of the official record . . . and shall include findings of fact and conclusions of law." (emphasis added). This statute does not discuss the "rendering" of a decision, but clearly requires that a final agency decision be in writing and include findings of fact and conclusions of law. Following the closed session of the Board's 22 April 2004 meeting, the Board merely informed the parties of its vote. It did not recite any findings of fact or conclusions of law. This oral announcement did not constitute a final decision as required by N.C. Gen. Stat. § 150B-36 and 150B-44. Further, our decision is consistent with this Court's previous interpretation of N.C. Gen. Stat. § 150B-44, stating: "[a] final decision is not made until it is in writing." *Occaneechi Band of the Saponi Nation v. N.C. Comm'n of Indian Affairs*, 145 N.C. App. 649, 656, 551 S.E.2d 535, 540 n.2 (2001)[1].

We now consider whether the Board's written decision signed 13 August 2004 "*nunc pro tunc* to 4 June 2004" was a final decision entered within the statutory time limit. There is no question the decision was signed outside of the sixty-day requirement of N.C. Gen. Stat. § 150B-44. The Board attempts to cure this patent defect by entering the final decision "*nunc pro tunc* to 4 June 2004."

> The power of a court to open, modify, or vacate the judgment rendered by it must be distinguished from the power of a court to amend records of its judgments by correcting mistakes or supplying omissions in it, and to apply such amendment retroactively by an entry nunc pro tunc. Nunc pro tunc is merely descriptive of the inherent power of the court to make its records speak the truth, to record that which was actually done, but omitted to be recorded. A nunc pro tunc order is a correcting order. The function of an entry nunc pro tunc is to correct the record to reflect a

1. Although the time limit referred to in *Occaneechi* has since been shortened from ninety to sixty days, the analysis in the case is still applicable.

> prior ruling made in fact but defectively recorded. A nunc pro tunc order merely recites court actions previously taken, but not properly or adequately recorded. A court may rightfully exercise its power merely to amend or correct the record of the judgment, so as to make the courts record speak the truth or to show that which actually occurred, under circumstances which would not at all justify it in exercising its power to vacate the judgment. However, a nunc pro tunc entry may not be used to accomplish something which ought to have been done but was not done.

46 AM JUR 2D *Judgments* § 156 (2004). The power to enter an order *nunc pro tunc* is based upon the inherent power of a *court*. *See* BLACK'S LAW DICTIONARY 1100 (8th ed. 2004) (defining "*nunc pro tunc*" as "having a retroactive legal effect through a court's inherent power"). It has no application to an administrative agency. An administrative agency is part of the executive branch of government and its authority to enforce a final agency decision is only found in Chapter 150B of the General Statutes. *See Employment Security Comm. v. Peace*, 128 N.C. App. 1, 8-9, 493 S.E.2d 466, 471 (1997) (" 'Administrative agencies . . . are distinguished from courts. They are not constituent parts of the General Court of Justice,' " but are part of the executive branch) (citations omitted). Chapter 150B contains no authority for the entry of decisions *nunc pro tunc*, but rather contains specific provisions governing the entry of final agency decisions.

We hold that an administrative agency cannot enter a decision under Chapter 150B "*nunc pro tunc*." N.C. Gen. Stat. § 150B-44 is " 'intended to guard those involved in the administrative process from the inconvenience and uncertainty of unreasonable delay.' " *Gordon v. N.C. Dep't of Corr.*, 173 N.C. App. 22, 27, 618 S.E.2d 280, 285 (2005) (citations omitted). Based on this principle, this Court has held an agency subject to Article 3 is "without authority to unilaterally extend the deadline for issuing its final decision." *Occaneechi*, 145 N.C. App. at 656, 551 S.E.2d at 540. Under this rationale, the Board cannot circumvent the time requirements of the statute by filing a final decision "*nunc pro tunc*" that was clearly filed outside of the prescribed time for making a final decision. To allow the Board to do so would render the time requirements enacted by the legislature in N.C. Gen. Stat. § 150B-44 meaningless.

Chapter 150B provides two specific methods for an agency to extend the sixty-day time period for entry of a final decision: (1) by agreement of the parties, or (2) for good cause shown. N.C. Gen. Stat.

§ 150B-44. If the agency fails to make its final decision within these time limits, the statute is clear; "the agency is considered to have adopted the administrative law judge's decision as the agency's final decision." *Id.* The record reveals the parties did not stipulate to an extension, nor did the Board enter an order extending the time to file the decision for good cause shown. Therefore, respondent's argument is without merit.

For the reasons discussed herein, we hold the trial court correctly interpreted and applied N.C. Gen. Stat. § 150B-44. The trial court did not err in determining the Board had not entered its final decision within the time required. Therefore, the Board is considered to have adopted the ALJ'S recommended decision.

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

MULTIPLE CLAIMANTS, Plaintiffs v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, JAILS AND DETENTION SERVICES, Defendant

No. COA04-808

(Filed 7 March 2006)

1. Appeal and Error— appealability—denial of motion to dismiss—public duty doctrine—substantial right

Although ordinarily the denial of a motion to dismiss is an interlocutory order, defendant's appeal in an action under the Tort Claims Act arising out of a fire at a county jail is based on the public duty doctrine, and thus, involves a substantial right warranting immediate appellate review.

2. Prisons and Prisoners; Tort Claims Act— public duty doctrine—jail inspections—private duty—special relationship

The public duty doctrine did not bar tort claims relating to the deaths of four inmates and serious injury to another inmate in a fire at a county jail allegedly caused by negligent inspection of the jail by an employee of defendant N.C. Department of Health and Human Services (DHHS) and negligent training of the inspector by DHHS because: (1) DHHS' duty to inspect jail conditions,

expressly including those related to fire safety, is for the purpose of ensuring the safety, health, and welfare of jail inmates; (2) neither the statutes nor the regulations can be reasonably construed as creating a duty to inspect for the benefit of the public or for the public's general protection; (3) even if the Court of Appeals concluded in this case, contrary to the pertinent statutes, that a duty was owed to the general public, the public duty doctrine would still not apply unless the claim alleged a failure to detect and prevent misconduct by third parties (there has been no allegation in this case that the fire was the result of misconduct as opposed to negligence by another person); (4) most of the cases cited by the dissent involve claims against local governments and not State agencies, or address law enforcement's exercise of its duty to protect the public generally and not a duty to a specified class of individuals; (5) the statutes and regulations pertinent to DHHS' duty in this case specifically identify the particular class of persons for protection by DHHS, which is inmates of local detention facilities; (6) although DHHS and the dissent urge alternatively that the public duty doctrine should nonetheless apply based on the fact that any duty to the inmates belonged solely to the local officials, the plain language of the statutes indicate that the General Assembly has chosen to impose a duty upon the State regarding jail inmates; (7) the Court of Appeals is not free to employ a common law rule to reinstate sovereign immunity when the State has both waived that immunity and specifically assumed a duty to jail inmates; (8) even if the Court of Appeals concluded that the statutes and regulations imposed a duty to inspect for the benefit of the public, the Court of Appeals would still hold that plaintiff prisoners fall within the special relationship exception to the public duty doctrine that arises by virtue of imprisonment; (9) federal courts in other jurisdictions have held that a state's duty to ensure that a jail meets prescribed standards is sufficient to support liability under the more stringent standards of 42 U.S.C. § 1983 despite primary responsibility for the jail resting with local officials; and (10) no cases were cited, nor were any found, suggesting in any manner that causation is relevant to a determination of the applicability of the public duty doctrine.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from order entered 19 March 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 February 2005.

Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., by Benjamin E. Baker, Jr.; Grimes & Teich, by Henry E. Teich; William Hixon; Elmore, Elmore & Williams, P.A., by Bruce A. Elmore, Jr.; C. Gary Triggs; Byrd, Byrd, Ervin, Whisnant & McMahon, P.A., by Robert K. Denton and Lawrence D. McMahon, Jr.; Anderson Law Firm, P.A., by Scott M. Anderson, for plaintiffs-appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General David Roy Blackwell, Special Deputy Attorney General Melissa L. Trippe, Special Deputy Attorney General Amar Majmundar, and Assistant Attorney General Richard L. Harrison, for defendant-appellant.

GEER, Judge.

Defendant North Carolina Department of Health and Human Services ("DHHS") appeals from an order of the North Carolina Industrial Commission denying its motion to dismiss based on the public duty doctrine. Plaintiffs' claims under the State Tort Claims Act arose out of a fire on 3 May 2002 at the Mitchell County jail. The fire claimed the lives of inmates Jason Jack Boston, Mark Halen Thomas, Jesse Allen Davis, and Danny Mark Johnson and seriously injured inmate O.M. Ledford, Jr. Plaintiffs contend that the inspector for DHHS was negligent in his inspection of the Mitchell County jail and that DHHS failed to properly train the inspector to perform his duties as an inspector of county jails.

Our Supreme Court has held that the public duty doctrine applies " 'to state agencies required by statute to conduct inspections *for the public's general protection*.' " *Wood v. Guilford County*, 355 N.C. 161, 167, 558 S.E.2d 490, 495 (2002) (emphasis added) (quoting *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000)). Although DHHS acknowledges that the General Assembly has placed a duty on DHHS to perform inspections of local detention facilities to ensure the health and welfare of prisoners in such facilities, it argues that these inspections "benefit the public" because "[t]he inmates addressed in these statutes are members of the public . . . ."

If we were to accept this facile argument, we would effectively eviscerate the Tort Claims Act, since State agencies would be able to argue that any duty that they owed was necessarily to a member of the public since all residents of North Carolina are members of the public. This Court must, however, be ever vigilant not to act as a

super-legislature that imposes its notion of public policy in the face of statutory determinations otherwise. It is for the General Assembly, and not judges, to decide questions of public policy regarding how and when the State may be sued.

For 100 years, North Carolina's courts have recognized that governments owe a private duty to inmates to maintain their health and safety. In connection with that duty, our General Assembly has specifically provided that DHHS has the duty to inspect local detention facilities, including jails, in order to ensure the protection of jail inmates. Since this duty is for the benefit of the inmates and not for the general public, the public duty doctrine does not apply. We, therefore, hold that the Industrial Commission properly denied DHHS' motion to dismiss.

Following the fire at the Mitchell County jail, plaintiffs filed separate affidavits of claim in the Industrial Commission pursuant to the Tort Claims Act, N.C. Gen. Stat. Art. 31, §§ 143-291 *et seq.* (2005). The claims of all five plaintiffs were consolidated before the Industrial Commission on 27 August 2003. Because this appeal is before us on DHHS' motion to dismiss, we treat the factual allegations in plaintiffs' affidavits of claim as true. *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 194, 499 S.E.2d 747, 748 (1998).

Plaintiffs alleged that Ernest Dixon, a DHHS employee responsible for inspecting the Mitchell County jail, failed to adequately inspect the jail "to ensure compliance with certain regulations and to ensure that all fire safety devices and procedures were in good working order." Plaintiffs also alleged that DHHS acted negligently in "fail[ing] to properly train [Mr. Dixon] to perform the special duties of inspecting county jails for the protection of . . . inmates."

DHHS filed a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(1), (2), and (6) on the grounds that plaintiffs' claims were barred by the public duty doctrine under *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), and *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449, 119 S. Ct. 540 (1998). In response to the motion, plaintiffs amended their affidavits of claim to expressly allege that a special relationship existed between the inmates and DHHS and that DHHS owed them a special duty.

Specifically, plaintiffs alleged that because the inmates were unable to protect themselves, "a special relationship arose between

the aforementioned department and [the inmate] to fulfill the duties imposed under the law to ensure that the [inmate], as a confined individual, would be protected in the event of a fire." Plaintiffs further alleged that "the State promised it would inspect county jails to ensure the protection of inmates in the event of fires." Finally, plaintiffs asserted that "[t]he duties described hereinabove were not for the benefit of the public at large, but for the benefit of the specific individuals confined in the subject jail."

Deputy Commissioner Edward Garner, Jr. denied DHHS' motion to dismiss. DHHS appealed to the Full Commission, which upheld the Deputy Commissioner's decision. DHHS timely appealed that decision to this Court pursuant to N.C. Gen. Stat. § 143-293 (2005).

Discussion

[1] As a preliminary matter, we note that ordinarily the denial of a motion to dismiss is an interlocutory order from which there may not be an immediate appeal. *Block v. County of Person*, 141 N.C. App. 273, 276, 540 S.E.2d 415, 418 (2000). Since, however, DHSS bases its appeal on the public duty doctrine, its appeal involves a substantial right warranting immediate appellate review. *Smith v. Jackson County Bd. of Educ.*, 168 N.C. App. 452, 457-58, 608 S.E.2d 399, 405 (2005).

[2] The sole question presented on this appeal by DHHS is whether the Commission erred when it failed to conclude that the public duty doctrine barred plaintiffs' claims. A law review commentator has cogently explained the development of the general rule:

> The public duty doctrine provides that, absent a special relationship between the governmental entity and the injured individual, the governmental entity will not be liable for injury to an individual where liability is alleged on the ground that the governmental entity owes a duty to the public in general. The doctrine has been commonly described by the oxymoron, "duty to all, duty to none." . . . .
>
> After the historic tort barrier of governmental immunity crumbled and states provided waiver mechanisms, state courts resurrected the [public duty doctrine] to provide limits to governmental tort liability when their legislatures had not done so. Thus, state courts embraced the public duty doctrine to confine liability to specific types of governmental actions, namely those not undertaken for the public in general.

Frank Swindell, Note, *Municipal Liability for Negligent Inspections in* Sinning v. Clark—*A "Hollow" Victory for the Public Duty Doctrine*, 18 Campbell L. Rev. 241, 247-49 (1996).

Our Supreme Court specifically adopted the public duty doctrine for the first time in 1991:

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

Braswell, 330 N.C. at 370-71, 410 S.E.2d at 901 (internal citations omitted). In 1998, the Supreme Court extended this "common law rule" to certain conduct of State agencies challenged under the Tort Claims Act. *Stone*, 347 N.C. at 479, 495 S.E.2d at 715. In response to Justice Orr's vigorous dissent, the majority emphasized that this extension involved a "limited new context, not heretofore confronted by this Court." *Id.* at 483, 495 S.E.2d at 717.

Subsequently, the Supreme Court described this extension as limited to applying "the public duty doctrine to state agencies required by statute *to conduct inspections for the public's general protection*." *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654 (emphasis added). Two years later, the Court reemphasized this limitation on the application of the public duty doctrine with respect to State agencies. *See Wood*, 355 N.C. at 167, 558 S.E.2d at 495 ("[T]his Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection . . . ."). *See also Isenhour v. Hutto*, 350 N.C. 601, 608, 517 S.E.2d 121, 126 (1999) (noting that the public duty doctrine applies only to a violation of a "statutory duty of a state agency to inspect various facilities for the benefit of the public").

The first question we must decide, therefore, is whether the duty of inspection relied upon by plaintiffs was one "to conduct inspections for the public's general protection." *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654. If we conclude that the duty to inspect set out by the General Assembly was not "intended to benefit the public at large," *Wood*, 355 N.C. at 169, 558 S.E.2d at 496, then the public duty

doctrine does not apply. If, on the other hand, we conclude that the public duty doctrine does apply, we must next determine whether plaintiffs fall within one of the two exceptions to that doctrine:

> [E]xceptions to the doctrine exist: (1) where there is a special relationship between the injured party and the governmental entity; and (2) when the governmental entity creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.

Stone, 347 N.C. at 482, 495 S.E.2d at 717. We note that in addition to arguing that the public duty doctrine does not apply to DHHS' duty to inspect, plaintiffs also specifically alleged in their amended affidavits that both a special relationship and a special duty exist.

DHHS and the dissent contend that *Stone* and *Hunt* establish the applicability of the public duty doctrine to this case. In *Stone*, the plaintiffs sought damages for injuries or deaths resulting from the fire at the Imperial Foods Products plant in Hamlet, North Carolina. The plaintiffs alleged that the North Carolina Department of Labor had negligently failed to inspect the plant. The Supreme Court first observed: " '[A] government ought to be free to enact laws for the *public protection* without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.' " *Id.* at 481, 495 S.E.2d at 716 (alteration and emphasis original) (quoting *Grogan v. Commonwealth*, 577 S.W.2d 4, 6 (Ky.), *cert. denied*, 444 U.S. 835, 62 L. Ed. 2d 46, 100 S. Ct. 69 (1979)).

The Court then turned to an assessment of the General Assembly's intent in imposing a duty of inspection on the Department of Labor:

> [T]he most the legislature intended was that the [Occupational Safety and Health] Division prescribe safety standards and secure some reasonable compliance through spot-check inspections made "as often as practicable." N.C.G.S. § 95-4(5) (1996). "In this way the safety conditions for work[ers] in general would be improved." *Nerbun v. State*, 8 Wash. App. 370, 376, 506 P.2d 873, 877 (holding that Washington Department of Labor did not owe an absolute duty to individual workers and concluding that the Washington legislature intended only that the Department act

on behalf of workers in general), *disc. rev. denied*, 82 Wash. 2d 1005 (1973).

Id. at 482, 495 S.E.2d at 716. The Court concluded: "Although N.C.G.S. § 95-4 imposes a duty upon defendants, *that duty is for the benefit of the public*, not individual claimants as here." *Id.* at 483, 495 S.E.2d at 717 (emphasis added).

In *Hunt*, the plaintiff alleged that the Department of Labor breached its duty to inspect amusement park rides with the result that the plaintiff was injured while riding in a go-kart with seat belts that were not in compliance with the Department's regulations. In holding that the public duty doctrine precluded the claim, the Court relied upon the fact that "[t]he Amusement Device Safety Act and the rules promulgated thereunder *are for the 'protection of the public* from exposure to such unsafe conditions' and do not create a duty to a specific individual." *Hunt*, 348 N.C. at 198, 499 S.E.2d at 751 (emphasis added) (quoting N.C. Gen. Stat. § 95-111.1(b) (1989)).

Stone and *Hunt* thus direct us to look at the specific statutes and regulations providing for any duty to inspect in order to determine whether the General Assembly intended the inspection to be for the protection of the general public or for the protection of specified individuals. *See Stone*, 347 N.C. at 482, 495 S.E.2d at 716 ("[W]e do not believe the legislature, in establishing the Occupational Safety and Health Division of the Department of Labor in 1973, intended to impose a duty upon this agency to each *individual* worker in North Carolina."); *Hunt*, 348 N.C. at 197, 499 S.E.2d at 750 ("[N]owhere in the [Amusement Device Safety] Act did the legislature impose a duty upon defendant to each go-kart customer.").

With respect to the inspection of jails by the State, the General Assembly has provided:

> The Department [of Health and Human Services] shall:
>
> . . . .
>
> (3) Visit and inspect local confinement facilities; advise the sheriff, jailer, governing board, and other appropriate officials as to deficiencies and recommend improvements; and submit written reports on the inspections to appropriate local officials.
>
> . . . .

(6) Perform any other duties that may be necessary to carry out the State's responsibilities concerning local confinement facilities.

N.C. Gen. Stat. § 153A-220 (2005). The General Assembly has more specifically provided in regards to this duty of inspection:

> Department personnel *shall* visit and inspect each local confinement facility at least semiannually. *The purpose of the inspections is to investigate the conditions of confinement, the treatment of prisoners*, the maintenance of entry level employment standards for jailers and supervisory and administrative personnel of local confinement facilities as provided for in G.S. 153A-216(4), *and to determine whether the facilities meet the minimum standards published pursuant to G.S. 153A-221.* The inspector *shall* make a written report of each inspection and submit it within 30 days after the day the inspection is completed to the governing body and other local officials responsible for the facility. The report *shall* specify each way in which the facility does not meet the minimum standards.

N.C. Gen. Stat. § 153A-222 (2005) (emphases added).

The "minimum standards" against which the facilities must be measured "shall be developed with a view to providing secure custody of prisoners *and to protecting their health and welfare and providing for their humane treatment.*" N.C. Gen. Stat. § 153A-221(a) (2005) (emphasis added). *See also* N.C. Gen. Stat. § 131D-11 (2005) ("The Department of Health and Human Services *shall*, as authorized by G.S. 153-51, *inspect regularly all confinement facilities* as defined by G.S. 153-50(4) to determine compliance with the minimum standards for local confinement facilities adopted by the Social Services Commission." (emphasis added)). The importance of these inspections to the General Assembly is reflected by the fact that the legislature has made the failure to provide the information required by law to DHHS regarding local confinement facilities a Class 1 misdemeanor. N.C. Gen. Stat. § 131D-13 (2005).

DHHS' regulations adopted pursuant to these statutes provide that "[a]ll jails shall be visited and inspected at least twice each year, but a jail shall be inspected more frequently if the Department considers it necessary or if it is required by an agreement of correction pursuant to 10A NCAC 14.1304." 10A N.C.A.C. 14J.1301 (2003). DHHS requires that following the inspection, the inspector "shall forward a

copy of the inspection report to the Secretary [of DHHS] within ten days after the inspection if there are findings of noncompliance" with any of certain specified standards, including the standards for "Fire Safety." 10A N.C.A.C. 14J.1302(b)(2) (2003). After receipt of the inspector's report "[t]he Secretary shall determine whether conditions in the jail jeopardize the safe custody, safety, health or welfare of its inmates within 30 days after receipt of the inspection report and the supporting materials." 10A N.C.A.C. 14J.1303(a) (2003). If the noncompliance involves the fire plan or fire equipment, among other specified concerns, the Secretary "shall determine" that the noncompliance "jeopardizes the safe custody, safety, health or welfare of inmates confined in the jail." 10A N.C.A.C. 14J.1303(c). Once the Secretary determines that such jeopardy exists, "[t]he Secretary shall order corrective action, order the jail closed, or enter into an agreement of correction with local officials pursuant to 10A NCAC 14J.1304." 10A N.C.A.C. 14J.1303(d).

These statutes and regulations are materially distinguishable from those in *Stone* and *Hunt*. The inspection of the jail conditions—expressly including those relating to fire safety—is for the purpose of ensuring the safety, health, and welfare of jail inmates. Neither the statutes nor the regulations can be reasonably construed as creating a duty to inspect for the benefit of the public or for the public's general protection.[1]

The dissent makes no attempt to explain in what way the duty of inspection under these statutes and regulations relates to the general public apart from flatly asserting so, despite the express language otherwise. Further, in arguing that the statutes establish no duty requiring that DHHS correct any jail conditions, the dissent disregards the nature of plaintiffs' claim. Plaintiffs allege a negligent inspection of the jail and not a negligent failure to correct the conditions. There is no need to decide whether the public duty doctrine or any other theory would preclude liability for a failure to correct the conditions in the Mitchell County jail. Although not addressed by the dissent, the sole pertinent question under *Stone*, *Hunt*, and the subsequent Supreme Court decisions for such a negligent inspection claim is the purpose of the duty to inspect: whether it was for the protection of the general public or specific individuals. The General Assembly was specific in providing that the purpose of the inspection

1. While the inspections are also expected to assess the security of the jails—relating to the public's protection—there is no allegation in this case that DHHS was in any way negligent with respect to security.

is to protect the inmates from harm, a purpose further reflected in DHHS' regulations.[2]

DHHS' suggestion that the statutes and regulations necessarily are for the benefit of the public because "[t]he inmates addressed in these statutes are members of the public" deserves little comment. Suffice it to say that inmates are in jail specifically so that they will be separate from the general public. *See West v. Atkins*, 487 U.S. 42, 56 n.15, 101 L. Ed. 2d 40, 54 n.15, 108 S. Ct. 2250, 2260 n.15 (1988) (noting that the correctional setting is "specifically designed to be removed from the community"). *See also Wood*, 355 N.C. at 169, 558 S.E.2d at 496 (holding that the public duty doctrine applied when the "protective services provided by Guilford County were intended to benefit *the public at large*" (emphasis added)).

The view that the duty of DHHS is a private one owed to the inmate and not the general public is also supported by prior decisions of our Supreme Court. In 1992, the Supreme Court noted that "North Carolina courts and lawmakers have long recognized the state's duty to provide medical care to prisoners" and pointed out that the "legislature has codified this duty in a statute" that required the Department of Corrections to prescribe standards for health services to prisoners. *Medley v. N.C. Dep't of Corr.*, 330 N.C. 837, 842, 412 S.E.2d 654, 657-58 (1992). The statute in *Medley* is analogous to the statutes at issue in this case. As support for an additional common-law duty to inmates, the Court quoted from a 1926 decision relating

2. We, in any event, disagree with the dissent's construction of N.C. Gen. Stat. § 153A-223 (2005), which provides that "if the Secretary determines that conditions in the facility jeopardize the safe custody, safety, health, or welfare of persons confined in the facility, the Secretary may order corrective action or close the facility . . . ." The dissent suggests that this language means that the Secretary is not required to act. When, however, the entire statute—and not just this phrase—is considered, the plain language of the statute establishes that the Secretary is required to take action, but may choose between ordering corrective action or closing the facility. The Secretary "shall" give notice of his determination (including "the inspector's report") to the local governing body, each local official responsible for the facility, and the senior resident superior court judge for the superior court district in which the facility is located. N.C. Gen. Stat. § 153A-223(1). The governing body, if it does not initiate corrective action or close the facility, may request a contested case hearing to address (1) whether the facility meets the minimum standards, (2) whether the conditions in the facility jeopardize the safe custody, safety, health, or welfare of the inmates, and (3) the appropriate corrective action to be taken and a reasonable time to complete the action. N.C. Gen. Stat. § 153A-223(3). On appeal to the superior court, "[t]he issue before the court shall be whether the facility continues to jeopardize the safe custody, safety, health, or welfare of persons confined therein." N.C. Gen. Stat. § 153A-223(6). Thus, the statute relied upon by the dissent underscores that the duty of inspection is for the benefit of the specific individuals confined in the jail.

to jail inmates: " 'The prisoner by his arrest is deprived of his liberty for the protection of the public; it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.' " *Id.*, 412 S.E.2d at 657 (quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)). The Court concluded by also noting that "[i]n addition to common-law and statutory duties to provide adequate medical care for inmates, the state also bears this responsibility under our state Constitution and the federal Constitution." *Id.*, 412 S.E.2d at 658.

In *Spicer*, the Court held that the board of county commissioners, rather than the sheriff, was liable for payment to a doctor for a jail inmate's medical care based on the "duty which the public owes to [the sheriff's] prisoner." *Spicer*, 191 N.C. at 490, 132 S.E. at 293. The Court observed, however, that the sheriff could "be required to answer in damages to the prisoner, or upon indictment to the public" for breach of his duty to obtain medical attention for a prisoner in his custody. *Id.* The Court thus recognized both a common law duty owed directly to the prisoner in addition to his general public duty to perform his public office.

In *Levin v. Town of Burlington*, 129 N.C. 184, 188-89, 39 S.E. 822, 824 (1901), the Court specifically distinguished between duties undertaken solely for the public good and those undertaken pursuant to a duty to individuals:

> [T]hese and such cases [against municipalities] are for the neglect in failing to perform some required duty—*such as erecting and keeping in proper condition city prisons by reason whereof the health of prisoners has been seriously impaired*[,] the failure to work and keep the public streets in repair and free from obstructions, whereby some person suffers injury. These are distinguishable from the case under consideration [involving a claim of malicious prosecution], where public officers are in the exercise of a public duty, and engaged in enforcing a public law for the public good.

(Emphasis added.) *See also Shields v. Town of Durham*, 118 N.C. 450, 456, 24 S.E. 794, 795-96 (1896) (holding that the Town of Durham could be held liable when the Commissioners had failed to inspect the town prison for five years because "[t]he law will not tolerate such gross negligence as this, without holding them responsible").

The dissent dismisses the above precedent and argues that this opinion fails to apply controlling precedent of this Court. The

cases cited by the dissent, however, either are entirely consistent with the conclusion we reach today or have been overruled by the Supreme Court.

The dissent first points to *Myers v. McGrady*, 170 N.C. App. 501, 613 S.E.2d 334, *disc. review allowed*, 359 N.C. 852, 619 S.E.2d 510 (2005). In *Myers*, however, this Court specifically pointed out that "[i]n 1998, our Supreme Court applied the public duty doctrine to state agencies *required to conduct inspections for the public's general protection*," *id.* at 505, 613 S.E.2d at 338 (emphasis added)—precisely the standard we have applied in this case. *Myers*, which did not involve a failure to inspect, does not purport to alter the Supreme Court's test. Instead, *Myers* appears to hold that even if a duty to inspect for the public's general protection exists, the public duty doctrine will not apply unless the claim involves a "failure of state departments or agencies to detect and prevent misconduct of others through improper inspections." *Id.* at 507, 613 S.E.2d at 339. In other words, under *Myers*, even if we concluded in this case—contrary to the pertinent statutes—that a duty was owed to the general public, the public duty doctrine would still not apply unless the claim alleged a failure to detect and prevent misconduct by third parties. There has been no allegation here that the fire was the result of "misconduct," as opposed to negligence, by another person.

With respect to the dissent's remaining cases, with a single exception, they all involve claims against local governments and not State agencies. Those cases addressing negligent inspection claims or conduct not involving law enforcement departments acting to protect the public have been overruled by *Thompson v. Waters*, 351 N.C. 462, 465, 526 S.E.2d 650, 652 (2000), and *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654.[3] Specifically, in *Thompson*, the Court held: "This Court has not heretofore applied the public duty doctrine to a claim against a municipality or county in a situation involving any group or individual other than law enforcement. After careful review of appellate decisions on the public duty doctrine in this state and other jurisdic-

3. These cases include *Simmons v. City of Hickory*, 126 N.C. App. 821, 487 S.E.2d 583 (1997) (addressing a city's negligent inspection of a home); *Tise v. Yates Constr. Co.*, 122 N.C. App. 582, 471 S.E.2d 102 (1996) (involving a city's failure to inform a construction company of potential tampering with equipment, resulting in the death of a police officer), *modified and aff'd on other grounds*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997) ("We have some doubt as to the applicability of the public duty doctrine to the circumstances of this case."); *Sinning v. Clark*, 119 N.C. App. 515, 459 S.E.2d 71 (involving negligent inspection of a home), *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995).

tions, we conclude that the public duty doctrine does not bar this claim against Lee County for negligent inspection of plaintiffs' private residence." 351 N.C. at 465, 526 S.E.2d at 652. *See also Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654 ("[W]e have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public.").

The remaining cases cited by the dissent address law enforcement's exercise of its duty to protect the public generally and not a duty to a specified class of individuals.[4] Indeed, this Court in *Clark v. The Red Bird Cab Co.*, 114 N.C. App. 400, 406, 442 S.E.2d 75, 78, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994), stressed: "Here, a review of the applicable city code provisions reveals no specific identification of a particular class of persons being singled out for protection by the city. We find no language creating a special duty which the police officers would owe to taxicab customers over and above the duty owed to the general public." By contrast, the statutes and regulations pertinent to DHHS' duty in this case do specifically identify a particular class of persons for protection by DHHS: inmates of local detention facilities. Further, in *Lassiter*, this Court specifically recognized that *Lovelace* "sought to reign [sic] in the expansion of the public duty doctrine's application to other government agencies and ensure it would be applied in the future only to law enforcement agencies fulfilling their 'general duty to protect the public,' and thus reasserted the principles of *Braswell*." 168 N.C. App. at 317, 607 S.E.2d at 692 (quoting *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654). In short, the cases cited by the dissent either support the analysis we have applied in this case or are inapplicable.

DHHS and the dissent urge alternatively that the public duty doctrine should nonetheless apply because any duty to the inmates

4. *See Lassiter v. Cohn*, 168 N.C. App. 310, 607 S.E.2d 688 (applying public duty doctrine to the discretionary actions of a police officer responding to an accident scene), *disc. review denied*, 359 N.C. 633, 613 S.E.2d 686 (2005); *Little v. Atkinson*, 136 N.C. App. 430, 432, 524 S.E.2d 378, 380 (relying upon the principle that "there is no liability for failure to furnish police protection to specific individuals" when the police are exercising their general police powers), *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000); *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 337, 511 S.E.2d 41, 43 (involving police officers' failure to provide warning to the public of a downed power line; to the extent the holding applied the public duty doctrine to claims against the City and fire department, it was overruled by *Lovelace*), *cert. denied*, 350 N.C. 851, 539 S.E.2d 13 (1999); *Humphries v. N.C. Dep't of Corr.*, 124 N.C. App. 545, 479 S.E.2d 27 (1996) (applying doctrine to probation officer's negligent failure to prevent convict from committing criminal acts against members of the public), *disc. review improvidently allowed*, 346 N.C. 269, 485 S.E.2d 293 (1997).

belonged solely to the local officials. As the plain language of the statutes indicate, however, the General Assembly has chosen to impose a duty upon the State regarding jail inmates.[5] *Medley*, *Spicer*, *Levin*, and *Shields* establish that when a governmental body has a duty regarding the care of an inmate, that duty is a private one owed to the inmate and not a public duty. By assuming a duty to jail inmates, the General Assembly assumed a private duty to those individuals, and the public duty doctrine does not apply. This holding is in accord with that of other states. *See Roberts v. State*, 159 Ind. App. 456, 462, 307 N.E.2d 501, 505 (1974) ("[A] public official, charged with the custody and care of a prisoner, owes a *private duty* to the prisoner to take reasonable precautions under the circumstances to preserve his life, health, and safety—a duty which is in addition to the duty of safekeeping owed to the public generally."); *Geiger v. Bowersox*, 974 S.W.2d 513, 517 (Mo. Ct. App. 1998) (holding that a nurse at a prison "does not owe the general public" a duty, but rather her duty is "owed specifically to the inmates").

While the Supreme Court in *Stone* stated that it "refuse[d] to judicially impose an overwhelming burden of liability on defendants for failure to prevent every employer's negligence that results in injuries or deaths to employees," 347 N.C. at 481, 495 S.E.2d at 716, the duty in this case is legislatively imposed. In contrast to *Stone* and *Hunt*, the statutes relied upon by plaintiffs in this case do not seek to secure only "reasonable compliance through spot-check inspections made 'as often as practicable.' " *Id.* at 482, 495 S.E.2d at 716 (quoting N.C. Gen. Stat. § 95-4(5) (1996)). Instead, they specifically require two inspections a year of each local detention facility with the intent that *total compliance* will be achieved with respect to certain standards such as fire safety—the very standards at issue here.

We are not free to employ a common law rule to reinstate sovereign immunity when the State has both waived that immunity and specifically assumed a duty to jail inmates. The dissent's claim that this opinion "has far reaching implications" is misplaced. Each of the examples given by the dissent—such as a restaurant patron, a patient, or a legal client—involves the general public. They do not involve the

5. The federal case cited by DHHS and the dissent supports the existence of this duty. *See Reid v. Johnston County*, 688 F. Supp. 200, 202 (E.D.N.C. 1988) ("There is no question that the North Carolina legislature has contemplated some state participation in the maintenance and operation of local confinement facilities."), *aff'd per curiam sub nom. Reid v. Kayye*, 885 F.2d 129, 131 (4th Cir. 1989) (noting that under North Carolina law, the Department "has the duty" both to develop minimum standards and to inspect each facility).

unique situation faced by inmates and the express assumption by the State of a duty to those inmates. Indeed, if we were to embrace the view of the dissents in this case and in *Myers*, it is difficult to identify any negligence claim asserted against the State that would fall outside the scope of the public duty doctrine. The result would be to judicially amend the State Tort Claims Act to require all plaintiffs to prove either a special relationship or a special duty as an element of their claim under the Tort Claims Act. To do so—based on a judicial assessment of the policy implications for the State and its taxpayers—would be to sit as a super-legislature.[6]

Even if we could conclude that the statutes and regulations imposed a duty to inspect for the benefit of the public, as required by *Stone* and *Hunt*, we would still hold that plaintiffs fall within the "special relationship" exception to the public duty doctrine. In *Hunt*, the Supreme Court explained that "in order to fall within the 'special relationship' exception to the public duty doctrine, plaintiff must allege a special relationship, such as that between 'a state's witness or informant who has aided law enforcement officers.' " 348 N.C. at 199, 499 S.E.2d at 751 (quoting *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902).[7]

This Court has previously held that a "special relationship" exists when the plaintiff is in police custody. *Hull v. Oldham*, 104 N.C. App. 29, 38, 407 S.E.2d 611, 616 ("[T]here are exceptions to the general rule of no liability where a special relationship exists between the victim and law enforcement, such as where the victim is in police custody . . . ."), *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991). *See also Stafford v. Barker*, 129 N.C. App. 576, 582, 502 S.E.2d 1, 5 (utilizing same quotation from *Hull* as an illustration of the type of circumstances that give rise to a special relationship), *disc. review denied*, 348 N.C. 695, 511 S.E.2d 650 (1998). For the purpose of the public duty doctrine, there is no meaningful distinction between a person who is in police custody and a person who is in the custody of the jail because of the State's decision to prosecute him.

In a context analogous to that of the public duty doctrine, our courts have held there is no duty to protect others against harm from

6. Contrary to the dissent's suggestion, the General Assembly had no need to respond to *Braswell* because it did not involve the State. Further, *Stone* and *Hunt* provide only narrow exceptions to State liability under the Tort Claims Act.

7. As analyzed in *Stone* and *Hunt*, there appears, in the context of negligent inspection cases, to be considerable overlap between the first inquiry—whether the duty is for the protection of the public—and the "special relationship" exception.

third persons except "when a special relationship exists between parties." *King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Auth.*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774, *disc. review denied*, 336 N.C. 316, 445 S.E.2d 396 (1994). In *King*, this Court observed that "recognized special relationships" include "custodian-prisoner." *Id.* at 346, 439 S.E.2d at 774. *See also Haworth v. State*, 60 Haw. 557, 563, 592 P.2d 820, 824 (1979) ("It is well settled that a state, by reason of the special relationship created by its custody of a prisoner, is under a duty to the prisoner to take reasonable action to protect the prisoner against unreasonable risk of physical harm."); Restatement (Second) of Torts § 314A(4) (1965) ("One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other."); *id.* cmt. b ("The duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule.").

Similarly, in *Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 554, 543 S.E.2d 920, 927, *disc. review denied and cert. denied*, 353 N.C. 724, 550 S.E.2d 771 (2001), this Court considered when a "special relationship" exists for purposes of imposing liability under the State Tort Claims Act for a negligent omission. The Court explained:

> "During the last century, liability for [omissions] has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. In such relationships the plaintiff is typically in some respect particularly vulnerable and dependant upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain. . . . There is now respectable authority imposing the same duty upon a shopkeeper to his business visitor, upon a host to his social guest, *upon a jailor to his prisoner*, and upon a school to its pupil."

Id., 543 S.E.2d at 926-27 (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 56, at 373-74, 376-77 (5th ed. 1984) (emphasis added and omitted)).

The United States Supreme Court has also recognized the special relationship that arises by virtue of imprisonment: "prisons and jails are inherently coercive institutions that for security reasons must exercise nearly total control over their residents' lives and the activities within their confines . . . ." *West*, 487 U.S. at 56 n.15, 101 L. Ed. 2d at 54 n.15, 108 S. Ct. at 2260 n.15. Accordingly,

> when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199-200, 103 L. Ed. 2d 249, 261-62, 109 S. Ct. 998, 1005-06 (1989) (internal citations omitted).

Although not disputing that inmates may fall within the "special relationship" exception, DHHS and the dissent argue that it had no "special relationship" with the inmates because any such relationship was between Mitchell County and the inmates. In doing so, DHHS and the dissent ignore the express responsibility mandated by the General Assembly and implemented in DHHS' own regulations. Federal courts in other jurisdictions have held that a state's duty to ensure that a jail meets prescribed standards is sufficient to support liability under the more stringent standards of 42 U.S.C. § 1983 despite primary responsibility for the jail resting with local officials. *See*, *e.g.*, *Nicholson v. Choctaw County*, 498 F. Supp. 295, 311 (S.D. Ala. 1980) ("The Commissioner of the Department of Corrections has violated the rights of inmates held in Choctaw County Jail by failing to exercise his duty under Alabama law to insure that the jail meets

the standards prescribed pursuant to Alabama Code § 14-6-81."); *Payne v. Rollings*, 402 F. Supp. 1225, 1228 (E.D. Va. 1975) (holding, based on state statutes requiring the Director of the Department of Corrections to enforce regulations regarding jails, that the defendant Director "did owe a duty to plaintiff," who was a jail inmate, that would support a claim under § 1983).

The district court and Fourth Circuit decisions in *Reid v. Johnston County*, 688 F. Supp. 200 (E.D.N.C. 1988), *aff'd per curiam sub nom. Reid v. Kayye*, 885 F.2d 129 (4th Cir. 1989), relied upon by DHHS, do not lead to a different conclusion. Neither court addressed state negligence claims, but rather only considered the liability of individual State officials under 42 U.S.C. § 1983 for "fail[ing] to take action to remedy the [constitutional] violations" arising out of conditions in the county jail. 885 F.2d at 131. The plaintiffs argued in *Reid* that the State officials "had not only the power but the duty to correct the conditions." *Id.* Although the Fourth Circuit acknowledged that, by statute, the State had a duty toward the jail inmates, it concluded that the statutes did not vest the officials "with the mandatory duty to remedy substandard jail conditions" and, in the absence of such a duty, "their inaction cannot be seen as a cause of those conditions and a § 1983 suit cannot be maintained against them." *Id. See also Reid*, 688 F. Supp. at 203 (granting the motion to dismiss the § 1983 action because "plaintiffs have not demonstrated that defendants' actions, taken under color of state law, have in any way *caused* existing or past constitutionally deficient conditions"). Thus, neither case disputed the existence of a "special relationship" between jail inmates and DHHS, but rather only addressed the issue of causation under § 1983.

The issue of causation is not, however, before this Court.[8] DHHS and the dissent have cited no cases suggesting in any manner that

8. Nothing precludes DHHS from challenging below plaintiffs' ability to prove the causation alleged in their affidavits of claim. We express no opinion regarding the conclusions reached by the federal courts in *Reid* as to the discretionary nature of DHHS' ability to enforce its standards. We note, however, that the courts did not address DHHS' regulations. *See* 10A N.C.A.C. 14J.1303(a) ("The Secretary shall determine whether conditions in the jail jeopardize the safe custody, safety, health or welfare of its inmates within 30 days after receipt of the inspection report and the supporting materials."); 10A N.C.A.C. 14J.1303(c) (mandating that the Secretary "shall determine" that noncompliance with certain standards, including those relating to fire safety, jeopardize the safe custody, safety, health, or welfare of inmates); 10A N.C.A.C. 14J.1303(d) (providing that "[t]he Secretary shall order corrective action, order the jail closed, or enter into an agreement of correction with local officials pursuant to 10A NCAC 14J.1304").

causation is relevant to a determination of the applicability of the public duty doctrine. Nor have we identified any. We, therefore, hold, based on the statutes discussed above, that plaintiffs have sufficiently demonstrated that they fall within the "special relationship" exception to the public duty doctrine.

Conclusion

We hold that the public duty doctrine does not apply under *Stone* and *Hunt* because DHHS' duty to inspect was for the purpose of protecting the inmates and not for protection of the public generally. Alternatively, we hold that, even if the public duty doctrine did apply, plaintiffs fall within the "special relationship" exception to that doctrine. Accordingly, we affirm the Industrial Commission's denial of DHHS' motion to dismiss.

Affirmed.

Judge McGEE concurs.

Judge TYSON concurs in part and dissents in part in a separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

I agree that defendant's appeal, although interlocutory, asserts a substantial right and is properly before this Court. *Smith v. Jackson County Bd. of Educ.*, 168 N.C. App. 452, 608 S.E.2d 398 (2005).

The majority's opinion then affirms the Industrial Commission's denial of DHHS' motion to dismiss and holds the public duty doctrine does not apply to the facts at bar. In the alternative, the majority's opinion holds DHHS had a "special relationship" to plaintiffs to except plaintiff's claims from the public duty doctrine. Precedents construing and applying the public duty doctrine clearly control and require dismissal of this case. No "special relationship" exists between plaintiffs and DHHS to except DHHS from the public duty doctrine. I respectfully dissent.

I. Public Duty Doctrine

The public duty doctrine "provides that governmental entities and their agents owe duties *only to the general public*, not to individuals, absent a 'special relationship' or 'special duty' between the entity and the injured party." *Stone v. N.C. Dept. of Labor*, 347 N.C.

473, 477-78, 495 S.E.2d 711, 714 (1998) (emphasis supplied); *see also Wood v. Guilford Cty.*, 355 N.C. 161, 167, 558 S.E.2d 490, 495 (2002) (". . . this Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection . . . ").

Our Supreme Court recognized the common law public duty doctrine as an exception to the Tort Claims Act for municipalities, political subdivisions, and their agents in *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991) (involving a county sheriff's alleged negligence in protecting a citizen). In *Stone*, our Supreme Court extended the scope of the public duty doctrine to "state agencies" and "governmental functions other than law enforcement." 347 N.C. at 481, 495 S.E.2d at 716.

Our Supreme Court also stated exceptions to the application of the public duty doctrine: (1) where the plaintiff shows a "special relationship" between the injured party and the governmental entity; or, (2) when the governmental entity creates a "special duty" by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. These exceptions are to be narrowly applied. *Id.* at 372, 410 S.E.2d at 902.

In *Braswell*, our Supreme Court held the public duty doctrine was necessary to prevent "an overwhelming burden of liability" on governmental agencies with "limited resources." *Id.* at 370-71, 410 S.E.2d at 901. The Court stated:

> The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort . . . would inevitably determine how the limited [public] resources . . . should be allocated and without predictable limits.

Id. at 371, 410 S.E.2d at 901-02 (*quoting Riss v. City of New York*, 22 N.Y.2d 579, 581-82, 240 N.E.2d 860, 860-61, 293 N.Y.S.2d 897, 898 (1968)).

In *Myers v. McGrady*, 170 N.C. App. 501, 507, 613 S.E.2d 334, 339 (2005), this Court recently held "that the public duty doctrine applies where plaintiffs allege negligence through (a) failure of law

enforcement to provide protection from the misconduct of others, and (b) *failure of state departments or agencies to detect and prevent misconduct of others through improper inspections*." (Emphasis supplied). The facts before us clearly fall into the second category.

II. Controlling Precedents

This case cannot be distinguished from controlling Supreme Court decisions in *Stone* and *Hunt v.* N.C. *Dept. of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998). We are bound by the decisions of our Supreme Court. *Eaves v. Universal Underwriters Group*, 107 N.C. App. 595, 600, 421 S.E.2d 191, 194 (1992), *disc. review denied*, 333 N.C. 167, 424 S.E.2d 908 (1992).

The result here is also controlled by this Court's prior precedents in *Myers*; *Lassiter v. Cohn*, 168 N.C. App. 310, 607 S.E.2d 688 (2005) (the public duty doctrine barred the plaintiff's claims against the city when, after a traffic accident, a city police officer asked the plaintiff to walk to the rear of his vehicle and the plaintiff was struck by a car); *Little v. Atkinson*, 136 N.C. App. 430, 433-34, 524 S.E.2d 378, 381 (the public duty doctrine barred claims against the city and its police officers who failed to adequately inspect a crime scene before allowing relatives of the victim to visit the site), *disc. rev. denied*, 351 N.C. 474, 543 S.E.2d 492 (2000); *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 340-41, 511 S.E.2d 41, 45 (the public duty doctrine barred claims against the city and its police officers who failed to warn the public of broken power lines that caused decedent's death), *cert. denied*, 350 N.C. 851, 539 S.E.2d 13 (1999); *Simmons v. City of Hickory*, 126 N.C. App. 821, 823-25, 487 S.E.2d 583, 586 (1997) (the public duty doctrine barred a claim against the city for negligently inspecting homes and issuing building permits); *Humphries v. N.C. Dept. of Correction*, 124 N.C. App. 545, 547-48, 479 S.E.2d 27, 28 (1996) (the public duty doctrine barred claim against the Department of Correction for alleged negligence in the supervision of a probationer), *disc. rev. improvidently allowed*, 346 N.C. 269, 485 S.E.2d 293 (1997); *Tise v. Yates Construction Co.*, 122 N.C. App. 582, 588-89, 471 S.E.2d 102, 107 (1996) (the public duty doctrine shielded city from liability for its failure to inform construction company of potential tampering of construction equipment by trespassers where decedent died after construction equipment crushed him); *Sinning v. Clark*, 119 N.C. App. 515, 518-20, 459 S.E.2d 71, 73-74 (the public duty doctrine applied to bar a claim against the city, the city building inspector, and

the city code administrator for gross negligence in an inspection of a home), *disc. rev. denied*, 342 N.C. 194, 463 S.E.2d 242 (1995); *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 406, 442 S.E.2d 75, 78 (1994) (the public duty doctrine protected the municipality and its police officers who negligently issued a taxicab permit to a driver who subsequently murdered a customer); *Prevette v. Forsyth County*, 110 N.C. App. 754, 758, 431 S.E.2d 216, 218 (the public duty doctrine barred a wrongful death claim against the county and against the director and an employee of the county animal control shelter for failing to protect plaintiff from dogs which defendants knew were dangerous), *disc. review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993). We are also bound by this Court's prior precedents. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Nothing in *Thompson* or *Lovelace*, cited in the majority's opinion, expressly overrules the precedents cited above.

A. *Stone v. N.C. Dept. of Labor*

In *Stone*, the plaintiffs sued the North Carolina Department of Labor and its Occupational Safety and Health Division ("DOL") under the Tort Claims Act seeking damages for injuries or deaths resulting from a fire at the Imperial Foods Products plant in Hamlet, North Carolina. 347 N.C. at 476, 495 S.E.2d at 713. Subsequent to the fire, DOL conducted an inspection of the plant. This was the only inspection DOL had conducted during the plant's eleven-year history of operation. *Id.* at 477, 495 S.E.2d at 713. As a result of the inspection, DOL discovered inadequate and blocked exits and an inadequate fire suppression system. *Id.*

As here, the Industrial Commission in *Stone* denied the State's Rule 12(b)(1) and 12(b)(6) motions. The Court of Appeals in *Stone* unanimously affirmed the Commission. *Id.* at 476, 495 S.E.2d at 713. Our Supreme Court granted discretionary review and reversed and remanded. Justice Whichard wrote:

> Just as we recognized the limited resources of law enforcement in *Braswell*, we recognize the limited resources of defendants here. Just as we there refused to judicially impose an overwhelming burden of liability on law enforcement for failure to prevent every criminal act, we now refuse to judicially impose an overwhelming burden of liability on defendants for failure to prevent every employer's negligence that results in injuries or deaths to employees. A government ought to be free to enact laws for the *public protection* without thereby exposing its supporting tax-

> payers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.

Stone, 347 N.C. at 481, 495 S.E.2d at 716 (internal citations and quotation marks omitted) (emphasis in original).

Similar to plaintiffs' claims here, the plaintiffs in *Stone* argued the state agency owed them an individualized duty under N.C. Gen. Stat. § 95-4(5) to inspect the plant. *Id.* at 483, 495 S.E.2d at 717. "This statute provides that the Commissioner of Labor is 'charged with the duty' to visit and inspect 'at reasonable hours, as often as practicable,' all of the 'factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State.' *Id.* (quoting N.C. Gen. Stat. § 95-4(5)). The Court held the individual claimants could not recover against the State because the duty imposed by this statute is for the benefit of the general public and not for the benefit of an individual. *Id.* The Court stated:

> [W]e do not believe the legislature, in establishing the Occupational Safety and Health Division of the Department of Labor in 1973, intended to impose a duty upon this agency to each *individual* worker in North Carolina. Nowhere in chapter 95 of our General Statutes does the legislature authorize a private, individual right of action against the State to assure compliance with OSHANC standards. Rather, the most the legislature intended was that the Division prescribe safety standards and secure some reasonable compliance through spot-check inspections made "as often as practicable." N.C.G.S. § 95-4(5) (1996). "In this way the safety conditions for workers in general would be improved." *Nerbun v. State*, 8 Wash. App. 370, 376, 506 P.2d 873, 877.

Id. at 482, 495 S.E.2d at 716 (internal citations and quotation marks omitted).

B. *Hunt v. N.C. Dept. of Labor*

In *Hunt*, decided a year after *Stone*, the plaintiff also sued DOL under the Tort Claims Act for injuries resulting from an accident at an amusement park. *Id.* The plaintiff argued DOL "had a duty under the Amusement Device Safety Act, chapter 95, article 14B of the North Carolina General Statutes, and the rules and regulations promulgated thereunder in the Administrative Code," and the DOL breached this duty by failing to inform the amusement park's manager that, pursuant to Rule .0429(a)(3)(B) of the Administrative Code, shoulder

straps and seat belts must be mounted on go-karts. *Id.* at 195, 499 S.E.2d at 748-49. The Commission again denied the State's Rule 12(b)(1) and 12(b)(6) motions and the Court of Appeals affirmed. *Id.* at 194, 499 S.E.2d at 748.

Our Supreme court reviewed the Amusement Device Safety Act and again reversed the Court of Appeal's affirmance and remanded. Justice (now Chief Justice) Parker wrote, "nowhere in the Act did the legislature impose a duty upon defendant to each go-kart customer." *Id.* at 197, 499 S.E.2d at 750. The Court further stated, "Pursuant to N.C.G.S. § 95-111.4, the Commissioner of Labor has promulgated rules governing the inspection of go-karts. 13 NCAC 15 .0400 (June 1992). These rules similarly do not impose any such duty." *Id.* The Court held that the rules promulgated under the Amusement Device Safety Act "are for the '[p]rotection of the public from exposure to such unsafe conditions' and do not create a duty to a specific individual." *Id.* at 198, 499 S.E.2d at 751. "To hold contrary to our holding in *Stone*, in which we held that the defendants' failure to inspect did not create liability, would be tantamount to imposing liability on defendant in this case solely for inspecting the go-karts and not discovering them to be in violation of the Code." *Id.* at 198-99, 499 S.E.2d at 751.

III. Analysis

The facts at bar fit squarely within the law set forth in *Stone* and *Hunt* and other binding precedents cited above. *Stone* and *Hunt* mandate that the public duty doctrine bars negligence claims against the State where the State legislatively imposes a duty to inspect to protect the public generally. Here, none of the applicable statutes before us impose any duty on or require the State to protect any individual claimant, nor do the statutes establish any special relationship between plaintiffs and DHHS.

A. Public, Not Private, Duty

The North Carolina General Assembly authorized Mitchell County to establish and maintain a county confinement facility. N.C. Gen. Stat. § 153A-218 (2003) ("A county may establish, acquire, erect, repair, maintain, and operate local confinement facilities and may for these purposes appropriate funds not otherwise limited as to use by law."). The General Assembly also recognized the Sheriff of Mitchell County bears the responsibility for the care and custody of the jail and its inmates. N.C. Gen. Stat. § 162-22 (2003) ("The sheriff shall

have the care and custody of the jail in his county; and shall be, or appoint, the keeper thereof.") These statutes clearly show the Legislature's intent to place the responsibility of and liability for the care and custody of detainees housed in local jails on Mitchell County and its sheriff, not the State. *Id.*

Further, under N.C. Gen. Stat. § 153A-216, "Legislative Policy", the General Assembly provided:

> The policy of the General Assembly with respect to local confinement facilities is:
>
> (1) *Local confinement facilities should provide secure custody of persons confined therein in order to protect the community* and should be operated so as to protect the health and welfare of prisoners and provide for their humane treatment.
>
> (2) Minimum statewide standards should be provided to *guide and assist local governments* in planning, constructing, *and maintaining* confinement facilities and in developing programs that provide for humane treatment of prisoners and contribute to the rehabilitation of offenders.
>
> (3) The State *should* provide services to *local governments* to *help improve* the quality of administration and local confinement facilities. These services should include inspection, consultation, technical assistance, and other appropriate services.
>
> (4) Adequate qualifications and training of the personnel of local confinement facilities are essential to improving the quality of these facilities. The State shall establish entry level employment standards for jailers and supervisory and administrative personnel of *local confinement facilities* to include training as a condition of employment in a local confinement facility pursuant to the provisions of Chapter 17C and Chapter 17E and the rules promulgated thereunder.

N.C. Gen. Stat. § 153A-216 (2003) (emphasis supplied).

Under this statute, the General Assembly's expressed intent is that defendant's public duty is clearly for the benefit of the public. *Id.* ("Local confinement facilities should provide secure custody of persons confined therein in order to protect the community"). Also, under this statute, the State "should provide services to local governments to help improve the quality of administration and local confinement facilities. These services should include inspection, consul-

tation, technical assistance, and other appropriate services." This language reinforces the legislative intent that defendant's role in providing statewide minimum standards and bi-annual inspections of local jails is for the benefit of the public and not for these individual claimants. This statute clearly does not impose either the categorical or derivative responsibility on the State to ensure county jail facilities comply with certain regulations or to create any liability to any individual for its failure to do so. N.C. Gen. Stat. § 153A-221 required DHHS to "develop and publish minimum standards for the operation of local confinement facilities." The standards must provide:

> (1) Secure and safe physical facilities;
>
> (2) Jail design;
>
> (3) Adequacy of space per prisoner;
>
> (4) Heat, light, and ventilation;
>
> (5) Supervision of prisoners;
>
> (6) Personal hygiene and comfort of prisoners;
>
> (7) Medical care for prisoners, including mental health, mental retardation, and substance abuse services;
>
> (8) Sanitation;
>
> (9) Food allowances, food preparation, and food handling;
>
> (10) Any other provisions that may be necessary for the safekeeping, privacy, care, protection, and welfare of prisoners.

N.C. Gen. Stat. § 153A-221(a) (2003). This statute imposes no affirmative duty on the State to ensure the safety of individual detainees housed in county jails.

N.C. Gen. Stat. § 153A-222, "Inspections of local confinement facilities" provides in pertinent part:

> Department personnel shall visit and inspect each local confinement facility at least semiannually. The purpose of the inspections is to investigate the conditions of confinement, the treatment of prisoners, the maintenance of entry level employment standards for jailers and supervisory and administrative personnel of *local confinement facilities* as provided for in G.S. 153A-216(4), and to determine whether the facilities meet the minimum standards published pursuant to G.S. 153A-221. The

> inspector shall make a written report of each inspection and submit it within 30 days after the day the inspection is completed *to the governing body and other local officials* responsible for the facility. The report shall specify each way in which the facility does not meet the minimum standards. *The governing body shall consider the report at its first regular meeting after receipt of the report and shall promptly initiate any action necessary to bring the facility into conformity with the standards.*

N.C. Gen. Stat. § 153A-222 (2003) (emphasis supplied). In the Tort Claims Act, the legislature clearly did not intend to impose liability on the State for injuries or deaths sustained by detainees in local confinement facilities with allegedly inadequate safety measures. Under the statute, the local governing body, and not the State, is charged with the duty to bring the facility into conformity with and maintain the standards. This statute also demonstrates the Legislature's intent that the State's role in county jails is limited to inspect and report on county correctional facilities to the county governing authorities for the benefit of the public generally. *Id.*

Further, N.C. Gen. Stat. § 153A-223 (2003), "Enforcement of Minimum Standards," shows the State is not liable for claims of detainees in local jails. The statute provides:

> If an inspection conducted pursuant to G.S. 153A-222 discloses . . . that a local confinement facility does not meet the minimum standards published pursuant to G.S. 153A-221 and, in addition, if the Secretary determines that conditions in the facility jeopardize the safe custody, safety, health, or welfare of persons confined in the facility, the Secretary *may* order corrective action or close the facility, as provided in this section . . . [.]

Id. (emphasis supplied). The United States Court of Appeals for the Fourth Circuit considered this statute in *Reid v. Kayye*, 885 F. 2d 129, 131 (4th Cir. 1989). The Court stated, "We must conclude . . . that use of the word 'may' in § 153A-223 is purposeful and that DHR officials are not vested with the mandatory duty to remedy substandard jail conditions." *Id.* Any enforcement action by defendant is couched in the discretionary language of "may" or "should." *Id.* The statute and the decisions interpreting the statute show the Legislature's clear intent for the State and its agencies to have a limited role inspecting and reporting on local jail facilities to prompt remedial action by the local governing body *Id.*

In *Braswell* and reiterated in *Stone* and *Hunt*, our Supreme Court recognized the limited resources and duty of the State. "For the courts to proclaim a new and general duty of protection in the law of tort . . . would inevitably determine how the limited [public] resources . . . should be allocated and without predictable limits." *Braswell*, 330 N.C. at 371, 410 S.E.2d at 901-02. Past precedents bind us to "refuse to judicially impose an overwhelming burden of liability on defendants" for DHHS's alleged failure to prevent Mitchell County and its sheriff's alleged negligence in the care, custody, and maintenance of its confinement facility. *Stone*, 347 N.C. at 481, 495 S.E.2d at 716. Mitchell County and its sheriff, not the State, bore the duty and responsibility to ensure the safety of the detainees in the county jail. N.C. Gen. Stat. § 162-22. Mitchell County recognized that duty and settled all of plaintiffs' claims.

Clear and controlling precedents show the state is not liable for the tragic injuries or deaths that occurred in the Mitchell County jail. The public duty doctrine shields the State from liability for negligence claims from "the alleged failure of a state agency to detect and prevent misconduct of a third party through improper inspections." *Myers*, 170 N.C. App. at 503, 613 S.E.2d at 337.

The regulatory powers of the state government are extensive and, in one way or another, reach virtually every aspect of our lives. The natural extension of the majority's unprecedented and unwarranted interpretation has far reaching implications. Under the majority's holding, a citizen who becomes ill from eating spoiled food at a restaurant could hold the State liable because DHHS has a statutory duty to inspect food establishments. N.C. Gen. Stat. § 130A-249 (2003) ("The Secretary may enter any establishment that is subject to the provisions of G.S. 130A-248 for the purpose of making inspections. The Secretary shall inspect each restaurant at least quarterly . . ."). These inspections are twice as frequent than what the statute requires of defendants here. N.C. Gen. Stat. § 153A-222 ("Department personnel shall visit and inspect each local confinement facility at least semiannually").

Similarly, a patient who receives negligent medical care or a client who receives faulty legal advice or whose lawyer stole the client's money could hold the State liable for negligent inspection, testing, and licensing of applicants. The State of North Carolina, through the North Carolina Medical Board, the North Carolina Board of Law Examiners, and the North Carolina State Bar licenses

and regulates the practices of medicine and law, including theft of a client's funds by an attorney. N.C. Gen. Stat. § 90-4 (2003); N.C. Gen. Stat. § 84-24 (2003); N.C. Gen. Stat. 84-23 (2003). State boards and agencies license and regulate a host of other professions and occupations. *See e.g.*, real estate appraisers (N.C. Gen. Stat. Chapter 93E); cosmetic art (N.C. Gen. Stat. Chapter 88B); teachers (N.C. Gen. Stat. Chapter 115C).

Not content with their substantial settlements from Mitchell County, plaintiffs now seek to also cash out from the taxpayers of this State. *Braswell* and its progeny, *Stone* and *Hunt*, have stood as binding precedents under these facts for over fifteen years without any affecting amendment of the Tort Claims Act by the General Assembly. *Blackmon v. N.C. Dept. of Correction*, 118 N.C. App. 666, 673, 457 S.E.2d 306, 310 (1995) ("[I]t is appropriate to assume the legislature is aware of any judicial construction of a statute.") The holdings in *Spicer*, *Levin*, and *Shields*, cited in the majority's opinion, all reinforce the legislature's intent that any individual duty owed to plaintiffs rests with the officials of the local governmental unit that own, operate, and maintain the jail, not the State.

B. "Special Relationship"

After having cited no controlling precedents or binding authority to support its broad interpretation, the majority's opinion states, "Even if we could conclude that the statutes and regulations imposed a duty to inspect for the benefit of the public, we would still hold that plaintiffs fall within the 'special relationship' exception to the public duty doctrine."

For the "special relationship" exception to apply, it "must be specifically alleged, and is not created merely by a showing that the state undertook to perform certain duties." *Lane v. Kinston*, 142 N.C. App. 622, 625, 544 S.E.2d 810, 813 (2001) (citation omitted). "In sum, the 'special duty' exception to the general rule against liability . . . is a very narrow one; it should be applied only when the promise, reliance, and causation are manifestly present." *Braswell*, 330 N.C. 372, 410 S.E.2d at 902. A "special relationship" may exist when plaintiffs are held in police custody. However, if that "special relationship" exists, it is between the detainees and Mitchell County and its sheriff, *not the State*.

The applicable statutes noted above clearly indicate that the Legislature intended the responsibility for the care and custody of

local jails to be borne by the county and the sheriff. The State did not waive its sovereign immunity or place such activities outside the public duty doctrine. Mitchell County and the Sheriff of Mitchell County bore the responsibility to ensure the county's confinement facilities were maintained in a safe condition for the detainees. Liability arising out of a "special relationship" is the liability of Mitchell County, which settled plaintiff's claims.

IV. Conclusion

The Industrial Commission failed to follow clearly controlling precedents and erred as a matter of law in denying the State's motions to dismiss plaintiff's claims due to the public duty doctrine. The Commission and this Court are bound by clear Supreme Court precedents. None of the statutes before us expressly impose liability on the State to an individual for the negligence of a third party.

For over fifteen years after the Supreme Court's decisions in *Braswell* and its progeny, the General Assembly has not amended the Tort Claims Act to alter or abolish the application of the public duty doctrine for alleged negligent inspections by state agencies to allow recovery for an individual's alleged injury as a result of actions by a third party.

I completely agree with the statement in the majority's opinion that "[t]his Court must . . . be ever vigilant not to act as a superlegislature that imposes its notion of public policy in the face of statutory determinations otherwise. It is for the General Assembly, and not judges, to decide questions of public policy regarding how and when the State may be sued." The General Assembly has spoken through the absence of legislation to reduce, alter, or abolish the public duty doctrine in North Carolina. Its intent should control the result here.

Detainees in the Mitchell County jail were killed or injured as a result of a tragic fire. "This Court should not, however, permit these 'bad facts' to lure it into making 'bad law.' " *N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 539, 374 S.E.2d 844, 850 (1988). I respectfully dissent.

THERESA D. HALL, ADMINISTRATRIX OF THE ESTATE OF MICHAEL H. HALL, AND THERESA D. HALL, INDIVIDUALLY, PLAINTIFFS v. TOREROS, II, INC., DEFENDANT

No. COA05-199

(Filed 7 March 2006)

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

Six of the original seven assignments of error that plaintiffs failed to argue in a negligence case are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

2. Alcoholic Beverages— alcoholic beverage license—intoxicated patron—driving after leaving licensed premises—injuries to others—no duties by licensee

A restaurant business licensed to sell alcoholic beverages had no legal duty to take affirmative precautionary measures to prevent an intoxicated patron from operating a motor vehicle after the patron was served his final drink or to prevent an intoxicated patron from consuming alcoholic beverages on its premises after it knew he was intoxicated, and the licensed business thus could not be held liable on either of those theories of negligence for injuries received by persons in a vehicle struck by an automobile driven by the intoxicated patron after he left the restaurant, because: (1) the restaurant owner's adoption of the ABC Commission's Retail Guide as the restaurant's policy with respect to serving alcoholic beverages to patrons, which provided that a licensee should make sure that an intoxicated patron has a safe way home, was insufficient to create a legal duty on the part of the restaurant to prevent an intoxicated patron from driving after he was served his final drink; (2) an ABC regulation prohibiting a licensee from allowing an intoxicated person to consume alcoholic beverages on the licensed premises did not impose a legal duty on the restaurant business to prevent an intoxicated patron from consuming alcoholic beverages on the licensed premises by drinking the remaining portion of a drink he had previously purchased or by drinking a sip from another customer's drink; and (3) the restaurant business did not have a common law duty to take affirmative precautionary measurers to prevent an intoxicated patron from driving after the patron was served his final drink.

Appeal by plaintiffs and defendant from judgment entered 1 April 2004 by Judge Abraham Penn Jones in Durham County Superior Court. Appeal by defendant from order entered 10 November 1999 by Judge Howard E. Manning, Jr. and from judgment entered 24 March 2000 and order entered 31 May 2000 by Judge James C. Spencer, Jr. in Durham County Superior Court. Heard in the Court of Appeals 18 October 2005.

Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, for plaintiffs.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Phillip J. Anthony, Christopher J. Derrenbacher, and Kathrine E. Downing, for defendant.

JOHN, Judge.

This case arises out of a fatal automobile collision involving an intoxicated driver. However, our decision herein concerns neither the grave responsibility of that driver nor the crime of driving while impaired. Rather, we consider only whether the law of this jurisdiction recognizes a duty of care under the circumstances presented.

Plaintiffs Theresa D. Hall, Administratrix of the Estate of Michael H. Hall, and Theresa D. Hall, Individually ("plaintiffs"), appeal the 1 April 2004 judgment (denominated order) in favor of defendant Toreros, II, Inc. ("Toreros" or "defendant") entered by Judge Abraham Penn Jones (Judge Jones). For the reasons discussed herein, we affirm.

Pertinent procedural and factual background information includes the following: On 3 December 1997, William S. Terry ("Terry") was a patron at Toreros, a Durham, North Carolina, restaurant licensed and permitted to sell alcoholic beverages by the North Carolina Alcoholic Beverage Control Commission ("the Commission"). While at Toreros, Terry was served alcoholic beverages by bartender Lisa McBroom ("McBroom"), the only bartender on duty. At about 9:30 p.m., Terry left Toreros and walked to a nearby Food Lion. Some thirty minutes later, Terry returned to Toreros and drank the remaining portion of an alcoholic beverage he had left on the bar. When Terry ordered another alcoholic beverage, McBroom informed him that Toreros would be closing soon, that she had "called last call" while he was away, and that alcohol was no longer being served. After

taking a sip from another customer's alcoholic beverage, Terry asked McBroom whether he could buy that customer another beverage. McBroom reiterated she had "called last call," and refused to sell Terry another beverage.

At approximately 10:30 p.m., Terry left Toreros. While operating his automobile less than one mile away, Terry crossed the center line and collided with a motor vehicle driven by Michael Hall and in which plaintiff Theresa Hall was a passenger. Michael Hall died as a result of the collision and his wife Theresa sustained serious injuries.

On 11 May 1998, plaintiffs filed the instant suit against Terry (later dismissed as a defendant following mediation) and defendant, alleging the latter negligently furnished alcoholic beverages to Terry when it knew or should have known Terry was intoxicated. Plaintiffs subsequently amended their complaint to allege the following:

> After furnishing a substantial amount of beer and liquor to Defendant Terry, Defendant Toreros knew Defendant Terry was intoxicated at the time he left Toreros, knew Defendant Terry was going to operate a motor vehicle in his intoxicated condition and failed to take any affirmative precautionary measures to prevent Defendant Terry from driving his vehicle or attempting to provide alternative transportation.

On 14 September 1999, defendant moved to dismiss the amended complaint. In an order entered 10 November 1999, Judge Howard E. Manning, Jr. (Judge Manning) denied the motion.

The case proceeded to trial the week of 28 February 2000. Following presentation of all the evidence, the jury was instructed to decide whether defendant was negligent in (i) "serving alcoholic beverage[s] to [] Terry, when it knew, or reasonably should have known that [he] was intoxicated at the time he was served," and/or (ii) "failing to take affirmative precautionary measures to prevent [] Terry from operating a motor vehicle when it knew or reasonably should have known he was intoxicated." On 9 March 2000, the jury returned a verdict finding no negligence by defendant with regard to the service of alcoholic beverages to Terry. However, the jury was unable to reach a verdict on the second issue. Judge James C. Spencer, Jr., (Judge Spencer) thereupon entered judgment (i) denying recovery to plaintiffs on the first count and (ii) declaring a mistrial regarding the issue of defendant's negligence in failing to take "affirmative precautionary measures."

Defendant subsequently filed a "Motion For Judgment Pursuant to Rule 50." On 31 May 2000, Judge Spencer denied the motion and certified his decision for immediate appeal. Defendant thereafter appealed to this Court both the 10 November 1999 order of Judge Manning and Judge Spencer's 31 May 2000 order. In an unpublished opinion filed 18 December 2001, the appeals of plaintiffs and defendant were both dismissed as interlocutory. *Hall v. Toreros II, Inc.*, 147 N.C. App. 785, 559 S.E.2d 294 (2001) (unpublished).

Retrial was scheduled before Judge Jones during February and March 2004. Upon conclusion of the evidence, the jury was charged to determine whether defendant was negligent in (i) "failing to take affirmative precautionary measures to prevent [] Terry from operating a motor vehicle when it knew he was intoxicated," and/or (ii) "allowing [] Terry to consume an alcoholic beverage on its premises when it knew he was intoxicated." After answering each issue in the affirmative, the jury awarded plaintiffs a total of $1,241,600.00 in damages.

Defendant thereupon moved for judgment notwithstanding the verdict ("JNOV"). On 1 April 2004, Judge Jones allowed the motion in an order providing as follows:

> In that it appears to the Court in this case that there is no legal duty by a commercial provider of alcohol in North Carolina after service of the final drink by the defendant, the plaintiffs' claims for relief do not establish recognized legal claims.
>
> It is therefore ordered that the jury's verdict as to each issue contained on the verdict sheet is set aside and judgment is entered in favor of the Defendant and against the Plaintiffs as to each issue.

Plaintiffs appeal the JNOV, and defendant appeals the 10 November order of Judge Manning, the rulings of Judge Spencer and Judge Jones allowing the issue of defendant's failure to take affirmative measures to be submitted to the jury in the first and second trials, and the denials by Judge Jones of defendant's motions for directed verdict. Because we affirm the ruling of Judge Jones on defendant's JNOV motion, it is unnecessary to address defendant's appellate contentions.

[1] Initially, we note plaintiffs have failed to present argument upon six of their original seven assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the omitted assignments of error are deemed

abandoned. We therefore limit our consideration of plaintiffs' appeal to the issue of whether Judge Jones erred in allowing defendant's JNOV motion.

[2] A JNOV motion "seeks entry of judgment in accordance with [a] movant's earlier motion for directed verdict, notwithstanding the contrary verdict actually returned by the jury." *Streeter v. Cotton*, 133 N.C. App. 80, 82, 514 S.E.2d 539, 541 (1999) (citations omitted). Since "ruling on such [a] motion is a question of law, and presents the same issue for appellate review as a motion for directed verdict," *id.* (citations omitted), "[i]t follows . . . that '[t]he propriety of granting a motion for [JNOV] is determined by the same considerations as that of a motion for directed verdict.' " *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979) (citation omitted).

"Ordinarily, [JNOV] is not proper unless it appears as a matter of law that [] recovery simply cannot be had by plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987) (citation omitted). "The heavy burden carried by the movant is particularly significant in cases . . . in which the principal issues are negligence and contributory negligence. Only in exceptional cases is it proper to enter a directed verdict or a [JNOV] against a plaintiff in a negligence case." *Id.* (citations omitted). However, one such "exceptional case[]" exists where the plaintiff is unable to offer evidence sufficient to establish each essential element of negligence. *Oliver v. Royall*, 36 N.C. App. 239, 242, 243 S.E.2d 436, 439 (1978).

This Court has previously held that

> [n]egligence is not presumed simply because an accident has occurred. In order to establish a *prima facie* case of negligence, plaintiff must offer evidence that defendant owed him a duty of care, that defendant breached that duty, and that defendant's breach was the actual and proximate cause of plaintiff's injury. If plaintiff fails to show any one of these elements, it is proper for the court to enter a directed verdict in favor of defendant.

Cowan v. Laughridge Construction Co., 57 N.C. App. 321, 323-24, 291 S.E.2d 287, 289 (1982) (citation omitted).

In the case *sub judice*, defendant successfully argued to Judge Jones that JNOV was appropriate because of the failure of plaintiffs' evidence on the duty element of negligence. According to defendant, North Carolina jurisprudence places no legal duty upon a commercial

vendor of alcoholic beverages which, having determined a patron is not intoxicated at the time of service, has served said patron his or her final drink. Upon careful consideration of pertinent case and statutory law, we affirm the decision of Judge Jones.

In examining how a duty to use reasonable care arises, this Court has cited the following provisions of The Restatement (Second) of Torts:

> How Standard of Conduct is Determined:
>
> The standard of conduct of a reasonable man may be
>
> (a) established by a legislative enactment or administrative regulation which so provides, or
>
> (b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or
>
> (c) established by judicial decision, or
>
> (d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision.

Hutchens v. Hankins, 63 N.C. App. 1, 13-14, 303 S.E.2d 584, 592 (quoting Restatement (Second) of Torts § 285), *disc. review denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

With respect to the sale of alcoholic beverages by ABC licensed or permitted businesses, N.C.G.S. § 18B-305(a) (2003) provides that it is "unlawful for a permittee or his employee . . . to knowingly sell or give alcoholic beverages to any person who is intoxicated." In *Hutchens*, after examining the general purposes of the statute, this Court "adopt[ed] the requirements of G.S. 18A-34 [now N.C.G.S. § 18B-305] as the minimum standard of conduct" for businesses having a license or permit to sell alcoholic beverages, and held that violation of the statute "can give rise to an action for negligence against the licensee [or permittee] by a member of the public who has been injured by the intoxicated customer." 63 N.C. App. at 16, 303 S.E.2d at 593; *see also Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 202, 505 S.E.2d 131, 135 (1998) (common law negligence claim may be maintained against commercial vendor based upon sale of alcohol to underage individual); *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 178 (1992) (common law negligence claim may be maintained against social host based upon service of alcohol to intoxicated individual).

However, in order to prevail in such an action, a plaintiff whose injury was proximately caused by a patron must also allege and prove "(1) that the patron was intoxicated and (2) that the licensee or permittee knew or should have known that the patron was in an intoxicated condition at the time he or she was served." *Hutchens*, 63 N.C. App. at 18, 303 S.E.2d at 595.

The jury verdict at the first trial, not challenged by plaintiffs in the instant appeal, determined that defendant did not "serv[e] alcoholic beverage[s] to [] Terry, when it knew, or reasonably should have known that [he] was intoxicated at the time he was served." Defendant was thus exonerated of violating the legal duty established in *Hutchens* and the propriety of the jury's decision in that regard is not before us. As Terry was not an underage individual, and as defendant was neither a "social host" nor (according to the first jury verdict) did it serve alcohol to Terry when it knew or should have known he was intoxicated, the legal duties established in *Hart* and *Mullis* are likewise not implicated herein.

Plaintiffs achieved a favorable jury verdict at the second trial, contending defendant was negligent in knowing Terry was intoxicated but failing to take affirmative measures to prevent him from operating a motor vehicle, and also in allowing him to consume an alcoholic beverage on its premises while intoxicated. Confronted with Judge Jones' entry of judgment against them notwithstanding the jury verdict, plaintiffs on appeal posit three theories of liability as sustaining the verdict. Plaintiffs maintain defendant's company policy, an administrative regulation of the Commission, and "general common law principles" support submission to the jury of plaintiffs' two contentions of defendant's negligence. We examine each assertion *ad seriatim*.

Company Policy

At trial, plaintiffs presented evidence tending to show defendant trained its employees to comply with the Commission's Retail Guide ("the Guide") when serving alcoholic beverages to customers. In responses to interrogatories from plaintiffs, defendant acknowledged it "maintain[ed]" a copy of the Guide in "the bar area" and used the Guide to "train employees about the service of alcohol[,]" "train employees in identifying and dealing with intoxicated customers[,]" and "discourage driving an automobile after drinking[.]" On direct examination, McBroom testified she was instructed by defendant to follow the Guide when serving alcoholic beverages, that she

"[a]bsolutely" followed defendant's "company's policies, the safety policies as far as the ABC Retail Guide[,]" and that the Guide and defendant's company policy were aimed at ensuring "not just the [safety of defendant's] customers but the safety of the general public in that the customer is then allowed to leave intoxicated and drive a car[.]" McBroom added that, according to the Guide, after a customer has become intoxicated, a bartender is "required to take their drink away. To make sure they have a safe way home; and to make sure that they will be fine."

Plaintiffs, citing *Peal v. Smith*, 115 N.C. App. 225, 230, 444 S.E.2d 673, 677 (1994), *aff'd per curiam*, 340 N.C. 352, 457 S.E.2d 599 (1995), *Klassette v. Mecklenburg County Area Mental Health*, 88 N.C. App. 495, 501, 364 S.E.2d 179, 183 (1988), *Blanton v. Moses H. Cone Hosp.*, 319 N.C. 372, 376, 354 S.E.2d 455, 458 (1987), and *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 521, 361 S.E.2d 909, 915 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988), maintain adoption by defendant of the Guide as its company policy "alone is sufficient for [a] finding of the legal duties submitted to the jury, found by the jury, but rejected by Judge Jones." We believe plaintiffs misperceive the purport of the cases cited.

Although recognizing that company policies "represent some evidence of a reasonably prudent standard of care," *Klassette*, 88 N.C. App. at 501, 364 S.E.2d at 183, this Court has consistently held that "voluntary written policies and procedures do not themselves establish a *per se* standard of due care . . . ." *Id.* (citations omitted); *accord Norris v. Zambito*, 135 N.C. App. 288, 295, 520 S.E.2d 113, 118 (1999) ("A violation of voluntarily adopted safety policies is merely some evidence of negligence and does not conclusively establish negligence."); *see also Wilson v. Hardware, Inc.*, 259 N.C. 660, 666, 131 S.E.2d 501, 505 (1963) (voluntary adoption of safety code "some evidence that a reasonably prudent person would adhere to the requirements of the code"); *Slade v. Board of Education*, 10 N.C. App. 287, 296, 178 S.E.2d 316, 322 (voluntary adoption of school bus driver training handbook as guide for protection of passengers and public admissible as "some evidence [] a reasonably prudent person would adhere to [its] requirements"), *cert. denied*, 278 N.C. 104, 179 S.E.2d 453 (1971).

In addition, defendant correctly interjects that the " 'existence of a legal duty' constitutes a threshold requirement for a negligence action," and that

> [i]n each of the cases cited by Plaintiff, the safety or company rules adopted by the defendants served as a method by which the defendants could comply with the underlying legal duty already existing under the law. The mere adoption of the rules was irrelevant to the question of whether a legal duty was owed. . . . [T]he legal duty already existed, and the failure to follow an adopted rule, policy, or procedure was merely some evidence of a breach of that legal duty.

In short, we hold defendant's adoption of the Guide merely represents "some evidence" of its alleged negligence, *see Norris*, 135 N.C. App. at 295, 520 S.E.2d at 118, in the event a duty of care is present, *see* Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts* § 16.61.2, at 190 (2d ed. 1999) ("Where it is determined that there is no duty, . . . the question of negligence is never reached."). To rule otherwise would serve only to discourage, indeed penalize, voluntary assumption or self-imposition of safety standards by commercial enterprises, thereby increasing the risk of danger to their customers and the public. Accordingly, we reject plaintiffs' assertion that adoption of the Guide by Toreros as company policy, standing "alone[,] [wa]s sufficient for [a] finding of the legal duties submitted to the jury[.]"

Administrative Regulations

4 N.C.A.C. 2S.0206 provides that "[n]o permittee or his employees shall allow an intoxicated person to consume alcoholic beverages on his licensed premises." At trial, essentially uncontradicted evidence indicated that upon returning from his visit to Food Lion, Terry drank the remaining portion of the alcoholic beverage he had previously purchased and took a sip from another customer's alcoholic beverage. Plaintiffs contend 4 N.C.A.C. 2S.0206 "establishes a legal duty [of care]" upon defendant and that "Judge Jones erred in setting aside [that portion of the affirmative jury] verdict" referencing violation of the regulation based upon his determination "that this is not a valid legal duty of a commercial provider of alcohol in North Carolina." Our research dictates upholding the ruling of Judge Jones in this regard.

As noted above, courts " 'may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation . . . .' " *Hutchens*, 63 N.C. App. at 14, 303 S.E.2d at 592 (quoting Restatement (Second) of Torts § 286); *see*, *e.g.*, *Lutz Industries*, *Inc. v. Dixie Home Stores*, 242 N.C. 332, 341-43, 88

S.E.2d 333, 339-40 (1955) (regulations of National Electrical Code, as promulgated by North Carolina Building Code, have force and effect of law in North Carolina). Thus, "a safety regulation having the force and effect of a statute creates a specific duty for the protection of others," *Baldwin v. GTE South, Inc.*, 335 N.C. 544, 546, 439 S.E.2d 108, 109 (1994) (citations omitted), and "[a] member of the class intend to be protected by a . . . regulation who suffers harm proximately caused by its violation has a claim against the violator," *id.* (citations omitted). Indeed, "when a statute [or regulation] imposes a duty on a person for the protection of others, it is a public safety statute and a violation of such a statute is negligence per se." *Gregory v. Kilbride*, 150 N.C. App. 601, 610, 565 S.E.2d 685, 692 (2002) (citations omitted), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 365 (2003).

However, " 'not every statute [or regulation] purporting to have generalized safety implications may be interpreted to automatically result in tort liability for its violation.' " *Williams v. City of Durham*, 123 N.C. App. 595, 598, 473 S.E.2d 665, 667 (1996) (citation omitted). Rather, in order for the requirements of an administrative regulation to be adopted as a standard of care, the purpose of the regulation must be exclusively or in part:

> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

Hutchens, 63 N.C. App. at 14, 303 S.E.2d at 592 (quoting Restatement (Second) of Torts § 286). In order "[t]o determine whether plaintiff is a member of the class protected by the regulation, . . . its purpose" must be examined. *Baldwin*, 335 N.C. at 547, 439 S.E.2d at 109; *see also* Restatement (Second) of Torts § 286, Comment d. (where court adopts a standard of conduct provided by regulation, "it is acting to further the general purpose which it finds in the legislation").

Additionally and most importantly, " '[w]hatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted.' " *Swaney v. Steel Co.*, 259 N.C. 531, 542, 131

S.E.2d 601, 609 (1963) (citation omitted). Indeed, "[a]n administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law." *Comr. of Insurance v. Insurance Co.*, 28 N.C. App. 7, 11, 220 S.E.2d 409, 412 (1975) (citation omitted). Finally, N.C.G.S. § 150B-19(3) (2003) provides that an agency is prohibited from adopting a rule or regulation which "[i]mposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty."

To discover the purpose of 4 N.C.A.C. 2S.0206, *see Hutchens*, 63 N.C. App. at 14, 303 S.E.2d at 592; *Baldwin*, 335 N.C. at 547, 439 S.E.2d at 109, and determine what force and effect it may be accorded, *see Swaney*, 259 N.C. at 542, 131 S.E.2d at 609; *Insurance Co.*, 28 N.C. App. at 11, 220 S.E.2d at 412; N.C.G.S. § 150B-19(3), therefore, we turn to an examination of the statutory scheme under which 4 N.C.A.C. 2S.0206 was adopted.

Although the Commission in its regulations describes "[t]he purpose of the Alcoholic Beverage Control System [as being] to provide regulation and control of the . . . consumption of alcoholic beverages to serve the public welfare," 4 N.C.A.C. 2R.0101; *see also Boyd v. Allen*, 246 N.C. 150, 154, 97 S.E.2d 864, 867 (1957) ("the business of dealing in or with intoxicating liquors is [a right] . . . . affecting the public health, morals, safety and welfare"), 4 N.C.A.C. 2S.0206 and other administrative regulations of the Commission are promulgated pursuant to N.C.G.S. § 18B-207. Under this section, the Commission is limited to "adopt[ing], amend[ing], and repeal[ing] rules to carry out *the provisions of* [Chapter 18B]." N.C.G.S. § 18B-207 (2003) (emphasis added).

Unquestionably, Chapter 18B provides "administrative" penalties for violation of the Commission's rules, *see* N.C.G.S. § 18B-104 (2003), and also authorizes aggrieved parties to file suit against a permittee for damages resulting from the sale or furnishing of alcoholic beverages to an underage individual, *see* N.C.G.S. § 18B-121 (2003). By contrast, however, Chapter 18B contains no express provisions regarding the consumption of alcohol by intoxicated persons.

Further, while Chapter 18B earlier made it unlawful for "a permittee or his agent or employee to knowingly allow . . . on his licensed premises . . . [a]ny violation of the ABC laws" (defined to

include "rules issued by the Commission under the authority" of Chapter 18B), *see* N.C.G.S. § 18B-1005(a)(1) (1981), this section was amended shortly thereafter, and years before the collision at issue herein, to reflect its current form, which prohibits simply "[a]ny violation of this Chapter." N.C.G.S. § 18B-1005(a)(1) (2003).

Finally, although the statutorily stated purpose of Chapter 18B includes in part the "establish[ment of] a uniform system of control over the . . . consumption . . . of alcoholic beverages in North Carolina," N.C.G.S. § 18B-100 (2003), our Supreme Court has previously stated that

> [t]here is no express purpose of protecting the public from intoxicated persons in the statute except in that portion of the chapter known as the Dram Shop Act, N.C.G.S. § 18B-120 *et seq.* . . . Where a statute specifies the acts to which it applies, an intention not to include others within its operation may be inferred.

Hart, 332 N.C. at 304, 420 S.E.2d at 177 (citation omitted).

In this latter context, we also note the parties cite no occasion whereupon the General Assembly has considered legislation making it illegal for a commercial vendor of alcoholic beverages to allow consumption of such beverages on its premises by an intoxicated person. This is particularly striking in light of the plenary occasions when related topics have drawn the interest of the General Assembly, including the multiple amendments of Chapter 18B to enact and rewrite 1) the Dram Shop Act, N.C.G.S. § 18B-120 *et seq.*, thereby allowing claims against ABC licensees resulting from the sale of alcoholic beverages to minors, 2) N.C.G.S. § 18B-302, prohibiting the sale of alcoholic beverages to minors, 3) N.C.G.S. § 18B-305, prohibiting the sale or furnishing of alcoholic beverages to an intoxicated person, and 4) N.C.G.S. § 18B-1005, prohibiting certain "kinds of conduct" on licensed premises.

Interestingly, our research reveals the Institute of Government (now School of Government) in 1966, acting at the request and under the direction of the State Board of Alcoholic Control, recommended the amendment of Chapter 18 (now Chapter 18B) to include prohibiting a licensee from "[p]ermit[ing] any intoxicated person to consume intoxicating liquor on the licensed premises," a proposed revision "derived from State ABC Board Regulation No. 30." Loeb, Ben F., Jr., *Regulation of Intoxicating Liquors—A Proposed Revision of Chapter 18, General Statutes of North Carolina*, pp. 143-44 (North

Carolina Institute of Government, Dec. 1966). While it is unclear whether the Institute of Government recommendation ever came to the attention of the General Assembly, that body in any event enacted no such amendment when subsequently rewriting Chapter 18 in 1971 or at any later time.

To summarize, therefore, had the General Assembly intended to prohibit by statute consumption of alcoholic beverages by intoxicated persons on the premises of an ABC licensee or permittee (and by implication thereby to impose a legal duty of care), it easily could and would have done so. *See In re Appeal of Philip Morris U.S.A.*, 335 N.C. 227, 230, 436 S.E.2d 828, 831 (1993) (having expressly prohibited contingent fees in a number of other settings where it deemed them to be inappropriate, the General Assembly would have expressly prohibited them in N.C.G.S. § 105-299 had it intended such a prohibition), *cert. denied*, 512 U.S. 1228, 129 L. Ed. 2d 850 (1994); *City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 284, 380 S.E.2d 163, 166 (1989) ("If the General Assembly had intended to limit . . . application [of N.C.R. Civ. P. 41(d)] to cases where the defendant was the same in both suits, it could have done so. There is simply no basis for judicially adding a requirement the General Assembly intended to leave out when the statute is clear[ly] unambiguous."), *aff'd per curiam*, 326 N.C. 360, 388 S.E.2d 768 (1990).

Significantly, moreover, N.C.G.S. § 18B-300, governing "Purchase, possession and consumption of malt beverages and unfortified wine," directs that

> [e]xcept as otherwise provided in [Chapter 18B], the purchase, consumption, and possession of malt beverages and unfortified wine by individuals 21 years old and older for their own use is permitted without restriction.

N.C.G.S. § 18B-300(a) (2003).

In addition, the provisions of Chapter 18B in general and the Dram Shop Act in particular were enacted at least in part in derogation of the common law principle that it was not a tort either to sell or furnish alcohol to an able-bodied person. *See Hutchens*, 63 N.C. App. at 5, 303 S.E.2d at 587 (citing 48 C.J.S., Intoxicating Liquors, § 430 (1947); 45 Am. Jur. 2d, Intoxicating Liquor, § 553 (1969); 97 A.L.R. 3d 528, § 2 (1980)). It is well settled that "[s]tatutes in derogation of the common law . . . must be strictly construed." *Barnard v.*

Rowland, 132 N.C. App. 416, 424, 512 S.E.2d 458, 464 (1999) (citation omitted). Accordingly, "taking [the] words [of Chapter 18B] in their natural and ordinary meaning," *id.* (quotations and citations omitted), "everything [must] be excluded from the operation of [Chapter 18B] which does not come within the scope of the language used" in the Chapter, *id.* (quotations and citations omitted).

In light of the foregoing, we are not persuaded 4 N.C.A.C. 2S.0206 constitutes "a safety regulation having the force and effect of a statute." *See Baldwin*, 335 N.C. at 546, 439 S.E.2d at 109. As discussed above, the rules and regulations of the Commission must "carry out the provisions of [Chapter 18B]." N.C.G.S. § 18B-207. However, the requirements of 4 N.C.A.C. 2S.0206 do not "carry out [any] provision[] of [Chapter 18B]," *see* N.C.G.S. § 18B-207, aimed at preventing the consumption of alcoholic beverages by intoxicated individuals in that no statutory provision addresses the subject. Nor does the regulatory requirement "carry out [any] provisions," *id.*, of the Dram Shop Act, which our Supreme Court has held is limited to "protecting the public from" the hazards created by underage drinkers, *see Hart*, 332 N.C. at 304, 420 S.E.2d at 177.

In addition, although 4 N.C.A.C. 2S.0206 professedly was enacted to "serve the public welfare," *see* 4 N.C.A.C. 2R.0101; *Boyd*, 246 N.C. at 154, 97 S.E.2d at 867, neither the regulation itself nor any provision of Chapter 18B impose civil liability for violation of the regulation. *See* N.C.G.S. § 150B-19(3). Instead, as authorized by 14A N.C.A.C. 8H, Alcohol Law Enforcement officers may issue only an oral warning, *see* 14A N.C.A.C. 8H.0402(c), a written warning, *see* 14A N.C.A.C. 8H.0403(c), or a violation report, *see* 14A N.C.A.C. 8H.0404(c), as a penalty for a licensee's or permittee's failure to comply with 4 N.C.A.C. 2S.0206. The Commission's power upon "violation of the ABC laws," in turn, is limited to the "administrative penalties" of ABC permit suspension or revocation and/or imposition of fines up to $1,000.00. *See* N.C.G.S. § 18B-104 (2003). Accordingly, this Court "is under no compulsion to accept [4 N.C.A.C. 2S.0206] as defining any standard of conduct for purposes of a tort action." Restatement (Second) of Torts § 286, Comment d.

Indeed, were we to hold, as plaintiffs urge, that violation of 4 N.C.A.C. 2S.0206 without qualification constitutes negligence *per se*, it would require a trial court to charge the jury that a commercial vendor's allowing an intoxicated individual to consume *any* amount of alcohol, even a sip from another customer's beverage, constitutes

negligence *per se*. In light of the factors set out herein, "[w]e do not believe the General Assembly intended this result." *Hart*, 332 N.C. at 304, 420 S.E.2d at 177 (concluding violation of N.C.G.S. § 18B-302, prohibiting the sale of alcohol to underage individuals, is not negligence *per se*). Therefore, we hold Judge Jones did not err in granting JNOV with reference to plaintiffs' contention that 4 N.C.A.C. 2S.0206 imposed a legal duty upon defendant to prevent Terry from consuming alcohol on its premises after it knew he was intoxicated.

General Common Law Principles

Lastly, plaintiffs claim "general common law principles of negligence" also impose a duty of care upon defendant. Plaintiffs contend that "the service of alcohol is extremely risky warranting a substantial legal duty upon commercial vendors of alcohol" beyond that previously recognized by our courts, including the taking of significant affirmative precautionary measures to forestall intoxicated customers from operating motor vehicles. As applied to the case under consideration, our review of the pertinent authorities compels us to conclude otherwise.

In asserting the common law as a source of a duty of care upon defendant, plaintiffs in their appellate brief also argue, at least by implication, that the common law imposes a duty upon defendant to prevent intoxicated customers from consuming alcoholic beverages on its premises. At trial, however, plaintiffs claimed defendant's duty to prevent intoxicated persons from consuming alcoholic beverages arose solely from the provisions of 4 N.C.A.C. 2S.0206, and the jury was instructed accordingly. As plaintiffs may not "assert a contradictory position or swap horses between courts in order to get a better mount" on appeal, *see Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 103 (2002) (per curiam) (citations and quotation marks omitted); *see also McDowell v. Smathers Super Market*, 70 N.C. App. 775, 778, 321 S.E.2d 7, 9 (1984) ("the cast of a case on appeal is irretrievably fixed in the trial court"), *disc. review denied*, 312 N.C. 797, 325 S.E.2d 631 (1985), we address only the contention, presented both to this Court and the trial court, regarding affirmative precautionary measures to prevent intoxicated patrons from operating motor vehicles, *see Grissom v. Dept. of Revenue*, 34 N.C. App. 381, 383, 238 S.E.2d 311, 312-13 (1977) ("An appeal has to follow the theory of the trial, and where a cause is heard on one theory at trial, appellant cannot switch to a different theory on appeal."), *disc. review denied*, 294 N.C. 183, 241 S.E.2d 517 (1978).

"Under the common law rule it was not a tort to either sell or give intoxicating liquor to ordinary able-bodied men, and no cause of action existed against one furnishing liquor in favor of those injured by the intoxication of the person so furnished." *Hutchens*, 63 N.C. App. at 5, 303 S.E.2d at 587. As previously noted, however, this Court in *Hutchens* adopted the requirements of N.C.G.S. § 18A-34 (no ABC licensee or permittee shall "upon the licensed premises . . . [k]nowingly sell [alcoholic] beverages to any person while such person is in an intoxicated condition") (now N.C.G.S. § 18B-305) as "the minimum standard of conduct for" licensed or permitted vendors of alcohol, *id.* at 16, 303 S.E.2d at 593. We thereupon held that "persons injured by an intoxicated tavern customer [maintain] the right to recover from the tavern that provided liquor to the customer upon proof of the tavern owner's negligence." *Id.* at 12, 303 S.E.2d at 591.

Similarly, in *Hart*, our Supreme Court reviewed North Carolina's "principles of negligence," 332 N.C. at 304, 420 S.E.2d at 177, and determined a social host is "under a duty to the people who travel on the public highways not to serve alcohol to an intoxicated individual who [i]s known to be driving." *Id.* at 305, 420 S.E.2d at 178. In *Mullis*, the Court applied *Hart* to a commercial vendor of alcohol, concluding "a common law cause of action may be maintained for the negligent sale of alcohol to an underage person if all common law negligence elements are satisfied[.]" 349 N.C. at 202-03, 505 S.E.2d at 135.

According to the *Hart* and *Mullis* decisions, neither case involved recognition of a new cause of action. *See Hart*, 332 N.C. at 305-06, 420 S.E.2d at 178; *Mullis*, 349 N.C. at 202, 505 S.E.2d at 135. In *Mullis*, for example, the Court stated it was "merely allow[ing] 'established negligence principles' to be applied to the facts of [the] plaintiff's case." 349 N.C. at 202, 505 S.E.2d at 135. Both decisions thereby reflected the intent of the General Assembly. *See* N.C.G.S. § 18B-128 (2003) ("The creation of any claim for relief by [the Dram Shop Act] may not be interpreted to abrogate or abridge any claims for relief under the common law[.]"); *see also* 1983 N.C. Sess. Laws ch. 435, s. 41.1 ("The original inclusion and ultimate deletion in the course of passing this [Dram Shop Act] of statutory liability for certain persons who sell or furnish alcoholic beverages to intoxicated persons does not reflect any legislative intent one way or the other with respect to the issue of civil liability for negligence by persons who sell or furnish those beverages to such persons.").

Plaintiffs concede the common law duties recognized in *Hutchens* and *Mullis* are limited to factual situations not extant in

the instant appeal. Nonetheless, plaintiffs urge this Court to reverse the JNOV entered by Judge Jones. Plaintiffs argue that defendant, as a commercial vendor of alcoholic beverages, owed Michael and Theresa Hall a common law duty of care. According to plaintiffs, the common law obligated defendant to undertake affirmative precautionary measures to prevent Terry from operating a motor vehicle upon defendant's learning at some undefined point following service of Terry's final drink that he had become intoxicated. Plaintiffs advance this assertion in the face of an unchallenged jury verdict finding defendant did not "serve alcoholic beverage[s] to [] Terry when it knew, or reasonably should have known that [he] was intoxicated at [any] time he was served." Based upon thorough research and careful consideration, we conclude the ruling of Judge Jones should be affirmed.

"In general, there is no duty to prevent harm to another by the conduct of a third person." *Hedrick v. Rains*, 121 N.C 344 N.C. 729, 477 S.E.2d 171 (1996). However, an exception to this rule exists where

> there is a special relationship between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct or a special relationship between the defendant and the injured party . . . gives the injured party a right to protection.

Id. (citations omitted). "In such event, there is a duty 'upon the actor to control the third person's conduct,' and 'to guard other persons against his dangerous propensities.' " *King v. Durham County Mental Health Authority*, 113 N.C. App. 341, 345-46, 439 S.E.2d 771, 774 (citations omitted), *disc. review denied*, 336 N.C. 316, 445 S.E.2d 396 (1994).

In the present case, we do not believe the relationship between defendant and Terry falls within those categories previously recognized by our courts to impose a special duty of care.

> Some examples of such recognized special relationships include: (1) parent-child; (2) master-servant; (3) landowner-licensee; (4) custodian-prisoner; and (5) institution-involuntarily committed mental patient. In each example, "the chief factors justifying imposition of liability are 1) the ability to control the person and 2) knowledge of the person's propensity for violence."

Id. at 346, 439 S.E.2d at 774 (citations omitted).

Here, however, the relationship between defendant and Terry was one of business-business invitee Although defendant was in control of Terry's purchase of alcoholic beverages upon its premises, *see* N.C.G.S. § 18B-305(b) ("Any person authorized to sell alcoholic beverages under this Chapter may, in his discretion, refuse to sell to anyone."), defendant nonetheless was accorded no authority by virtue of the business-business invitee relationship to control Terry's decision when to leave the premises, his method of leaving the premises, or his actions once he had left the premises. In short, the relationship between defendant and Terry lacks both a "custodial" nature and an "ability to control," *see id.*, factors inherent in those relationships imposing a special duty.

As to the relationship between defendant and Michael and Theresa Hall, this Court has previously observed that

> [w]hether or not a party has placed himself in such a relation with another so that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that the other will not be injured calls for the balancing of various factors: (1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.

Leasing Corp. v. Miller, 45 N.C. App. 400, 406-07, 263 S.E.2d 313, 318 (citations omitted), *disc. review denied*, 300 N.C. 374, 267 S.E.2d 685 (1980); see also W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 53, at 359 n.24 (5th ed. 1984) (identifying "[v]arious [nonexclusive] factors . . . given conscious or unconscious weight" in considering existence of duty, including the "extent of burden to defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach").

In the case *sub judice*, plaintiffs without question suffered grave and serious harm as a result of the motor vehicle collision involving Terry. In addition, this Court has previously stated that

> a jury could . . . reasonably find that [an intoxicated customer's] negligent operation of his motor vehicle after leaving the defendants' tavern was a normal incident of the risk they created [by the sale or furnishing of an alcoholic beverage to that intoxicated

> customer], or an event which they could reasonably have foreseen, and that consequently there was no effective breach in the chain of causation.

Hutchens, 63 N.C. App. at 11, 303 S.E.2d at 591 (citation omitted).

Nevertheless, plaintiffs are unable to cite a single case from any jurisdiction in which the duty of care has been extended to impose common law liability upon an alcohol licensee or permittee solely for failing to take affirmative precautionary measures to prevent an intoxicated person from operating a motor vehicle. By contrast, our research reveals that, in generally similar circumstances, courts in multiple states have refused to do so. *See*, *e.g.*, *Sports*, *Inc. v. Gilbert*, 431 N.E.2d 534, 538 (In. Ct. App. 1982) (automobile racetrack under no duty to prevent intoxicated third-party from leaving premises, noting "[w]e know of no case from any jurisdiction which imposes a duty to control a third person when no right to control exists. The right to control another person's actions is essential to the imposition of this duty"); *Loeffler v. Sal & Sam's Restaurant*, 541 So.2d 937, 939 (La. Ct. App. 1989) (no allegation of "an affirmative act sufficient to violate the duty owed by bar owners" where plaintiff asserted bar was negligent in allowing intoxicated patron to drive "after he had become intoxicated upon their premises and to their profit"); *Vale v. Yawarski*, 357 N.Y.S.2d 791, 795 (N.Y. Sup. Ct. 1974) (tavern owner had no duty to restrain obviously intoxicated patron from leaving premises, stating "[t]his court . . . finds no basis in the law of New York or elsewhere for the imposition of" a duty to "determine whether each departing guest is an automobile driver and fit or unfit to drive safely and then, if need be, take proper and lawful steps to prevent him from driving"); *Gustafson v. Matthews*, 441 N.E.2d 388, 390-91 (Ill. App. Ct. 1982) (tavern owed no duty to passengers in intoxicated patron's vehicle to prevent him from operating the vehicle, commenting "[t]his duty would . . . apply to all businesses that maintain parking lots and would require them to evaluate the behavior of their customers to determine whether they have the capacity to drive safely. This is an unjustifiably burdensome responsibility and should not be imposed in the absence of some further relationship between the customer and the business"); *Nolan v. Morelli*, 226 A.2d 383, 388-89 (Conn. 1967) (tavern had no common law duty to prevent intoxicated patron from operating motor vehicle, observing "[i]f it is assumed . . . that the operation of the car by the decedent while he was intoxicated was the immediate cause of death, it is of course unfortunate, from the vantage point of hindsight, that the defendants

did not contrive to dissuade or prevent him from operating his car. But the plaintiff has pointed to no common-law duty resting on these defendants, as sellers, proprietors or otherwise, to go to that extent, or otherwise to guard against injuries sustained at unknown distances from the defendants' premises and at places and under circumstances wholly outside the defendants' knowledge or control"); *see also West v. East Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 552 (Tenn. 2005) (while convenience store employees owe "a duty of reasonable care to persons on the roadways . . . not to sell gasoline to a person whom the employee knows (or reasonably ought to know) to be intoxicated and to be the driver of [a] motor vehicle," such employees do not have a duty to "physically restrain or otherwise prevent intoxicated persons from driving"); *Armstrong v. State*, 537 S.E.2d 147, 149 (Ga. Ct. App. 2000) (affirming defendant's conviction for false imprisonment of intoxicated victim and concluding trial court did not err by instructing the jury that "Georgia law sets no mandate with regard to the constraint of an impaired individual" because although "[Georgia's Dram Shop law] sets forth a basis for civil liability where an alcohol provider knowingly continues to serve alcohol to an intoxicated person[,] . . . nothing in that statute or any other provision of Georgia law mandates that a provider of alcoholic beverages must prevent an intoxicated person from driving").

Similarly, in the current case there is no indication defendant "intended to affect" plaintiffs by allowing Terry to leave its premises, *see Leasing Corp.*, 45 N.C. App. at 406, 263 S.E.2d at 318, and the "the connection between [defendant's] conduct and the injury" to plaintiffs, although arguably "proximate," *see Hutchens*, 63 N.C. App. at 11, 303 S.E.2d at 591, contains several intervening causes which diminish the "closeness" thereof, *see Leasing Corp.*, 45 N.C. App. at 406, 263 S.E.2d at 318. Further, although the Dram Shop Act may represent a legislative effort to "prevent[] future harm" associated with drunken driving, *see id.* at 407, 263 S.E.2d at 318, neither the General Assembly nor our courts have previously placed liability upon an ABC licensee or permittee for failing to take affirmative precautionary measures to prevent an intoxicated patron from operating a motor vehicle.

In short, it appears that requiring defendant under the circumstances of this case to take affirmative measures to prevent Terry from leaving its premises and operating a motor vehicle implicates consideration of factors embedded not in the common law, but rather within the "policy-making" domain of the General Assembly, *see Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169-70, 594 S.E.2d 1, 8-9 (2004)

("The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws. This Court has continually acknowledged that, unlike the judiciary, the General Assembly is well equipped to weigh all the factors surrounding a particular problem, balance competing interests, provide an appropriate forum for a full and open debate, and address all of the issues at one time." (citations and quotation marks omitted)). To date, no legislative enactment has been forthcoming, and, without question, we may not usurp the constitutional prerogative of the General Assembly. *See D & W, Inc. v. Charlotte*, 268 N.C. 577, 589, 151 S.E.2d 241, 250 (1966) (" '[The constitutional duty] is not ours to make the law. That is legislative. It is ours to interpret the law as the legislature enacts it.' " (citation omitted)); *see also Jarman v. Deason*, 173 N.C. App. 297, 299, 618 S.E.2d 776, 778 (2005) ("It is not the province of this Court to superimpose our own determination of what North Carolina's public policy should be over that deemed appropriate by our General Assembly.").

Based upon the foregoing, we are not persuaded that there existed any "special relationship" which imposed upon defendant a common law duty to protect Michael and Theresa Hall from Terry's actions following his departure from the premises of defendant. Therefore, under the circumstances of the case *sub judice*, we conclude Judge Jones did not err in his entry of JNOV.

Prior to closing, it is appropriate to acknowledge that the "legalese" in which this opinion is necessarily cast may falsely suggest insensitivity to the poignant circumstances upon which this appeal was founded. Without any fault on their part, a young father was tragically killed and his wife grievously injured in a motor vehicle collision with an intoxicated driver. While acutely aware of the loss and harm endured by the plaintiffs and while similarly cognizant of the carnage which drunken drivers wreak upon the roadways of this state and nation, *see Bullins v. Schmidt*, 322 N.C. 580, 584, 369 S.E.2d 601, 604 (1988) ("With approximately fifty thousand persons killed on the nation's public highways each year (1640 in North Carolina), drunken drivers are a deadly menace to innocent persons."), we have been obligated in this matter, as in any, to perform our duty as judges dispassionately and in compliance with our constitutional mandate, that is, to rule upon questions of law and not to legislate. *See Underwood v. Howland, Comr. of Motor Vehicles*, 1 N.C. App. 560, 563, 162 S.E.2d 124, 126 ("It is our duty to adjudicate, not legislate; to interpret the law as written, not as we would have

it."), *rev'd on other grounds*, 274 N.C. 473, 164 S.E.2d 2 (1968); *see also State v. Arnold*, 147 N.C. App. 670, 673, 557 S.E.2d 121, 121 (2001) ("It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures. However poised and eager we may be at times to launch our agenda, judges have not been entrusted by the people of this State to be legislators."), *aff'd per curiam*, 356 N.C. 291, 569 S.E.2d 648 (2002). As the present case so vividly illustrates, the task is rarely an easy one.

Affirmed.

Judges TYSON and JACKSON concur.

SHIRLEY T. WILLIAMS, EXECUTRIX OF THE ESTATE OF RAYMOND W. WILLIAMS, PLAINTIFF v. CSX TRANSPORTATION, INC., DEFENDANT

No. COA05-488

(Filed 7 March 2006)

1. Evidence— cross-examination—expert witness—impeachment—opening the door

The trial court did not abuse its discretion in a negligence case arising out of plaintiff's exposure to asbestos at work by denying defendant the opportunity to cross-examine plaintiff's pathology expert regarding tests he ordered and reviewed, by allowing plaintiff to cross-examine and impeach defendant's expert, by admitting testimony about photographs of a steam era locomotive, and by allowing plaintiff to cross-examine his own witness by playing the cross-examination of a doctor's videotaped deposition which was initially taken by defendant, because: (1) the trial court held defendant to its pretrial agreement by preventing the cross-examination of plaintiff's nontestifying consulting pathology expert since the work product report would not be in evidence and questioning about the report would cause the jury to speculate on its content; (2) plaintiff was allowed to impeach defendant's expert regarding his lack of reliance on fiber burden analysis in an earlier case as this was contrary to his testimony in the present case that such evidence was the gold

standard, and plaintiff was allowed to use a tissue report to impeach defendant's expert since it was admitted for the limited purpose of impeaching the expert; (3) testimony about photographs of a steam era locomotive were admissible as relevant rebuttal evidence when defense expert opened the door to this evidence, and assuming arguendo that the ruling was error, the testimony elicited was not helpful to plaintiff's position; and (4) the direct and cross-examination testimony in the deposition of a videotaped expert did not make the expert either party's witness until the deposition was introduced at trial, and further, defendant enjoyed the advantage of having its own examination of the expert played by withdrawing its objections to the playing of the deposition.

2. Evidence; Witnesses— testimony—medical opinions—qualifications—causation—asbestos exposure—lay witness

The trial court did not abuse its discretion in a negligence case arising out of plaintiff's exposure to asbestos at work by admitting testimony about causation and exposure by permitting nonphysicians including a cell biologist and an epidemiologist to provide expert medical opinions as to causation, and by allowing lay witnesses' testimony regarding asbestos exposure, because: (1) the two witnesses were qualified by experience, training, and education with specialized scientific knowledge regarding the development of mesothelioma; and (2) the testimony of plaintiff's former coworkers was rationally based on these lay witnesses's perceptions of their working conditions.

3. Evidence— testimony—medical literature concerning dangers of asbestos exposure—foreseeability—actual or constructive knowledge

The trial court did not err in a negligence case arising out of plaintiff's exposure to asbestos at work by admitting testimony regarding the medical literature concerning the dangers of asbestos exposure without requiring a showing that defendant had actual or constructive knowledge about the potential harm, because: (1) from the medical literature presented, the jury could infer that defendant had knowledge of the harm from asbestos; and (2) there was testimony that even after OSHA regulations required that workers be protected from asbestos exposure, plaintiff and his coworkers were not informed about ways to protect themselves.

4. Negligence— failure to instruct—contributory negligence—specific contentions

The trial court did not err in a negligence case arising out of plaintiff's exposure to asbestos at work by failing to instruct the jury on contributory negligence and defendant's specific contentions, because: (1) although defendant contends plaintiff's history of smoking was a factor meriting a contributory negligence instruction, it is well established that smoking and mesothelioma are not related; and (2) considering the instructions as a whole, defendant's contentions were adequately given to the jury in substance.

5. Negligence— motion for new trial—motion for directed verdict—motion for judgment notwithstanding verdict

The trial court did not err in a negligence case arising out of plaintiff's exposure to asbestos at work by denying defendant's post-trial motions for a new trial, directed verdict, and judgment notwithstanding the verdict, because: (1) the evidence in the case contained a genuine issue of material fact as to causation due to conflicting expert testimony, and the trial court appropriately allowed expert testimony on both sides; (2) the trial court did not abuse its discretion by calling a two-week recess in the trial since the parties were well informed of and did not object to the trial court's time restraints at either the outset of trial or at the time of the recess; and (3) the trial court found the amount of damages awarded by the jury was justified by the evidence and that defendant had agreed to the jury charge regarding damages, and no substantial miscarriage of justice would result from upholding the trial court's ruling denying defendant's motion for a new trial.

Appeal by defendant from judgment entered 1 October 2004 and orders entered 6 January 2005 by Judge B. Craig Ellis in Scotland County Superior Court. Heard in the Court of Appeals 9 January 2006.

Jones Martin Parris & Tessener Law Offices, P.L.L.C., by H. Forest Horne, Jr. and E. Spencer Parris, for plaintiff-appellee.

Millberg, Gordon & Stewart, P.L.L.C., by Frank J. Gordon, and Jordan & Moses, by Randall A. Jordan and Mary Helen Moses, for defendant-appellant.

MARTIN, Chief Judge.

Raymond Williams (Williams) filed this action against his employer, CSX Transportation, Inc. (CSX), under the Federal Employers' Liability Act (FELA), alleging that he was regularly exposed to asbestos and asbestos containing materials by CSX and that CSX failed to warn him about the dangers of asbestos exposure. He further alleged that as a direct and proximate result of CSX's negligence, and his exposure to asbestos, he developed malignant mesothelioma requiring the surgical removal of a lung. The parties stipulated that Williams worked for CSX and its predecessor railroad from 1962 until his retirement in 1999.

At trial, plaintiff Williams introduced evidence that tended to show that CSX, as a member of the Association of American Railroads (AAR), knew as early as 1937 that asbestos generated "toxic dusts." A report from the AAR annual meeting in 1937 discussed ways to identify these hazards and reduce employee exposure. In addition, there was testimony that the AAR's meeting minutes for 1958 contained information that asbestos was carcinogenic and their official industrial hygiene publication summarized articles about asbestos exposure and dust control.

Dr. John Dement, an industrial hygienist, testified that "most researchers would accept 1960 as the date" where a causal relationship between mesothelioma and asbestos exposure was definitively established. Dr. Dement further testified that the federal government, under OSHA, required air sampling and other asbestos protections beginning in the 1970s. Dr. Dement opined that information about the dangers of asbestos exposure and necessary precautions to protect workers was widely available while plaintiff worked for CSX. Williams also introduced a letter from the railroad's Chief Medical Officer, dated 1977, indicating that mesothelioma was linked to asbestos exposure.

There was evidence that CSX did not conduct any air sampling for asbestos hazards until sometime after hiring Mark Badders, CSX's first industrial hygienist in 1980. A 1986 asbestos air sampling report prepared for CSX established that asbestos dust in excess of safe levels was created when asbestos siding was cut with a saw. It also noted that these results may have been low due to other dust particles in the air sample. A 1996 survey of CSX's Hamlet, North Carolina facility, where Williams worked for the majority of his career, indicated large quantities of asbestos in pipe insulation and siding, wall,

and roof panels. Asbestos was also used in various train components, such as brakes.

Williams introduced evidence that he was exposed to asbestos dust while working around craftsmen who manipulated asbestos containing materials and while working around the construction, repair, and demolition of buildings containing asbestos siding. Williams and his former co-workers testified that asbestos debris was regularly cleaned up using air hoses and brooms, which moved dust into the air, and that they were never instructed by CSX to take precautions because asbestos was harmful.

Williams and his family testified that as a result of developing mesothelioma, his entire left lung was surgically removed and his stomach then migrated into his empty chest cavity and required a second surgery. He underwent several rounds of chemotherapy to treat his cancer. He also testified as to his pain, which required the daily use of pain medication.

Dr. David Harpole, Williams' lung surgeon, and Dr. John Anagnost, Williams' oncologist, both opined that Williams' asbestos exposure caused his mesothelioma. They further attested to his poor prognosis, pain, and shortened life expectancy. Cell biologist Dr. Arnold R. Brody, an expert in lung pathology, industrial hygienist Dr. Dement, and pathologist Dr. Steven Dikman all testified that Williams' exposure to asbestos caused his mesothelioma.

Williams also presented the videotaped deposition of another pathologist, Dr. Victor Roggli, who examined four sections of his lung tissue for "asbestos bodies" with an electron microscope. Dr. Roggli reported asbestos bodies counts of 37, 27, 3.3, and 3.2 in the four lung tissue samples and averaged the results of these samples to get levels of asbestos bodies that were below his laboratory's "normal" value of 20. This led him to conclude that Williams' mesolthelioma was idiopathic, or not related to his asbestos exposure.

On cross-examination, however, Dr. Roggli also testified that his conclusion was based solely on his review of these tissue samples and that consideration of other factors would be appropriate. Dr. Roggli further explained that 94% of pleural mesotheliomas in males were caused by asbestos exposure and acknowledged the possibility that Williams' mesothelioma was related to asbestos exposure. He explained that tissue testing was not a perfect indicator and admitted asbestos fibers may have cleared from Williams' lung thereafter, rendering them undetectable by fiber burden analysis.

Williams presented expert testimony regarding Dr. Roggli's test results. Dr. Brody explained the ability of the lungs to clear asbestos and that fiber burden analysis and other tests for presence of asbestos in lung tissue are not the sole factor in diagnosing mesothelioma. He noted that it was not necessarily common practice to average asbestos body counts as Dr. Roggli had done and testified that in his scientific opinion the high sample amounts indicated asbestos exposure. Dr. Dement testified that even brief or low exposures of asbestos at work could be considered related to mesothelioma. Dr. Dement also testified that it was his scientific opinion that Williams' mesothelioma was attributable to occupational asbestos exposure.

At the close of Williams' evidence, CSX moved for a directed verdict, which the trial court denied. CSX then presented evidence, including expert testimony from industrial hygienists Mark Badders, Larry Liukonen and Dr. Francis Weir, pulmonary medicine experts Dr. Bernard Gee and Dr. James Crapo, pathology expert Dr. Michael Graham, and radiology expert Dr. Peter Barrett, all of whom testified to their belief that Williams' mesothelioma was not caused by asbestos exposure for which CSX could be held liable.

The parties agreed upon the jury instructions at the charge conference with the exception of defendant's request to charge the jury on comparative or contributory negligence. CSX requested a charge on "contributory" negligence, contending that plaintiff's history of smoking gave rise to the issue. The trial court denied the request, citing the fact that both Williams' and CSX's experts testified that smoking is irrelevant to the development of mesothelioma. The trial court agreed, however, to instruct the jury to consider Williams' health, habits, and constitution in determining plaintiff's life expectancy when calculating the amount of damages. Defendant also requested additional jury instructions regarding its contentions, which the trial court denied.

The jury returned a verdict by which it found that defendant CSX was negligent, that such negligence caused injury to plaintiff Williams, and that Williams had been damaged in the amount of $7,500,000.00. Defendant's motions for judgment notwithstanding the verdict and for a new trial were denied, and the judgment was entered on the verdict. After the entry of the verdict, plaintiff died and Shirley T. Williams, Executrix of the Estate of Raymond W. Williams, was substituted as plaintiff-appellee. CSX appeals.

On appeal, defendant brings forward twenty-six assignments of error in eleven arguments. Defendant argues that the trial court made numerous errors by I) allowing cross-examination of witnesses, II) admitting non-expert testimony regarding plaintiff's asbestos exposure and causation of his mesothelioma, III) admitting evidence of foreseeability without a proper foundation as to CSX's knowledge, IV) denying defendant's requested jury instructions, and V) denying defendant's post-trial motions. After careful consideration of CSX's arguments, we find no error.

I. Cross-examination

[1] CSX alleges four discrete errors in rulings by the trial court regarding the cross-examination of witnesses. CSX contends that the trial court erroneously 1) denied CSX the opportunity to cross-examine Williams' pathology expert, Dr. Steven Dikman, regarding tests he ordered and reviewed; 2) allowed plaintiff to cross-examine and impeach CSX expert Dr. James Crapo; 3) admitted testimony about photographs of a steam era locomotive; and 4) allowed plaintiff to cross-examine his own witness by playing the cross-examination from Dr. Roggli's videotaped deposition which was initially taken by CSX.

Rule 611(b) of the Rules of Evidence provides: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2005). "The trial court is vested with broad discretion in controlling the scope of cross-examination and a ruling by the trial court should not be disturbed absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Jones v. Rochelle*, 125 N.C. App. 82, 85-86, 479 S.E.2d 231, 233, *disc. review denied*, 346 N.C. 178, 486 S.E.2d 205 (1997). Furthermore, an expert may be required "to disclose the facts, data, and opinions underlying the expert's opinion not previously disclosed. . . . [and] may be cross-examined with respect to material reviewed by the expert but upon which the expert does not rely." *State v. Black*, 111 N.C. App. 284, 294, 432 S.E.2d 710, 717 (1993) (citation omitted).

CSX relies on *State v. Black* to support its argument that it should have been permitted to cross-examine Dr. Dikman concerning a pathology report by Dr. Gordon, despite Dr. Dikman's assertions that he did not rely on Dr. Gordon's report. Prior to trial, however, plaintiff Williams filed a motion for a protective order regarding Dr.

Gordon's status as a consulting expert pursuant to Rule 26(b)(4) of the Rules of Civil Procedure, and prior to the hearing on the motion CSX agreed not to seek information regarding Dr. Gordon. Accordingly, the trial court allowed plaintiff Williams' motion *in limine* and precluded defendant from questioning Dr. Gordon "about the work-product report that a non-testifying consulting expert prepared; especially since the work product report would not be in evidence and questioning about the report would cause the jury to speculate on its content." Thus, the trial court did not abuse its discretion in holding CSX to its pre-trial agreement and preventing the cross-examination of Dr. Dikman about Dr. Gordon, and this assignment of error is overruled.

Concerning the cross-examination of defendant's expert, Dr. Crapo, CSX contends the trial court allowed entirely unrelated and irrelevant testimony regarding Dr. Crapo's testimony as an expert witness in another case. Dr. Crapo testified at trial that fiber burden analysis was "the gold standard" test necessary for diagnosing asbestos induced mesothelioma. Dr. Crapo concluded that Williams' mesothelioma was idiopathic because Dr. Roggli's fiber burden analysis did not indicate Williams had abnormal asbestos exposure. On cross-examination, Williams sought to impeach Dr. Crapo by inquiring about his expert testimony in an earlier case in which Dr. Crapo concluded, despite a negative fiber burden analysis, that plaintiff had asbestos related mesothelioma.

"The range of facts that may be inquired into [on cross-examination] is virtually unlimited except by the general requirement of relevancy and the trial judge's discretionary power to keep the examination within reasonable bounds." *State v. Freeman*, 319 N.C. 609, 617, 356 S.E.2d 765, 769 (1987). We do not believe the trial court abused its discretion in permitting the plaintiff to impeach Dr. Crapo regarding his lack of reliance on fiber burden analysis in the earlier case as this was contrary to his testimony in the present case that such evidence was the "gold standard." Defendant also complains that the tissue report that plaintiff used to impeach Dr. Crapo should not have been admitted as it was unauthenticated hearsay. The report, however, was not admitted for the truth of the matter asserted, but for the limited purpose of impeaching Dr. Crapo. *See Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 178, 552 S.E.2d 674, 677 (2001) (holding no error when admitting school records for impeachment purposes). Accordingly, this assignment of error is overruled.

Additionally, CSX complains that the trial court impermissibly admitted testimony about irrelevant photographs of steam era locomotives because the evidence was clear that Williams never worked with those trains. As noted above, the trial court controls "the nature and scope of the cross-examination in the interest of justice" and confines the testimony to competent, relevant and material evidence. *McClain v. Otis Elevator Co.*, 106 N.C. App. 45, 49, 415 S.E.2d 78, 80 (1992) (citation omitted). Evidence that is not otherwise admissible may "be offered to explain or rebut evidence elicited by the defendant," and this evidence is admissible "even though such latter evidence would be incompetent or irrelevant had it been offered initially." *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 61, 607 S.E.2d 286, 294 (2005) (citations omitted). In determining relevant rebuttal evidence, "we grant the trial court great deference," *id.*, and we do not disturb its rulings absent an abuse of discretion "and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *McClain*, 106 N.C. App. at 49, 415 S.E.2d at 80.

Dr. Weir had testified that railroad workers were not heavily exposed to asbestos in the steam era. On cross-examination, Williams' counsel apparently showed Dr. Weir a photograph of a steam locomotive, in which it appeared that workers were being exposed to an asbestos covered steam engine. The trial court overruled CSX's objection that the photograph was irrelevant. The trial court did not abuse its discretion in allowing this testimony about the photograph because Dr. Weir "opened the door." Even assuming *arguendo* the ruling was in error, we note that the testimony elicited was not helpful to plaintiff's position. Dr. Weir stated that the asbestos on a steam engine was inert and did not subject the workers to the risk of contracting asbestos disease, helping to explain why in his opinion defendant was unaware of asbestos disease in the early 1930s. CSX could not have been prejudiced, and this argument is overruled.

Finally, CSX complains the trial court erroneously allowed plaintiff Williams to play the videotaped cross-examination of Dr. Roggli because Williams had adopted Dr. Roggli as his witness. According to Rule 32 of the Rules of Civil Procedure:

> A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that

> of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition.

N.C. Gen. Stat. § 1A-1, Rule 32(c) (2005).

The direct and cross-examination testimony in the deposition did not make Dr. Roggli either party's witness until the deposition was introduced at trial. While it is generally true that a party cannot lead its own witness, "it is firmly entrenched in the law of this State that it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and in the absence of abuse the exercise of such discretion will not be disturbed on appeal." *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 235 (1974).

Here, plaintiff Williams informed the trial court of his intent to offer the videotaped deposition of Dr. Roggli, who was originally deposed by CSX and cross-examined by plaintiff. Williams informed the trial court prior to playing the videotape that CSX might need to be heard; however, CSX withdrew its objections. Then, after the direct examination portion of the videotaped deposition played, CSX objected to playing the cross-examination, arguing that plaintiff had adopted Dr. Roggli as his witness and, therefore, could not play the cross-examination since Williams would be leading his own witness. Defendant has not shown the trial court abused its discretion in permitting the plaintiff to play the cross-examination portion of Dr. Roggli's deposition, especially since CSX enjoyed the advantage of having its own examination of Dr. Roggli played by withdrawing its objections to the playing of the deposition. "A party may not complain of action which he induced." *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994). Therefore, we overrule this assignment of error.

II. Causation and Exposure

[2] Next, CSX maintains that the trial court erroneously admitted testimony about causation and exposure by 1) permitting non-physicians Dr. Brody and Dr. Dement, a cell biologist and an epidemiologist respectively, to provide expert medical opinions as to causation, and 2) allowing lay witnesses' testimony regarding asbestos exposure.

CSX contends that the medical opinions offered by plaintiff Williams' physicians were not admissible because their testimony "reflected an unscientific analysis and investigation" about the cause

of his mesothelioma due to their reliance on Williams' assertions regarding his exposure to asbestos. Defendant also maintains that in an effort to bolster the medical doctors' contentions, the trial court also erroneously admitted improper testimony from Drs. Brody and Dement regarding causation.

If the trial court determines that "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702 (2005). We review a trial court's admission of expert testimony for abuse of discretion. *Floyd v. McGill*, 156 N.C. App. 29, 38, 575 S.E.2d 789, 795, *disc. review denied*, 357 N.C. 163, 580 S.E.2d 364 (2003). Expert testimony is not "limited to those witnesses who are licensed in some particular field of endeavor, nor limited by whether such witnesses employ their skills professionally or commercially." *Maloney v. Hospital Systems*, 45 N.C. App. 172, 178, 262 S.E.2d 680, 684, *disc. review denied*, 300 N.C. 375, 267 S.E.2d 676 (1980). This Court has previously declined to establish "a preferred or exclusive class among medical expert witnesses." *Id.*

Dr. Brody is the vice chairman of the pathology department at Tulane University Medical School, and he earned a Ph.D. in cell biology. Prior to going to work at Tulane, he was the head of the Lung Pathology Laboratory at the National Institute of Environmental Health Sciences for fifteen years. He is published in peer-reviewed journals and medical textbooks and has been studying asbestos diseases and pathology since 1974. Dr. Dement is a research professor in Environmental Medicine at Duke University, who works as an industrial hygienist and epidemiologist. He has a masters degree in industrial hygiene from the Harvard School of Public Health and an Ph.D. from the University of North Carolina at Chapel Hill, and he has worked in the field for over thirty years. His doctoral research focused on the relationship between occupational asbestos exposure and mesothelioma, and he is widely published in peer-reviewed journals. Moreover, defendant did not object to his qualifications as an expert in his field. The trial court did not err in concluding that Dr. Brody and Dr. Dement were qualified by experience, training, and education with specialized scientific knowledge regarding the development of mesothelioma. Nor did it abuse its discretion in permitting their testimony. This argument is overruled.

Defendant also argues that plaintiff's former co-workers provided improper lay opinion testimony. We disagree. Lay witnesses can testify in the form of opinions or inferences "which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2005). Here, Jimmy Strickland and Robert McEwen testified that they regularly worked with asbestos, which was brittle and frequently crumbled, creating dust, in the shops that Williams supervised. As a result, Williams was exposed to this dust. We hold this testimony was rationally based on these lay witnesses' perception of their working conditions. Thus, the trial court did not err in admitting this testimony.

III. Foreseeability

[3] Next, CSX contends the trial court erred by admitting testimony regarding the medical literature concerning the dangers of asbestos exposure without requiring a showing that CSX had actual or constructive knowledge about the potential harm. "[A]n employer will not be held liable for an employee's injury if it had no reasonable way of knowing about the hazard that caused the injury." *McKeithan v. CSX Transportation, Inc.*, 113 N.C. App. 818, 821, 440 S.E.2d 312, 314 (1994). Under the liberal construction accorded FELA, however, if the "railroad's negligence played any part, even the slightest, in causing the employee's injury," the plaintiff should recover. *Id.* Despite this lenient standard, "the usual common law criteria of negligence," including "reasonable foreseeability that the defendant's action or omission might result in injury, must be met." *Id.* As an illustration of how lenient the FELA standard is regarding foreseeability, this Court in *McKeithan* cited a United States Supreme Court case where the verdict for an injured worker was upheld "for injuries sustained as a result of his being bitten by an insect while he was working near a pool of stagnant water" because the railroad "was negligent in allowing a fetid pool to exist." *Id.*

Williams presented testimony regarding 1) the medical literature dating from the 1960s that asbestos caused harm, 2) CSX's membership in the AAR, whose publications and annual meeting minutes acknowledged the danger of asbestos exposure beginning in 1937, and 3) documents from CSX's medical officer dating from the 1970s about the dangers of asbestos. From this evidence, the jury could infer that CSX had knowledge of the harm from asbestos. Defendant does not argue that CSX had no knowledge of the information presented at the AAR meetings. *Cf. Bagley v. CSX Transp., Inc.*, 465

S.E.2d 706, 708 (Ga. Ct. App. 1995) (holding no error in grant of summary judgment where there was "absolutely no evidence of record that CSX had actual or constructive knowledge of the topics discussed at meetings which took place before its formation;" therefore, it was not possible to impute, as a matter of law, this knowledge to CSX). Moreover, there was testimony that even after OSHA regulations required workers be protected from asbestos exposure, plaintiff and his coworkers were not informed about ways to protect themselves. This assignment of error is overruled.

IV. Jury Instructions

[4] CSX contends the trial court erred in failing to instruct the jury on 1) comparative negligence and 2) CSX's specific contentions.

We consider and review jury instructions in their entirety, and under this "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." *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). FELA established a comparative negligence scheme, so that contributory negligence of an injured worker is not a bar to recovery "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53 (2005); *see Conrail v. Gottshall*, 512 U.S. 532, 542, 129 L. Ed. 2d 427, 440 (1994) (noting that "to further FELA's humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers [including rejection of] the doctrine of contributory negligence"). When "determining the sufficiency of the evidence to justify submission of contributory negligence, we consider defendant's evidence" and all reasonable inferences in the light most favorable to the defendant. *Radford v. Norris*, 74 N.C. App. 87, 88, 327 S.E.2d 620, 621, *disc. review denied*, 314 N.C. 117, 332 S.E.2d 483 (1985). An instruction, however, will not be supported by "[e]vidence which merely raises a conjecture as to plaintiff's negligence." *Id.*

We note that the trial court and the parties initially used the term "comparative" when outlining the issues to be discussed at the charge conference, and defendant's brief argues the trial court erred by failing to charge the jury on comparative negligence. The requested instruction contained in the record on appeal and the language used during the charge conference, however, refer to contributory negli-

gence; therefore, we also use that term. First, CSX contends that William's history of smoking was a factor meriting a contributory negligence instruction. Defendant thoroughly cross-examined Williams about his smoking and his related ill health. As defendant's experts testified, it is well established that smoking and mesothelioma are not related. In light of this testimony, we do not believe the trial court erred in failing to give the requested contributory negligence instruction. Defendant has not shown error, in light of the entire charge, that misled the jury. This argument is overruled.

Second, CSX argues the trial court erred in failing to give its requested instructions regarding their contentions. "The trial court is required to give a party's requested instructions when they are correct and supported by the evidence; however, they need not be given exactly as submitted, but must only be given in substance." *Robinson*, 87 N.C. App. at 526, 361 S.E.2d at 918.

Here, prior to the 10 September 2004 recess, the trial court conducted the charge conference, and with the exception of the requested instruction on comparative negligence, the parties agreed to the instructions. Then, just prior to closing arguments, defense counsel requested that the trial court instruct the jury as follows:

> Defendant denies each of the plaintiff's allegations in this case and contends that
>
> (1) plaintiff Raymond Williams was not exposed to asbestos dust in any significant or harmful amount,
>
> (2) CSX was not negligent with respect to the safety of the plaintiff's workplace, and
>
> (3) the plaintiff's mesothelioma was not caused by exposure to asbestos.

The trial court declined, instead instructing the jury in pertinent part:

> the burden is on plaintiff Raymond Williams to establish, by the greater weight of the evidence, in the case the following facts: First that defendant CSX was negligent in one or more of the particulars alleged, and second, that the defendant CSX's negligence caused or contributed, in whole or in part, to some injury and consequent damage sustained by the plaintiff Raymond Williams.
>
> Plaintiff Raymond Williams alleges that the defendant CSX's conduct . . . was negligent in the following particulars: CSX knew or

> should have known that asbestos dust was a hazard to which its employees were exposed. CSX knew or should have known that asbestos dust could cause lung diseases. CSX knew or should have known how to reduce asbestos dust hazards, but did not reduce asbestos dust hazards. CSX should have warned employees that exposure to asbestos dust could cause lung diseases, but CSX did not warn its employees that exposure to asbestos dust could be harmful. The defendant denies each of these allegations.

The trial court reiterated that the burden of proof was on plaintiff in the instructions for each element of negligence, and again when charging on the issue of damages. Defendant's contentions are essentially denials of plaintiff's allegations. Thus, considering the instructions as a whole, defendant's contentions were adequately given to the jury in substance. Accordingly, this assignment of error is overruled.

V. Post Trial Motions

[5] Defendant's remaining arguments relate to the denial of his post-trial motions. CSX maintains that the trial court erred in denying defendant's motions for new trial, directed verdict, and judgment notwithstanding the verdict. In support of these arguments, defendant contends that 1) federal law requires more proof than was proffered in this case, 2) the recess taken to accommodate the trial court's personal plans prevented CSX from receiving a fair trial, and 3) the verdict after a long recess and short deliberations indicates that the jury did not base the verdict on the evidence. We will address each of these contentions in turn.

"A motion for directed verdict pursuant to G.S. § 1A-1, Rule 50(a) tests the sufficiency of the evidence to support a verdict for the non-moving party, [and a] motion for judgment notwithstanding the verdict pursuant to G.S. § 1A-1, Rule 50(b) is essentially a renewal of an earlier motion for directed verdict." *Whaley v. White Consol. Indus., Inc.*, 144 N.C. App. 88, 92, 548 S.E.2d 177, 180 (citations omitted), *disc. review denied*, 354 N.C. 229, 555 S.E.2d 277 (2001). The trial court applies the same test for each motion, taking the non-movant's evidence as true and considering it "in the light most favorable to him, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor." *Id.* A motion for directed verdict or judgment notwithstanding the verdict should only be denied where the "evi-

dence is insufficient to justify a verdict for the plaintiff," and "a motion for a new trial pursuant to G.S. § 1A-1, Rule 59 is addressed to the trial court's discretion." *Id.*

Defendant maintains that because federal case law governs FELA actions, this case should never have gone to a jury. To support this contention, CSX analogizes this case to that of *Wills v. Amarada Hess Corp.*, 379 F.3d 32 (2d Cir. 2004), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 64 (2005). We are not persuaded. In *Wills*, the district court excluded the plaintiff's expert testimony, necessary to show causation, because it was based on a "controversial theory" and on animal tests rather than on scientific studies on human subjects. *Id.* at 38-40. As a result of the plaintiff's failure to meet the burden of proof, defendant-employer was granted summary judgment. *Id.* at 40. Affirming the district court's grant of summary judgment, the Second Circuit recognized the district court's broad discretion governing discovery matters and analyzed the rest of the plaintiff's evidence. *Id.* at 41-42. Plaintiff argued Mr. Wills' squamous cell carcinoma was caused from exposure to toxic fumes on defendant's ships, but there was expert testimony to show squamous cell carcinoma can be caused by smoking, a fact that plaintiff's expert's testimony did not consider. *Id.* at 50. In contrast, the evidence in the case below contained a genuine issue of material fact as to causation due to conflicting expert testimony. The trial court appropriately allowed expert testimony on both sides; accordingly, we defer to the actions of the trial court, as the Second Circuit did in *Wills*.

Regarding CSX's contention that it was deprived of a fair trial because of the recess, we note that the trial court has "large discretionary power as to the conduct of a trial" and "in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within the trial court's discretion and are reviewed only for abuse of that discretion." *State v. Waddell*, 351 N.C. 413, 423, 527 S.E.2d 644, 651 (2000).

Prior to jury selection, the trial judge informed the parties that due to his personal travel plans, if the trial were not completed in two weeks, there would be a two-week recess before the conclusion. Neither party moved to continue based on this information. On 10 September 2004, the evidentiary phase of the trial was concluded. The trial court informed the jurors of the two-week recess, instructing them not to discuss or come to any conclusions regarding the case, and then held the charge conference. The trial court did not

abuse its discretion in calling this recess, since the parties were well informed of and did not object to the trial court's time restraints at either the outset of trial or at the time of the recess.

Finally, when denying the motion for a new trial, the trial court found the amount of damages awarded by the jury was justified by the evidence and that defendant had agreed to the jury charge regarding damages:

> 22. Plaintiff introduced evidence that as a result of developing mesothelioma, his entire left lung was surgically removed. The evidence showed that Plaintiff suffered significant physical pain and mental anguish as a result of that surgical procedure. Plaintiff had to undergo a second surgery when his stomach migrated into his empty chest cavity, a complication of the lung removal surgery. During the surgery to remove Plaintiff's stomach from his chest cavity, doctor's [sic] discovered that the cancer had spread to his stomach. Plaintiff, by the time of trial, had undergone 3 full rounds of chemotherapy, with multiple treatments. After his lung removal surgery, Plaintiff had to take numerous pain pills and other pills daily. Plaintiff's doctors testified that he did not have long to live; that Plaintiff had months rather than years to live. The evidence established that plaintiff could expect to die a painful death. The life expectancy tables were offered into evidence and Plaintiff's life expectancy, pursuant to statute, was approximately 21 years. The jury awarded damages in part for the loss of twenty years of Plaintiff's life. Plaintiff's evidence was that he had past unreimbursed medical expenses of nearly $80,000 and past and future lost wages from a part-time job of nearly $80,000.
>
> 23. Plaintiff, Plaintiff's daughter, and Plaintiff's stepson, in addition to medical witnesses, testified about Plaintiff's physical pain, mental suffering, and how the cancer and medical treatment had affected his life.
>
> 24. Contrary to Defendant's implication, Plaintiff's counsel did not argue in closing arguments that the jury should award punitive damages. Regardless, Defense counsel did not request that the closing argument be recorded and did not object to any of Plaintiff's closing with respect to damages. The Court specifically instructed the jury that punitive damages were not recoverable and should not be awarded, and there is nothing to indicate any portion of the verdict was for punitive damages.

"Absent an obvious 'substantial miscarriage of justice,' this Court cannot overturn a trial court's denial of a motion for new trial." *Hawley v. Cash*, 155 N.C. App. 580, 585, 574 S.E.2d 684, 688 (2002). Based on our review of the record, we find no substantial miscarriage of justice that would result from upholding the trial court's ruling denying defendant's motion for a new trial.

No Error.

Judges McGEE and STEELMAN concur.

TONY D. AVERY, EMPLOYEE, PLAINTIFF v. PHELPS CHEVROLET, SELF-INSURED, EMPLOYER AND SEDGWICK CMS, INC., SERVICING AGENT, DEFENDANTS

No. COA05-562

(Filed 7 March 2006)

1. Workers' Compensation— expert testimony—causation

The Industrial Commission did not err in a workers' compensation case by concluding that the medical evidence established a causal connection between plaintiff's shoulder injury on 3 January 1996 and his cervical spine condition based on a doctor's testimony stating he believed it was likely, because: (1) our Supreme Court has found expert testimony that an accident likely caused a subsequent injury to be competent evidence to support a finding of causation; (2) although other medical experts testified plaintiff's injury could or might have been the result of his workplace accident, where the evidence is conflicting, the Commission's findings of fact are conclusive on appeal; and (3) the evidence tending to support plaintiff's claim is viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.

2. Workers' Compensation— expert testimony—findings of fact—consideration—credibility—relevancy

The Industrial Commission did not err in a workers' compensation case by allegedly failing to make any findings of fact with regard to the consideration, credibility, and relevancy of the testimony of a board certified orthopedist, because: (1) the exten-

sive findings of fact regarding the orthopedist's evaluations of plaintiff show the Commission did consider and evaluate the evidence presented by the orthopedist; and (2) as long as it is clear from the record that the Commission did consider conflicting expert testimony, the Court of Appeals will not question its acceptance of one theory over another.

3. Workers' Compensation— findings of fact—failure to inform initial treating physicians of injury

The Industrial Commission did not err in a workers' compensation case by failing to make any findings of fact with regard to the consideration, credibility and relevancy of plaintiff's failure to inform his initial treating physicians of his alleged cervical spine injury, because: (1) although plaintiff failed to complain of neck pain between 3 January 1996 and 20 March 1996, plaintiff did make continuous complaints of severe and persistent shoulder pain; (2) two doctors testified that pain medication and the rotator cuff tear in plaintiff's shoulder might have masked the symptoms of plaintiff's neck injury during that period of time, and another doctor testified that shoulder and neck symptoms overlap quite a bit; (3) all of plaintiff's treating physicians testified plaintiff's neck pain could have been or was likely caused by his 3 January 1996 accident; and (4) the Commission did consider plaintiff's failure to complain specifically of neck pain between January and March 1996, yet still determined the January accident likely caused plaintiff's neck injury.

Appeal by defendants from decision entered 17 February 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 January 2006.

Edwards & Ricci, P.A., by Brian M. Ricci, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by John A. Tomei and Kathryn Deiter-Maradei, for defendant-appellants.

MARTIN, Chief Judge.

Defendants appeal from an order of the North Carolina Industrial Commission ("Commission") awarding plaintiff (1) temporary total disability for time missed from work, (2) costs for medical treatment related to his injury, and (3) attorneys' fees. For the reasons which follow, we affirm.

The evidence before the Commission tended to show that plaintiff, who had a high school education, began working as a mechanic for defendant Phelps Chevrolet ("Phelps") in 1987. On 3 January 1996, plaintiff fell backwards while stepping off of a stool, striking his back and right shoulder on a concrete block. Plaintiff felt "major pain" in his neck and shoulder as soon as he fell, and he could not move his shoulder. He received immediate medical attention at "Med Center One" where x-rays were taken and his shoulder was put in a sling. Plaintiff continued to return to Med Center One for six months where he received physical therapy and a steroid shot in his right shoulder. When he failed to improve, he was recommended to Dr. Steven L. Wooten, a board-certified orthopaedist.

Dr. Wooten first saw plaintiff in March of 1996. At that time, Dr. Wooten stated plaintiff "had good motion in his shoulder. His muscle strength was good, but due to his persistent pain I [recommended] an MRI scan of his shoulder." Plaintiff scheduled an appointment for the MRI, but he was too large to fit into the MRI scan. Instead, Dr. Wooten obtained an arthrogram to determine if plaintiff had a tear of his rotator cuff. The arthrogram indicated a large tear of the rotator cuff, which Dr. Wooten recommended plaintiff undergo surgery to repair. In April 1996, the injury to plaintiff's right shoulder was accepted as compensable, and he was paid temporary total disability beginning 30 April 1996.

Plaintiff's rotator cuff surgery took place on 23 April 1996. After surgery, plaintiff testified that when he turned his neck, he felt "like it was pulling the shoulder in two." Dr. Wooten continued to send plaintiff to therapy, and he recommended plaintiff not use his right hand and keep his right arm in a sling while at work. When Dr. Wooten saw plaintiff on 24 May 1996, plaintiff continued to have "tightness over his neck in that same area, but it was improving." A month later, Dr. Wooten found plaintiff's neurologic exam to be normal. However, plaintiff continued to have pain in the right side of his neck and down his arm into his hand. Dr. Wooten believed the pain was a result of either (1) the nerve block administered to plaintiff during surgery, (2) a herniated cervical disk in plaintiff's neck, or (3) continued pain from the rotator cuff tear.

A subsequent arthrogram indicated plaintiff had a "persistent or recurrent rotator cuff tear." However, Dr. Wooten stated that "[m]ost people with a rotator cuff tear won't have neck pain or pain below the elbow," leading him to believe that an additional cause of plaintiff's pain might be a herniated cervical disk. Dr. Wooten

first considered the possibility that a herniated disk was the cause of plaintiff's pain in August of 1996, seven months after plaintiff's accident. Although he stated that symptoms of a cervical disk herniation generally appear sooner than seven months after an injury takes place, he believed it was "possible" the injury caused the cervical disk herniation.

Dr. Wooten recommended plaintiff see Dr. William J. Mallon, an expert in the field of orthopedic surgeries with a sub-specialty in shoulder and elbow surgery. Dr. Mallon treated plaintiff between 19 June 1997 and 12 June 2001 and performed two surgeries on plaintiff's shoulder. The first surgery was to repair his rotator cuff, after which plaintiff improved briefly. However, because plaintiff continued to have pain, Dr. Mallon performed a second surgery on 15 January 1999. During this surgery, Dr. Mallon removed a portion of plaintiff's distal clavicle, or collar bone, at the joint where the collar bone meets the shoulder blade. Plaintiff again improved briefly then later regressed. In May of 1999, plaintiff told Dr. Mallon he was "50 percent better than before . . . but not normal yet and [his injury] continued to hurt him a fair amount."

On 26 May 1999, plaintiff was "pulling on an air conditioning part" at work when he lost his grip and "developed a sharp shooting pain in his shoulder." Dr. Mallon indicated he thought plaintiff had "intrinsic tendonopathy," meaning his tendon was intact but weaker than normal, and some activities that were not previously painful now caused pain in the tendon. Dr. Mallon restricted plaintiff from raising his right arm above shoulder level, lifting more than ten pounds, and standing on ladders or unrestricted heights. When Dr. Mallon saw plaintiff on 6 November 2000, plaintiff was complaining of pain radiating up into his neck muscles. At that point, Dr. Mallon felt the best course of action for plaintiff was to go to a pain clinic. On 12 June 2001, Dr. Mallon referred plaintiff to Dr. Lynn Johnson at the Greenville Pain Clinic.

Dr. Johnson practices in pain management and is board-certified in anesthesiology and pain medicine. He first saw plaintiff on 1 October 2001, at which time plaintiff complained of neck, shoulder, and arm pain in his right side. Dr. Johnson observed the following symptoms in plaintiff: (1) limited right shoulder range of motion; (2) pain and tenderness of the right shoulder; (3) nerve root irritation of the wrist and elbow; (4) tenderness in the neck; and (5) tenderness and decreased sensitivity to light touch in his right arm. Dr. Johnson recommended plaintiff have an EMG, which is a nerve conduction study

of the arm, and a cervical MRI scan of his neck. Having lost a significant amount of weight since 1996, plaintiff was able to obtain the MRI scan. The MRI indicated multilevel disk protrusions between the C3 and C7 disks, a potential herniation at C7-T1, and a herniation at C5-6. The EMG revealed some problem with the nerves in plaintiff's right wrist and arm, but it did not indicate a nerve root irritation. Despite this, Dr. Johnson believed there was nerve root irritation, stating that EMGs are "relatively insensitive to the wide spectrum of nerve problems" and do not pick up small or sensory nerve problems readily. Dr. Johnson prescribed pain medication and performed a nerve root block of the C6 nerve on plaintiff's right side, but when plaintiff did not improve, he referred him to Dr. Kurt Voos, an expert in the field of orthopaedic surgery.

Dr. Voos first saw plaintiff on 11 March 2002. At that time, plaintiff complained of "[s]hooting pain into the right shoulder, forearm, thumb, index finger, along with numbness and tingling." Plaintiff described his pain as an eight on a scale of one to ten. Dr. Voos reviewed plaintiff's MRI, which revealed a herniated disk at C5-6 and C6-7. He recommended plaintiff receive a cervical epidural steroid injection, which Dr. Johnson's associate performed on 17 June 2002. When asked whether he believed the disk herniation could or might have been caused by the 3 January 1996 injury, he replied, "I think it could have been, yes." Upon reviewing Dr. Wooten's records indicating plaintiff had symptoms of disk herniation in August of 1996, Dr. Voos stated that the herniation was "*likely* to be related to the injury." (Emphasis added). Dr. Voos further stated it was "very likely" plaintiff's pain from the rotator cuff tear had initially masked the symptoms he would have had from a herniated disk in his neck.

A hearing before a deputy commissioner was held to determine if plaintiff's cervical spine problems were related to his compensable injury of 3 January 1996. The majority of the medical testimony indicated plaintiff "could or might" have a cervical spine condition as a result of his 3 January 1996 fall, which the deputy commissioner found to be insufficient to establish a causal relationship between the incident and his current condition. He made, *inter alia*, the following relevant findings:

> 14. Dr. Wooten, an orthopedic surgeon, was certainly in the best position to given [sic] an opinion regarding the genesis of plaintiff's cervical spine problem insofar as it might relate to the injury because he treated plaintiff during the year following the injury and during the time the first possibly related symptoms mani-

> fested themselves. He testified in essence that a causal relationship was possible but was not likely and that he would have expected radicular symptoms to have developed sooner than seven months after the injury. In over twenty-two years as a Deputy Commissioner, the undersigned cannot remember another case where a treating physician related a herniated disc to an injury where there was such a long delay in the development of symptoms. Consequently, the cervical spine condition with which plaintiff was diagnosed in approximately March 2002 was not proven by the greater weight of the credible evidence to have been a proximate result of the January 3, 1996 injury by accident.
>
> 15. In addition, the May 26, 1999 injury by accident was not proven to have caused or aggravated the cervical spine condition at issue.

The deputy commissioner therefore concluded as a matter of law that plaintiff was "not entitled to benefits under the Workers' Compensation Act for his cervical spine condition."

The full Industrial Commission reversed the holding of the deputy commissioner, finding "Plaintiff's cervical disc problems are causally related to his January 3, 1996 injury by accident." In its Finding of Fact No. 22, the Commission stated:

> 22. When asked whether Plaintiff's cervical disc herniations could or might have been caused by the January 3, 1996 injury, Dr. Voos replied, "I think it could have been, yes." Based on Plaintiff's medical records, Dr. Voos opined that it was *likely* that Plaintiff's cervical conditions are related to his January 3, 1996 injury.

(Emphasis added). The Commission then made the following conclusions of law:

> 1. On or about January 3, 1996, Plaintiff sustained a compensable injury by accident to his right shoulder. On or about May 26, 1999, Plaintiff sustained a compensable injury by accident and/or aggravation of a pre-existing condition to his arm and shoulder as set forth in the Form 18 filed by Plaintiff on August 31, 1999 and the Form 60 filed by Defendant-Employers on June 27, 2001. N.C. Gen. Stat. § 97-2(6).

2. Plaintiff's cervical spine herniations are causally related to his compensable injury by accident of January 3, 1996 and May 26, 1999 aggravation of his injury.

3. Defendants are obligated to pay Plaintiff's medical expenses resulting from his compensable injury by accident, including treatment for his neck injuries, for so long as such treatment may be reasonably required to effect a cure, provide relief, or lessen the period of disability. N.C. Gen. Stat. §§ 97-2(19), 97-25.

4. Plaintiff is entitled to be rated for any permanent partial disability he may have sustained to his cervical spine.

The Commission awarded plaintiff (1) "temporary total disability compensation at the rate of $465.40 per week for any days missed from work as a result of his cervical disc herniations and related cervical conditions," (2) "medical expenses incurred or to be incurred by Plaintiff as a result of his compensable cervical disc condition so long as such evaluations, treatments and examinations may reasonably be required to effect a cure, give relief and/or lessen Plaintiff's period of disability," and (3) attorneys' fees "in the amount of 25% of the compensation due Plaintiff pursuant to this award." Defendants appeal.

On appeal, defendants argue the opinion and award of the Commission should be reversed for the following reasons: (1) the medical evidence is so speculative so as to be insufficient to establish a causal connection between plaintiff's right shoulder injury on 3 January 1996 and his alleged cervical spine injuries or condition; (2) the Commission failed to make any findings of fact with regard to the consideration, credibility and relevancy of the testimony of the treating physician Dr. Mallon; and (3) the Commission failed to make any findings of fact with regard to the consideration, credibility and relevancy of the testimony regarding plaintiff's failure to inform his treating physicians of his alleged cervical spine injury.

"The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). If there is competent evidence to support the findings of fact, they are conclusive on appeal even though there is evidence to support contrary findings. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853,

856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). 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).

[1] Defendants first argue the medical evidence is so speculative it is insufficient to establish a causal relationship between plaintiff's injury on 3 January 1996 and his cervical spine condition. Our Supreme Court has stated that "expert opinion testimony . . . based merely upon speculation and conjecture . . . is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). Expert testimony indicating only that plaintiff's condition "could or might" have been related to the compensable injury is not competent evidence to show causation. *Edmonds v. Fresenius Med. Care*, 165 N.C. App. 811, 600 S.E.2d 501 (2004) (Steelman, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 359 N.C. 313, 608 S.E.2d 755 (2005). However, where expert testimony finds it "likely" that plaintiff's injury was related to the workplace accident, our Supreme Court has determined that to be competent evidence to establish a causal connection between the accident and the injury. *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 603 S.E.2d 552 (2004) (Hudson, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 359 N.C. 403, 610 S.E.2d 374 (2005). Pursuant to our Supreme Court's adoptions of the dissents in *Edmonds* and *Alexander*, this Court recently stated:

> it appears that our Supreme Court has created a spectrum by which to determine whether expert testimony is sufficient to establish causation in worker's compensation cases. Expert testimony that a work-related injury "could" or "might" have caused further injury is insufficient to prove causation when other evidence shows the testimony to be "a guess or mere speculation." However, when expert testimony establishes that a work-related injury "likely" caused further injury, competent evidence exists to support a finding of causation.

Cannon v. Goodyear Tire & Rubber Co., 171 N.C. App. 254, 264, 614 S.E.2d 440, 446-47, *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005) (citations omitted).

In the present case, Dr. Kurt Voos stated in his deposition he believed it was "likely" plaintiff's cervical disc herniation was related to plaintiff's 3 January 1996 workplace accident. Although other medical experts testified plaintiff's injury "could" or "might" have been

the result of his workplace accident, where the evidence is conflicting, the Commission's findings of fact are conclusive on appeal. *Adams v. AVX Corp.*, 349 N.C. 676, 682, 509 S.E.2d 411, 414 (1998). Furthermore, "[t]he evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* at 681, 509 S.E.2d at 414. Because our standard of review is to determine whether there is "any competent evidence in the record" to support the Commission's findings, and because our Supreme Court has found expert testimony that an accident "likely" caused a subsequent injury to be competent evidence to support a finding of causation, we must overrule defendants' first argument that the medical evidence was insufficient to establish a causal connection between plaintiff's workplace accident and his cervical spine injury.

[2] Defendants' second argument is that the Commission's opinion and award should be reversed because it failed to make any findings of fact with regard to the consideration, credibility and relevancy of the testimony of Dr. Mallon. Defendants cite *Gutierrez v. GDX Automotive*, 169 N.C. App. 173, 176, 609 S.E.2d 445, 448, *disc. review denied*, 359 N.C. 851, 619 S.E.2d 408 (2005), which states the Commission "must consider and evaluate all the evidence before it is rejected," and "it is reversible error for the Commission to fail to consider the testimony or records of a treating physician." *Gutierrez*, 169 N.C. App. at 176, 609 S.E.2d at 448 (citations omitted).

The Commission made the following findings of fact regarding Dr. Mallon's deposition testimony:

> 11. Dr. Mallon is board-certified in orthopedics and has a subspecialty in shoulder and elbow surgery. He treated plaintiff from September 19, 1997 to June 12, 2001. On September 19, 1997, Dr. Mallon indicated in his medical notes that plaintiff had already had a workup on his neck and had received a nerve block in his neck with no significant relief.
>
> 12. On August 27, 1997, Dr. Mallon performed surgery for Plaintiff's torn rotator cuff. On October 14, 1997, Plaintiff did not complain about neck pain. On November 25, 1997, Plaintiff complained of neck pain but stated that his neck was not hurting like it did previously. Plaintiff continued to complain of pain in his neck and shoulder.

13. Plaintiff underwent a second surgery by Dr. Mallon on January 15, 1999 to excise approximately a centimeter of his clavicle. This surgery was related to plaintiff's January 3, 1996 injury. Defendants reinstated his temporary total disability benefits on January 15, 1999 and paid plaintiff benefits until May 17, 1999, when plaintiff was due to return to work. After his second surgery, plaintiff had some improvement, but subsequently began complaining of right arm pain again after he reported that he had re-injured himself on May 26, 1999 when he pulled a part off an air conditioner and experienced a sharp shooting pain in his shoulder.

14. Plaintiff had not previously undergone an MRI due to his size. Dr. Mallon noted that plaintiff's weight had dropped from 340 to 235. On August 5, 1999, Dr. Mallon assigned the following restrictions to Plaintiff: no overhead use of the right arm, no raising right arm above shoulder level, no lifting of more than ten pounds, no ladders and no unrestricted heights.

15. On November 6, 2000, Plaintiff reported to Dr. Mallon that most of his pain was in his neck area. Dr. Mallon had a functional capacity examination (FCE) performed. It revealed myofascial pain around the levator scapula, trapezius and scalene muscles (all muscles in the neck). Plaintiff also demonstrated a positive impingement sign.

16. As the result of an FCE, Dr. Mallon placed Plaintiff on the following restrictions: no lifting over 10 pounds, no overhead work and no overhead lifting. However, the sharp pain in Plaintiff's neck and right shoulder and arm returned. Dr. Mallon believed that there was a nerve problem, but he indicated to Plaintiff he had done all he could. On June 12, 2001, Dr. Mallon referred Plaintiff to Dr. Lynn Johnson at Greenville Pain Clinic.

. . .

19. An MRI taken in March 2002 revealed cervical herniated discs at C5-6 and C6-7. When asked during his deposition whether Plaintiff's compensable injury on January 3, 1996 caused the herniated cervical discs, Dr. Mallon responded, "I guess it could have."

These extensive findings of fact regarding Dr. Mallon's evaluations of plaintiff make it clear the Commission did "consider and evaluate" the evidence presented by Dr. Mallon as required in *Gutierrez*.

Gutierrez, 169 N.C. App. at 176, 609 S.E.2d at 448. Plaintiff's argument in this respect has no merit.

Defendants further argue under *Gutierrez* the Commission erred by "fail[ing] to make a finding of fact with regard to why Dr. Mallon's deposition testimony was given no weight as compared to the testimony of Dr. Voos." Defendants incorrectly interpret *Gutierrez* as requiring this Court to reverse the Commission where it gave one expert's opinion greater weight than another's. "The commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted). As we previously noted, where the evidence is conflicting, the Commission's findings of fact are conclusive on appeal. *Id.* at 682, 509 S.E.2d at 414. Therefore, as long as it is clear from the record the Commission did consider conflicting expert testimony, we will not question its acceptance of one theory over another. "[T]his Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Id.* at 681, 509 S.E.2d at 414 (citation omitted). Therefore, defendant's second argument is overruled.

[3] Defendants' final argument is that the opinion and award of the Commission should be reversed because the Commission failed to make any findings of fact with regard to the consideration, credibility and relevancy of plaintiff's failure to inform his initial treating physicians of his alleged cervical spine injury. Defendants again rely on *Gutierrez*, where this Court concluded the Commission erred by not entering findings of fact regarding plaintiff's failure to report her back injury to a physician treating her for unrelated medical problems. We determined her failure to mention her back pain to the physician treating her for menstrual problems and headaches was "material evidence" indicating her back injury may have resolved, and the Commission therefore should have entered "a finding of fact regarding the consideration, credibility, or relevancy" of this conflicting evidence. *Gutierrez*, 169 N.C. App. at 176, 609 S.E.2d at 448.

In the present case, defendants contend plaintiff failed to complain of neck pain between 3 January 1996 and 20 March 1996. Plaintiff did, however, make continuous complaints of severe and persistent shoulder pain. First, we note both Dr. Wooten and Dr. Voos testified that pain medication and the rotator cuff tear in plaintiff's shoulder might have masked the symptoms of plaintiff's neck injury

during that period of time, and Dr. Mallon testified that shoulder and neck "symptoms overlap quite a bit." Also, in *Gutierrez*, the Commission failed to enter any findings of fact regarding the testimony of a treating physician whose testimony constituted "material evidence" that plaintiff might have recovered from her injury. Here, in contrast, the Commission did make findings of fact indicating plaintiff did not complain of neck pain until 3 May 1996, four months after his accident. It also made findings, however, that all of plaintiff's treating physicians testified plaintiff's neck pain "could" have been or was "likely" caused by his 3 January 1996 accident. Therefore, it is clear the Commission did consider plaintiff's failure to complain specifically of neck pain between January and March of 1996 yet still determined the January accident "likely" caused his neck injury. We cannot find, as in *Gutierrez*, that the Commission failed to consider conflicting evidence.

Defendants also argue the Commission's findings do not address plaintiff's failure to complain of neck pain to Dr. Mallon even though he testified at the hearing his neck had never stopped hurting since 3 January 1996. We listed the Commission's findings of fact regarding Dr. Mallon's testimony above, including the following: (1) "[o]n October 14, 1997, Plaintiff did not complain about neck pain" to Dr. Mallon; (2) "[o]n November 25, 1997, Plaintiff complained of neck pain but stated that his neck was not hurting like it did previously;" (3) "[p]laintiff continued to complain of pain in his neck and shoulder;" (4) Dr. Mallon performed a functional capacity examination which revealed a positive impingement sign and pain in plaintiff's neck muscles; (5) Dr. Mallon believed plaintiff had a nerve problem; and (6) Dr. Mallon stated plaintiff's accident "could have" caused the herniated cervical discs. These findings indicate the Commission fully considered plaintiff's initial failure to report neck pain to Dr. Mallon. It is not this Court's role to weigh the credibility of the evidence. *Adams v. AVX Corp.*, 349 N.C. at 680-81, 509 S.E.2d at 413-14; *see also Gutierrez*, 169 N.C. App. at 176, 609 S.E.2d at 448. We have already concluded there was competent evidence to support the Commission's decision that plaintiff's accident caused his cervical disc herniation. Therefore, having determined the Commission fully weighed conflicting evidence, we must overrule defendants' third and final argument and affirm the decision of the Commission.

Affirmed.

Judges McGEE and STEELMAN concur.

BROADBENT v. ALLISON

[176 N.C. App. 359 (2006)]

ANDREW BROADBENT, AND REBECCA BROADBENT, PLAINTIFFS v. KENNETH T. ALLISON, WILLIE T. ALLISON, AND WIFE, PATRICIA M. ALLISON, TRANSYLVANIA COUNTY AIRPORT, L.L.C., DEFENDANTS

No. COA05-194

(Filed 7 March 2006)

1. Nuisance— airport—special instruction

The trial court's special airport nuisance instruction was not erroneous because, when read as a whole, it accurately instructed the jury on the relevant law.

2. Nuisance— airport—failure to instruct on mitigation of damages—no evidence of resulting benefit

The trial court did not err in an airport nuisance case by refusing to instruct the jury on mitigation of damages because there was no evidence that plaintiffs'property was enhanced in value due to its proximity to defendants' airport.

3. Nuisance— failure to charge jury and structure issue sheet to consider liability of each defendant individually

The trial court did not err in a nuisance case by failing to charge the jury and structure the issue sheet in such a way that the jury could consider the liability of each defendant individually.

4. Civil Procedure— motion for new trial—newly discovered evidence

The trial court did not err in a nuisance case by denying defendants' motions for a new trial based upon newly discovered evidence that plaintiffs purchased additional property adjoining their property and the airport that allegedly constituted the nuisance following the jury trial and before the permanent injunction hearing in this case, and that plaintiffs had intended to purchase this property before trial, because: (1) the fact that plaintiffs purchased additional property cannot be the basis for a new trial under N.C.G.S. § 1A-1, Rules 59 and 60 since this did not occur until after the trial was completed; and (2) even if the Court of Appeals held that plaintiffs' purported intent constituted newly discovered evidence, it cannot be said that the trial court abused its discretion in denying defendants' motions in light of the fact that plaintiffs testified at trial that they had no intention of moving.

5. Evidence— videotapes—edited

The trial court did not err in an airport nuisance case by admitting evidence of an edited videotape of planes flying over plaintiffs' property, because: (1) although defendants contend the chain of custody was broken, they did not object to the admission of the video at trial on this basis, and do not include an assignment of error in the record preserving this argument; (2) although defendants contend two of plaintiffs' video exhibits do not accurately depict the events they purport to show, the jury was told the videos were edited from many hours of tape recorded over a period of several months, the video was time-stamped so the jury could see exactly when each segment was recorded, the jury was made aware that some of the footage was filmed in zoom mode, and additional testimony indicated the approximate altitudes of planes as they took off or landed over plaintiffs' property; (3) on the instant facts it was not necessary that the sound on the video exactly match that of the actual airplanes, and defendants cannot show prejudice when the sound on the video was not as loud as the actual sound; and (4) although defendants contend two of the videos contain hearsay statements, they do not include any of the purported hearsay statements in their brief, do not make any legal arguments to support any finding that the statements were improperly admitted or that they were prejudicial in any manner, and they have not preserved this argument by any assignment of error in the record.

6. Evidence— exhibits—still photograph

The trial court did not err in a nuisance case by admitting plaintiffs' exhibit of a still photograph of an airplane flying over plaintiffs' property, even though defendants contend it does not fairly and accurately depict what it purports to show, because: (1) the Court of Appeals is not prepared to hold that photographs are inadmissible as evidence due to their inherent dimensional limitations; (2) after reviewing this exhibit, the Court of Appeals concluded that there was no possibility the jurors believed the photo depicted an airplane flying directly over plaintiffs' house unless they believed it was a model airplane; and (3) a jury is able to comprehend that when one object in a photograph is small relative to another object, the relatively smaller object is farther away.

7. Nuisance— motion for new trial—sufficiency of evidence—private nuisance

The trial court did not err in a nuisance case by denying defendants' motion for a new trial under N.C.G.S. § 1A-1, Rule 59(a)(7) based on alleged insufficient evidence of private nuisance, because: (1) defendants' Rule 59(a)(7) motion, filed 18 February 2004, followed the entry of judgment on 9 February 2004, and thus, none of the findings and conclusions in that judgment are directed to defendants' motion nor can they be relied upon to attack the verdict; (2) defendants may have acted in a completely reasonable fashion, but plaintiffs still prevail if defendants' conduct created a substantial and unreasonable negative impact on plaintiffs' enjoyment of their property; (3) as this is a question of sufficiency of evidence, this issue is not to be decided as a matter of law; (4) the trial court's ruling did not amount to a substantial miscarriage of justice; and (5) defendants did not argue that the trial court committed an abuse of discretion in denying their Rule 59 motion, and the Court of Appeals found none.

8. Injunction— temporary or permanent—avigation easement

The trial court erred in a nuisance case by denying plaintiffs' motion for a permanent injunction and by granting defendants' request for an avigation easement, and the case is remanded for a new trial on damages and a new injunction hearing, because the Court of Appeals is unable to ascertain from the record whether the jury's award constituted temporary or permanent damages, or both.

Appeals by plaintiffs and defendants from judgment entered 9 February 2004 by Judge Zoro J. Guice, Jr. in Transylvania County Superior Court. Heard in the Court of Appeals 21 September 2005.

James M. Kimzey for plaintiffs-appellants-appellees.

Dean & Gibson, by Susan L. Hofer and Christopher W. Cook, for defendants-appellees-appellants.

STEELMAN, Judge.

We affirm the verdict of the jury finding the operation of defendants' airport constituted a private nuisance. We reverse and remand for a new trial on damages. We further vacate the judgment of the

trial court denying plaintiffs' motion for a permanent injunction and granting defendants an avigation easement, and remand for a new hearing on these issues.

Plaintiffs purchased fifty-eight acres of land in rural Transylvania County in April of 1994. In May of 1996, plaintiffs moved into the house they had constructed on the property. Defendants purchased an adjacent property in December of 1995, which was being used as farmland. After plaintiffs had moved into their house they learned that defendants intended to construct an airstrip. In August of 1998, plaintiffs learned that the airstrip was going to be used for commercial purposes. Aircraft began using the airport in September of 1998.

Plaintiffs discussed the airport with defendants soon after it opened, voicing concern that planes were flying low over their house, barn, and riding ring. Flights continued over plaintiffs' property. By the time of trial, two planes had crashed on plaintiffs' property, resulting in one death and several serious injuries to occupants of the planes.

On 9 May 2001, plaintiffs filed suit alleging nuisance, and requesting compensatory and punitive damages, as well as injunctive relief. Following a jury trial at the 21 January 2003 session of Transylvania County Superior Court on the issues of liability and damages, the jury determined that the airport constituted a nuisance, and awarded plaintiffs $358,000.00 in compensatory damages. The jury rejected plaintiffs' claim for punitive damages. Following a 1 July 2003 hearing in front of Judge Guice, plaintiffs' request for a permanent injunction was denied, and defendants were granted an avigation easement permitting continued operation of the airport by defendants. Defendants filed motions for judgment notwithstanding the verdict and for a new trial, which were denied by order entered 29 July 2004. Both plaintiffs and defendants appeal.

Defendants' Appeal

[1] In defendants' first argument, they contend that the trial court erred in failing to properly instruct the jury. We disagree.

"It is the duty of the trial judge without any special requests to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence. When a party appropriately tenders a written request for a special instruction which is correct in itself

and supported by the evidence, the failure of the trial judge to give the instruction, at least in substance, constitutes reversible error." *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 509-10, 358 S.E.2d 566, 568 (1987). Defendants first contend that the jury was misled by the special airport nuisance instruction given by the trial court.

> In order to establish a claim for nuisance, a plaintiff must show the existence of a substantial and unreasonable interference with the use and enjoyment of its property. In this context, our Supreme Court has interpreted substantial interference to mean a 'substantial annoyance, some material physical discomfort . . . or injury to [the plaintiff's] health or property.'

Shadow Group v. Heather Hills Home Owners Ass'n, 156 N.C. App. 197, 200, 579 S.E.2d 285, 287 (2003) (citations omitted). Defendants cite to a small portion of the trial court's instruction, and argue that the trial court omitted the requirement that the jury find substantial interference as defined above. When the trial court's instruction is read as a whole, we hold that it fully and accurately instructed the jury on the relevant law.

[2] Defendants next argue that the trial court erred in refusing to instruct the jury on mitigation of damages, arguing that the airport enhanced the value of plaintiffs' property. When permanent damages are at issue in a nuisance trial, and that nuisance " 'operates as a partial taking of the plaintiff's property, any resulting benefit peculiar to him may be considered in mitigation of damages.' " *Brown v. Virginia-Carolina Chemical Co.*, 162 N.C. 83, 87, 77 S.E. 1102, 1104 (1913) (citation omitted). In the instant case, defendants presented no evidence at trial in support of their contention that plaintiffs' property was enhanced in value due to its proximity to the airport. Because there was no evidence of any resulting benefit to plaintiffs, the trial court did not err in refusing to give a mitigation of damages instruction.

[3] Defendants next argue that the trial court erred in failing to charge the jury and structure the issue sheet in such a way that the jury could consider the liability of each defendant individually. Defendants' argument fails to state why the trial court should have granted their request, and it does not indicate how the denial of their request prejudiced them in any manner. Defendant's first argument is without merit.

[4] In defendants' second argument, they contend that the trial court erred in denying their motions for a new trial based upon newly discovered evidence. We disagree.

On 18 February 2004 defendants moved for judgment notwithstanding the verdict and a new trial based on evidence that plaintiffs bought additional property adjoining their property and the airport following the jury trial and before the permanent injunction hearing in this case, and that they had intended to purchase this property before trial. Defendants further moved on 15 October 2004 for relief from the 9 February 2004 judgment and 29 July 2004 order after obtaining statements from four jurors indicating that knowledge of plaintiffs' intent to purchase this property would have influenced their verdict. Defendants argue that the evidence that plaintiffs purchased additional property undercuts their testimony at trial that they were in constant fear for their lives living next to the airport.

N.C. Gen. Stat. 1A-1, Rule 59(a)(4) provides for a new trial based on "[n]ewly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;" provided motion is made within ten days of entry of judgment. N.C. Gen. Stat. Sec. 1A-1, Rule 60(b)(2) provides for a new trial based on "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]" "The motion shall be made within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken." *Id.* In order for evidence to be "newly discovered evidence" under these rules, it must have been in existence at the time of the trial, and not discoverable through due diligence. *Parks v. Green*, 153 N.C. App. 405, 412, 571 S.E.2d 14, 19 (2002). The trial court's rulings on these motions will not be overturned absent an abuse of discretion. *Cole v. Cole*, 90 N.C. App. 724, 727, 370 S.E.2d 272, 273 (1988); *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 380, 329 S.E.2d 333, 343 (1985).

The fact that plaintiffs purchased additional property cannot be the basis for a new trial under Rules 59 and 60, because this did not occur until after the trial was completed. *Green*, 153 N.C. App. at 412, 571 S.E.2d at 19. Defendants argue that plaintiffs had the *intent* to purchase additional property before trial, and that this intent constitutes evidence sufficient to warrant a new trial. Assuming *arguendo* that this intent did in fact exist before trial, and that intent can be

considered evidence for Rule 59 and 60 purposes, defendants' argument still fails.

Plaintiffs testified at trial that they intended to continue living on that property, despite the disruption and fear that diminished their enjoyment of the property. They did not intend to move. Further, even were we to hold that this purported intent did constitute newly discovered evidence, in light of the fact that plaintiffs testified at trial that they had no intention of moving, we cannot say that the trial court abused its discretion in denying defendants' motions. Since plaintiffs made the decision to live on the property in spite of the adjoining airport, it is not surprising that they would purchase additional land if such purchase would make their property more useful and enjoyable. This argument is without merit.

In their third argument, defendants contend that the trial court erred in admitting certain evidence. We disagree.

[5] Defendants first argue that an edited videotape of planes flying over their property was improperly admitted. They contend that when viewing the videotape, one cannot determine the location from which some of the footage was filmed; it is unclear whether a zoom lens was used, making the actual altitude of the planes uncertain; the sound of the planes on the tapes did not accurately reflect the actual sound the planes made; and the videos included improper hearsay statements. Defendants also argue that admission of the video was in violation of Rule 401 of the North carolina Rules of Evidence.

Video evidence is admissible in North Carolina "upon laying a proper foundation and meeting other applicable evidentiary requirements." N.C. Gen. Stat. § 8-97; *Albrecht v. Dorsett*, 131 N.C. App. 502, 507, 508 S.E.2d 319, 323 (1998). In order to admit video evidence, three questions must be affirmatively answered:

> (1) whether the camera and taping system in question were properly maintained and were properly operating when the tape was made, (2) whether the videotape accurately presents the events depicted, and (3) whether there is an unbroken chain of custody.

State v. Mason, 144 N.C. App. 20, 26, 550 S.E.2d 10, 15 (2001).

Defendants do not argue that the video taping system was not properly maintained or properly functioning. Defendants do argue that the chain of custody was broken, however they did not object to the admission of the video at trial on this basis, and do not include an

assignment of error in the record preserving this argument. This argument is therefore deemed abandoned. N.C.R. App. P. Rules 10(a) and 10(b)(1); *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002); *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991).

Defendants argue that two of plaintiffs' video exhibits (plaintiffs' exhibits 64 and 66) do not accurately depict the events they purport to show. Defendants argue that the editing, which condenses a series of airplane fly-overs into six minutes which actually occurred over several months, makes it appear that the intrusion was much more frequent than it actually was. However, the jury was told that the videos were edited from many hours of tape recorded over a period of several months, and the video was time-stamped, so the jury could see exactly when each segment was recorded. Our Rules of Evidence allow for voluminous recordings to be presented in summary form. North Carolina Rules of Evidence, Rule 1006. The jury was also made aware that some of the footage was filmed in a zoom mode. There was also additional testimony indicating the approximate altitudes of planes as they took off or landed over plaintiffs' property. We hold that the trial court did not abuse its discretion in admitting this evidence at trial. *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498, 524 S.E.2d 591, 595 (2000).

Defendants further argue that *Statesville v. Cloaninger*, 106 N.C. App. 10, 15, 415 S.E.2d 111, 114 (1992), holds that for a video of an airplane entering or leaving an airport to be admissible, there must be evidence that the video accurately represents the sound of the airplane. We first note that the manner in which defendants present this argument in their brief is misleading, as *Cloaninger* makes no such holding. The *Cloaninger* opinion discussed the foundation laid by the party offering the video, and then held that the foundation was sufficient. In the instant case, plaintiffs' evidence was that the video did not accurately represent the actual sound of the airplanes because the actual sound was louder than the recorded sound. We hold that on the instant facts it was not necessary that the sound on the video exactly match that of the actual airplanes. Further, as plaintiffs' evidence was that the sound on the video was not as loud as the actual sound, even if the video was improperly admitted, defendants can show no prejudice.

Though defendants argue that two of the videos (plaintiffs' exhibits 63 and 64) contain hearsay statements, they do not include

any of the purported hearsay statements in their brief, and do not make any legal arguments to support any finding that the statements were improperly admitted, or that they were prejudicial in any manner. Further, defendants have not preserved this argument by any assignment of error in the record. Defendants have abandoned this argument. N.C. R. App. P. Rules 28(b)(6) and 10(c)(1).

[6] Finally, defendants argue that the trial court erred in admitting plaintiffs' exhibit 4a, a still photograph of an airplane flying over plaintiffs' property, because it does not fairly and accurately depict what it purports to show. Defendants argue that the photograph incorrectly makes it appear as if the plane is directly over the plaintiffs' house because a photograph depicts a three dimensional scene in two dimensions. We are not prepared to hold that photographs are inadmissible as evidence due to their inherent dimensional limitations. Further, after reviewing plaintiffs' exhibit 4a, it is clear to this Court that there is no possibility the jurors believed the photo depicted an airplane flying directly over plaintiffs' house unless they believed it was a model airplane. We are confident of a jury's ability to comprehend that when one object in a photograph is small relative to another object, the relatively smaller object is farther away. This argument is without merit.

[7] In defendants' fourth argument, they contend that the trial court erred in denying their motion for a new trial pursuant to N.C.R. Civ. P. Rule 59(a)(7) because there was insufficient evidence to prove private nuisance. We disagree.

> Rule 59(a)(7) states:
>
> *Grounds*.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> . . . . .
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]

When a Rule 59(a)(7) motion is based upon an insufficiency of the evidence, our standard of review is abuse of discretion; when the motion is based upon a claim that the verdict is contrary to law, we perform a *de novo* review. *In re Will of Buck*, 350 N.C. 621, 516 S.E.2d 858 (1999); *Britt v. Allen*, 291 N.C. 630, 634-35, 231 S.E.2d 607, 611-12 (1977). "In order to establish a claim for nuisance, a plaintiff must

show the existence of a substantial and unreasonable interference with the use and enjoyment of its property." *Shadow Group v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 200, 579 S.E.2d 285, 287 (2003).

The trial court's second conclusion of law in its judgment entered 9 February 2004, following the 1 July 2003 injunction hearing, states: "The conduct of the Defendants is not unreasonable in that the Transylvania County Airport provides significant benefit to the community as well as humanitarian, government and emergency services and promotes business growth within the community." Defendants argue that because the trial court concluded defendants had not acted unreasonably, it also necessarily concluded that plaintiffs failed their burden as stated in *Shadow Group* to prove a private nuisance.

We first note that defendant's motion for a new trial based upon insufficiency of the evidence is directed to the jury's verdict rendered on 31 January 2003. The findings of fact and conclusions of law in the trial court's 9 February 2004 judgment pertained to the trial court's ruling on the plaintiff's motions for a permanent injunction and defendants' motion for an avigation easement, which were entered following a 1 July 2003 non-jury hearing before Judge Guice. The findings of fact and conclusion's of law contained in the 9 February 2004 judgment are relevant only with respect to those issues before Judge Guice in the 1 July 2003 hearing. Judge Guice had no authority to make determinations concerning which evidence presented at trial the jury relied upon in determining that plaintiffs' claim for private nuisance was valid. The consideration of the evidence at trial for the purposes of supporting the jury verdict was the sole province of the jury. Because defendants' Rule 59(a)(7) motion, filed 18 February 2004, followed the entry of judgment on 9 February 2004, none of the findings and conclusions in that judgment are directed to defendants' motion.

Further, defendants misunderstand the burden of proving unreasonable interference as stated in *Shadow Group*. The question under *Shadow Group* was whether defendants' conduct created an unreasonable interference with plaintiffs' enjoyment of their property, not whether defendants' conduct *itself* was unreasonable. Defendants may have acted in a completely reasonable fashion, but plaintiffs still prevail if defendants' conduct created a substantial and unreasonable negative impact on plaintiffs' enjoyment of their property. It is clear that the trial court in the instant case was making just such a determination; defendants operation of the airport was not an

unreasonable endeavor, i.e. defendants themselves were not acting unreasonably, but the operation of the airport had a substantial and unreasonable impact on plaintiffs' enjoyment of their property.

Defendants further argue that because the trial court found that noise from takeoffs and landings interfered with only about two to four and a half minutes of plaintiffs' day, this fails as a matter of law to constitute substantial injury or interference. Again, the trial court's findings of fact were not directed towards the sufficiency of the evidence to support the jury's verdict, therefore, defendants cannot rely upon these findings of fact to attack that verdict. Further, as this is a question of sufficiency of the evidence, this issue is not to be decided as a matter of law. *In re Will of Buck*, 350 N.C. 621, 516 S.E.2d 858 (1999).

Defendants next argue that the trial court erred in denying their Rule 59 motion because the evidence at trial was insufficient to support the jury verdict. Our standard of review for this issue is abuse of discretion. *Id.* " 'An appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.' " *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997) (quoting *Campbell v. Pitt County Mem'l Hosp., Inc.*, 321 N.C. 260, 265, 362 S.E.2d 273, 275 (1987)).

Upon our review of the record, we are not reasonably convinced that the trial court's ruling probably amounted to a substantial miscarriage of justice. Nowhere in defendants' argument do they contend that the trial court committed an abuse of discretion in denying their Rule 59 motion, and we hold that there was none. This argument is without merit.

Because defendants have not argued their other assignments of error in their brief, they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2003).

Plaintiffs' Appeal

[8] In plaintiffs' first argument, they contend that the trial court erred in denying their motion for a permanent injunction, and further erred in granting defendants' request for an avigation easement. For the reasons stated below, we remand this case to the Superior Court of Transylvania County for a new trial on damages, and a new injunction hearing.

Plaintiffs' argue that they were entitled to a permanent injunction as a matter of law because they prevailed on the private nuisance claim. This is incorrect. Though a prevailing plaintiff in a private nuisance action may in certain circumstances be awarded damages, injunctive relief, or both, injunctive relief is not mandated in every situation. *Phillips v. Chesson*, 231 N.C. 566, 570, 58 S.E.2d 343, 347 (1950); *Berger v. Smith*, 160 N.C. 205, 75 S.E. 1098 (1912); *Mayes v. Tabor*, 77 N.C. App. 197, 200, 334 S.E.2d 489, 490-91 (1985). If plaintiffs have been awarded temporary damages, they may institute additional actions in the future to obtain additional damages as they occur. *Phillips*, 231 N.C. at 570, 58 S.E.2d at 347. If plaintiffs have been awarded permanent damages, they may not institute additional actions based on the same nuisance, as the award constitutes recompense for all past and future damages. *Id.* When permanent damages have been awarded, defendants have in effect been granted an easement to continue operations on their property in the same manner as previously conducted. *Id.*

In the instant case, we are unable to ascertain from the record whether the jury's award constituted temporary or permanent damages, or both. The trial court instructed the jury in relevant part as follows:

> Members of the jury, an actual injury involves more than a slight inconvenience or a petty annoyance. It is an injury to the plaintiffs' comfort and enjoyment of their property, or damage to their real property.
>
> Members of the jury, you should answer this issue in such dollar amount that you find the plaintiffs have proved by the greater weight of the evidence that the value of their real property has been damaged, and in addition any damages you find that the plaintiffs have suffered for the loss of use and enjoyment of their property.

The issue sheet submitted to the jury states as issue 2: "What amount of damages are the plaintiffs entitled to recover from the defendants?" The jury answered this question by simply writing "$358,000" in the space provided on the verdict issue sheet. In its judgment of 9 February 2004, the trial court concluded as a matter of law that the jury's award constituted permanent damages and that plaintiffs had been "fully and adequately compensated in law for the injuries they claim as a result of living next to the airport and therefore a perma-

nent injunction should not issue." The record does not support this conclusion, as it is impossible from the record to determine the basis upon which the jury rendered its award. The jury was not instructed to make separate awards of permanent and temporary damages, and the verdict sheet does not indicate on what basis damages were awarded. In light of this, it is necessary that we reverse and remand this case for a new trial on damages. We further vacate the trial court's judgment denying plaintiffs' motion for a permanent injunction and granting defendants an avigation easement, and remand for further proceedings, since the trial court's judgment was based at least in part on the assumption, unsubstantiated by the record, that the jury awarded permanent damages. Upon remand, the trial court should instruct the jury on both temporary and permanent damages, and draft the issue sheet in such a way that it is clear whether the jury is awarding permanent damages, temporary damages, or both. Once all the relevant issues in the case have been determined by the jury and the trial court, plaintiffs shall be allowed to elect between available remedies to the extent necessary to "prevent double redress for a single wrong." *United Lab. v. Kuykendall*, 335 N.C. 183, 191, 437 S.E.2d 374, 379 (1993); *see also Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 426-27, 344 S.E.2d 297, 301 (1986).

Because we have remanded this case for a new trial on damages, we do not address plaintiffs' other arguments.

DEFENDANTS' APPEAL: AFFIRMED.

PLAINTIFFS' APPEAL: REVERSED AND REMANDED FOR NEW TRIAL ON DAMAGES AND NEW HEARING ON PERMANENT INJUNCTION.

Judges HUNTER and TYSON concur.

VERNETTA MARIE COCKERHAM-ELLERBEE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CANDICE COCKERHAM, PLAINTIFF v. THE TOWN OF JONESVILLE, D/B/A THE JONESVILLE POLICE DEPARTMENT, SCOTT VESTAL AND LEE GWYN, DEFENDANTS

No. COA05-576

(Filed 7 March 2006)

1. Appeal and Error— appealability—denial of motion to dismiss—public duty doctrine—substantial right

Although an appeal from the denial of a motion to dismiss is generally an appeal from an interlocutory order, an appeal based on the public duty doctrine involves a substantial right warranting immediate appellate review.

2. Police Officers— negligence—public duty doctrine—special duty exception

The trial court did not err by denying defendants' motion to dismiss based on the public duty doctrine in a negligence case arising out of officers' negligence in failing to enforce domestic violence protective orders after they knew of repeated violations, failing to warn plaintiff and her daughter that they had not arrested the perpetrator, and failing to protect plaintiff and her daughter after officers knew the perpetrator had not been arrested, because: (1) plaintiff's complaint reveals a special duty was created by virtue of a promise made by the officers to protect plaintiff and her children, the protection was not forthcoming since the officers failed to fulfill their promise to arrest the perpetrator, and plaintiff and her daughter's reliance on the promise of protection was causally related to the injury suffered; and (2) the police officers' assurances were much more specific than those made in *Braswell v. Braswell*, 330 N.C. 363 (1991), plaintiff had a protective order in this case while the wife in *Braswell* did not, and the Supreme Court reviewed *Braswell* in light of a Rule 50 motion made at the end of the trial whereas in this case the Court of Appeals is reviewing the judge's ruling made following a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6).

Appeal by defendants from judgmen t entered 2 March 2005 by Judge James M. Webb in Yadkin County Superior Court. Heard in the Court of Appeals 23 January 2006.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellee.

Moss, Mason, and Hill, by Matthew L. Mason and William L. Hill, for defendants-appellants.

STEELMAN, Judge.

Defendants appeal the trial court's order denying their motion to dismiss. For the reasons discussed herein, we affirm the ruling of the trial court.

When reviewing the trial court's denial of a motion to dismiss, we must treat all of the factual allegations contained in the plaintiff's complaint as true. *Lane v. City of Kinston*, 142 N.C. App. 622, 624, 544 S.E.2d 810, 813 (2001). The complaint alleges that on 13 November 2002, plaintiff, Vernetta Marie Cockerham-Ellerbee, obtained a Domestic Violence Protective Order (protective order) against her estranged husband, Richard Ellerbee. The protective order prohibited Ellerbee from threatening plaintiff or her children or coming within 250 feet of them. Pursuant to the requirements of N.C. Gen. Stat. § 50B-3(c), a copy of the order was issued to and retained by the Jonesville Police Department (JPD).

Ellerbee violated the protective order on numerous occasions. On 13 November 2002, Ellerbee dug graves directly across the street from plaintiff's home and threatened to kill her and her children and place their bodies in the graves. Plaintiff reported this to the JPD. The Jonesville Chief of Police came to plaintiff's home where she showed him the graves and told him of Ellerbee's death threats. On 18 November 2002, Ellerbee violated the order when he went to the day-care for one of plaintiff's children. Plaintiff and her seventeen-year-old daughter, Candice Cockerham, were also present. Plaintiff reported Ellerbee's violation of the protective order to the JPD. That same day, plaintiff informed defendant, Scott Vestal (Vestal), a Jonesville police officer, that Ellerbee was following her and his vehicle was within 250 feet of her car at an intersection. Ellerbee was in close proximity to Vestal at this time. Vestal followed Ellerbee for a distance, but failed to arrest him even though Vestal had knowledge of Ellerbee's violations of the protective order. Later that day, plaintiff called the JPD to arrange a meeting. At approximately 5:00 p.m., plaintiff met with Vestal and defendant Lee Gwyn, another Jonesville police officer, at her father's home. When Vestal and Gwyn arrived, she informed them Ellerbee had been stalking her. While they were

there, Ellerbee drove up in front of the home. Vestal and Gwyn promised plaintiff and Candice they were going to arrest Ellerbee. They also promised plaintiff and her daughter that they "would no longer have to worry about their safety." The officers got into their vehicle and followed Ellerbee down the street, which led plaintiff and her daughter to believe they would arrest Ellerbee and place him in jail. However, the officers never arrested Ellerbee, nor did they advise plaintiff of their failure to do so.

On 19 November 2002, Ellerbee broke into plaintiff's home and laid in wait until Candice arrived. When Candice arrived, defendant stabbed her and suffocated her with duct tape, resulting in her death. Ellerbee also repeatedly stabbed plaintiff when she returned home, causing her to sustain serious bodily injuries.

On 18 November 2004, plaintiff filed this action against defendants, the Town of Jonesville and two of its employees, Scott Vestal and Lee Gwyn, in their official capacities. Plaintiff alleged the officers were negligent in failing to enforce the protective order after they knew of Ellerbee's repeated violations, failing to warn plaintiff and her daughter that they had not arrested Ellerbee, and failing to protect plaintiff and her daughter after they knew Ellerbee had not been arrested. Defendants filed a motion to dismiss, asserting the public duty doctrine as a bar to plaintiff's action. By order entered 2 March 2005, the trial court denied defendants' motion. Defendants appeal.

In their sole argument on appeal, defendants contend the trial court erred in denying its motion to dismiss because the public duty doctrine bars plaintiff's negligence claims. We disagree.

Appealability of Order

[1] Ordinarily, the denial of a motion to dismiss is interlocutory and there is no immediate right of appeal. *Smith v. Jackson Cty. Bd. of Educ.*, 168 N.C. App. 452, 457, 608 S.E.2d 399, 405 (2005). However, because defendant's appeal is based on the public duty doctrine, it "involves a substantial right warranting immediate appellate review." *Id.* at 458, 608 S.E.2d at 405.

Motion to Dismiss

[2] When reviewing the trial court's denial of a motion to dismiss, we must decide whether the allegations of the complaint are sufficient to state a claim upon which relief may be granted under some legal the-

ory. *Lane*, 142 N.C. App. at 624, 544 S.E.2d at 813. In doing so, we must treat plaintiff's factual allegations as true. *Id.*

Public Duty Doctrine

In all negligence actions, the plaintiff must prove the defendant owed the plaintiff a duty of care. *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). To be actionable, the duty must be one owed to the injured plaintiff and not one owed to the public in general. *Id.* at 166, 558 S.E.2d at 493-94. This is true regardless of whether the defendant is a governmental entity or a private person. *Id.* Generally, the public duty doctrine bars negligence claims by individuals against a municipality or its agents acting in a law enforcement role for failure to provide protection to that person from the criminal acts of a third party. *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). "This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act," especially since law enforcement has a duty to protect the general public, not specific individuals. *Id.*

As an initial matter, we note that since plaintiff's cause of action is based on defendant's failure to protect her from the acts of a third party rather than any direct misconduct on their part, the public duty doctrine is applicable. *Smith*, 168 N.C. App. at 459-60, 608 S.E.2d at 406.

Next, we must determine whether plaintiff's claim involves " 'the type of discretionary governmental action shielded by the public duty doctrine,' such as those acts that involve 'actively weighing the safety interests of the public.' " *Id.* at 461, 608 S.E.2d at 407 (citations omitted). Our Supreme Court has stated that " 'the public duty doctrine shields the state and its political subdivisions from tort liability arising out of discretionary governmental actions that by their nature are not ordinarily performed by private persons.' " *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 716 (1998) (citations omitted). N.C. Gen. Stat. § 50B-4.1(b) states: "A law enforcement officer *shall* arrest and take a person into custody without a warrant or other process if the officer has probable cause to believe that the person knowingly has violated a valid protective order . . . ." (emphasis added). N.C. Gen. Stat. § 50B-4(c) states: "A valid protective order entered pursuant to this Chapter *shall* be enforced by all North Carolina law enforcement agencies

without further order of the court." (emphasis added). Plaintiff contends the use of the word "shall" in these statutes creates a mandatory duty as opposed to a discretionary one; therefore, the public duty doctrine is inapplicable.

In *Lassiter v. Cohn*, this Court found it "implicit in *Braswell* and the public duty doctrine that an officer fulfilling his or her duty to provide police protection must employ some level of discretion as to what each particular situation requires, criminal or otherwise." 168 N.C. App. 310, 317, 607 S.E.2d 688, 692-93, *disc. review denied*, 359 N.C. 633, 613 S.E.2d 686 (2005). The United States Supreme Court expressed this same opinion in *Town of Castle Rock v. Gonzales*, stating:

> "In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police . . . . However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally . . . . They clearly do not mean that a police officer may not lawfully decline to make an arrest."

545 U.S. 748, 760, 162 L. Ed. 2d 658, 671 (2005) (citations omitted). *But see id.* (noting in the alternative that " '[t]here is a vast difference between a mandatory duty to arrest [a violator who is on the scene] and a mandatory duty to conduct a follow up investigation [to locate an absent violator]' ") (quoting *Donaldson v. Seattle*, 831 P.2d 1098, 1104 (Wn. App. 1992)).

Although the use of the word "shall" in these statutes implies that law enforcement has a mandatory duty to arrest those in violation of a protective order, without any ability to exercise any discretion such an interpretation is unreasonable. There are many factors and variables that a police officer must take into consideration in deciding when and where to arrest an individual believed of engaging in criminal conduct, not the least of which is the public's safety. In order to find that the legislature intended a true mandate of police action, a stronger indication would be required. In the absence of such a specific legislative intent, we hold that the statute is discretionary. Since defendants had some level of discretionary authority in carrying out the enforcement of the protective order, we hold the public duty doctrine is applicable.

Exceptions to the Public Duty Doctrine

The public duty doctrine is not a "blanket defense" to all actions by law enforcement officers. *Smith*, 168 N.C. App. at 461, 608 S.E.2d at 407. "[E]xceptions exist to prevent inevitable inequities to certain individuals." *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. An exception to the doctrine applies where a "special duty" exists between the governmental entity and a specific individual. *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 338, 511 S.E.2d 41, 44, *cert. denied*, 358 N.C. 851, 539 S.E.2d 13 (1999). A "special duty" may be created in one of three ways. First, a "special duty" is created "where the municipality, through its police officers, . . . promise[s] protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.' " *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902 (citations omitted). Second, a " 'special duty' may be created by virtue of a 'special relationship,' such as that between 'a state's witness or informant . . . [and] law enforcement officers.' " *Vanasek*, 132 N.C. App. At 338, 511 S.E.2d at 44 (quoting *Hunt v. N.C. Dept. of Labor*, 348 N.C. 192, 199, 499 S.E.2d 747, 751 (1998)). We note that some confusion has arisen in this area due to the fact that this Court has previously referred to the "special relationship" exception as being a separate exception to the public duty doctrine, when, in fact, it is "actually a subset of the 'special duty' exception[.]" *Id.* at 338, n.1, 511 S.E.2d at 44 n.1. A "special relationship" is simply another way to show that a "special duty" exists. *Id.* Third, "a 'special duty' may be created by statute; provided there is an express statutory provision vesting individual claimants with a private cause of action for violations of the statute." *Id.* at 338, 511 S.E.2d at 44. Our courts have generally held that a private right of action only exists where the legislature expressly provides for such in the statute. *Id.*

We look first to see whether a special duty was created by virtue of a "promise" made by Officers Vestal and Gwyn to protect plaintiff and her children. In order to fit within this exception, plaintiff must specifically allege in her complaint that defendants promised to protect her, the protection was not forthcoming, and that her reliance on the promise of protection was causally related to the injury suffered. *Id.*

Whether defendants made a promise of protection, thereby creating a special duty, depends not just on the statements made by the police, but must be considered in light of all the attendant circum-

stances. *See Hobbs v. N.C. Dep't of Human Res.*, 135 N.C. App. 412, 419, 520 S.E.2d 595, 601 (1999) (considering not just assurances made by the agencies involved with the placement of a child in foster care, but also considering the tenor of the meetings and the conduct of those representatives in finding the defendants had created a "special duty" by promise); *see also Hull v. Oldham*, 104 N.C. App. 29, 38, 407 S.E.2d 611, 616 (considering both representations and conduct of the police), *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1999).

In the instant case, plaintiff's complaint alleges that plaintiff had obtained a protective order against Ellerbee prohibiting him from being within 250 feet of herself or her children. Pursuant to N.C. Gen. Stat. § 50B-4(c) and 4.1(b), the police had a duty to arrest Ellerbee if they had probable cause to believe he was in violation of the order. Defendants had actual knowledge of the protective order. Plaintiff informed defendants of Ellerbee's violations of the protective order and his repeated threats. On 13 November 2002, the Jonesville Chief of Police visited plaintiff's home and personally saw the graves Ellerbee had dug across the street, in which he threatened to bury plaintiff and her children after he killed them. Defendants also had actual knowledge of Ellerbee's violations of the protective order on two separate occasions on 18 November 2002. Earlier that day, plaintiff informed Officer Vestal that Ellerbee was following her in violation of the order. Officer Vestal was in close proximity to Ellerbee's car and witnessed this violation. He followed Ellerbee for a distance, but failed to make an arrest. Later that day, plaintiff met with Officers Vestal and Gwyn at her father's home and informed them that Ellerbee had been stalking her for much of the day. At that time, Ellerbee drove up in front of the house. The officers promised plaintiff and her daughter they were going to arrest Ellerbee "right then" and that they would no longer have to worry about their safety. Following these assurances, the officers got into their vehicle and followed Ellerbee's car down the street. The officers failed to arrest Ellerbee and the next day he laid in wait at plaintiff's home where he killed Candice and stabbed plaintiff.

Viewing all these allegations as true, plaintiff's complaint contains sufficient allegations to place her within the special duty exception to the public duty doctrine. She specifically alleged that the officers made a promise to protect her and her daughter, that protection was not forthcoming since the officers failed to fulfill their promise to arrest Ellerbee, and that she and her daughter relied on this promise of protection to their detriment.

Defendants assert that *Braswell* is factually indistinguishable from the instant case and that it compels this Court to dismiss plaintiff's action. In *Braswell*, the wife found letters from her estranged husband, a deputy sheriff, which intimated that he planned to kill her and then commit suicide. She told the sheriff she was afraid that her husband would go through with the plan. Although the wife did not obtain a protective order against her husband, the sheriff told her " 'he would see she got back and forth to work safely . . . [and] that his men would be keeping an eye on her.' " 330 N.C. at 369, 410 S.E.2d at 900. A few days later, the wife's husband shot her to death while she was on a lunchtime errand. Based on the public duty doctrine, our Supreme Court found that the sheriff had no specific duty to protect the woman from her husband; that the sheriff's statements were simply general words of comfort and assurance of the type customarily used by law enforcement officers in situations involving domestic problems, and that such promises were not sufficient to constitute an actual promise of protection. *Id.* at 371-72, 410 S.E.2d at 902. Even so, the Court acknowledged that the sheriff's promise to the wife to protect her as she went to and from work was arguably specific enough to create a special duty exception to the public duty doctrine. *Id.* at 372, 410 S.E.2d at 902. However, since the wife was killed while on a lunchtime errand and not while traveling to or from work, the Court determined this was "outside the scope of protection arguably promised by [the sheriff]." *Id.*

The instant case is distinguishable from *Braswell*. The police officers' assurances here were much more specific than those made in *Braswell*. In addition, plaintiff had a protective order, while the wife in *Braswell* did not. Further, the Supreme Court reviewed *Braswell* in the light of a Rule 50 motion made at the end of the trial, while this Court is reviewing the judge's ruling made following a motion to dismiss pursuant to Rule 12(b)(6).

Considering the totality of the circumstances alleged in plaintiff's complaint and treating them as true, we hold plaintiff's allegations are sufficient to state a claim falling under the special duty exception to the public duty doctrine.

Plaintiff need only demonstrate that she meets one exception to the public duty doctrine to survive a motion to dismiss. Since we have held that the allegations in the complaint stated a claim under the special duty exception, we need not determine whether the allegations in the complaint satisfy the requirements of any other exception.

For the reasons discussed herein, we affirm the ruling of the trial court.

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

LENA LOCKLEAR, Plaintiff v. STEPHEN L. LANUTI, M.D., STEPHEN L. LANUTI, M.D., P.A., and SCOTLAND SURGICAL SERVICES, Defendants

No. COA05-900

(Filed 7 March 2006)

Medical Malpractice— statute of limitations—continuous course of treatment doctrine

A de novo review revealed that the trial court erred in a medical malpractice case by granting defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) based on the expiration of the statute of limitations, because: (1) continuous course of treatment is an exception to the rule that the action accrues at the time of defendant's negligence; (2) on its face, the complaint does not establish that plaintiff knew or should have known that the doctor's conduct was allegedly wrongful during the course of treatment and whether that conduct allegedly caused plaintiff's injuries; (3) whether plaintiff was under the continuous care of the doctor for the injuries which gave rise to the cause of action cannot be resolved as a matter of law from the face of plaintiff's complaint; and (4) taking plaintiff's allegations as true and reviewing them in the light most favorable to plaintiff, it does not appear to a certainty that plaintiff is not entitled to the benefit of the continuing course of treatment doctrine to overcome defendants' statute of limitations defense.

Appeal by plaintiff from order entered 9 May 2005 by Judge Ola M. Lewis in Robeson County Superior Court. Heard in the Court of Appeals 9 February 2006.

Mitchell Brewer Richardson, by Ronnie M. Mitchell and Coy E. Brewer, Jr., for plaintiff-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Mark E. Anderson, Tobias S. Hampson, and Edward K. Brooks, for defendants-appellees.

TYSON, Judge.

Lena Locklear ("plaintiff") appeals from the trial court's order granting Stephen L. Lanuti, M.D. ("Dr. Lanuti"), Stephen L. Lanuti, M.D., P.A., and Scotland Surgical services' (collectively, "defendants") motion to dismiss. We reverse and remand.

I. Background

A. History of Treatment

On 27 June 2002, plaintiff filed a complaint against defendants in the Robeson County Superior Court alleging medical malpractice by defendants. Plaintiff's complaint alleges the following sequence of events.

On or about 13 January 1997, plaintiff was seen by Dr. Lanuti for complaints of rectal bleeding, weakness, nausea, and vomiting coffee ground gastric contents. On 15 January, Dr. Lanuti performed an outpatient colonoscopy and esophagogastroduodenoscopy (EGD) procedure. Three biopsy specimens were sent to pathology for identification and description. A rectal polyp was identified as "histologically unremarkable rectal mucosa." Plaintiff was instructed to follow up with Dr. Lanuti in one week. The following day, plaintiff telephoned Dr. Lanuti's office with complaints of bleeding and pain. Plaintiff was examined in the emergency room of Scotland Memorial Hospital and Plaintiff was released with instructions to follow up with Dr. Lanuti. On 27 January 1997, Dr. Lanuti diagnosed plaintiff with grade III hemorrhoids.

On 5 February 1997, plaintiff was again admitted to Scotland Memorial Hospital, diagnosed with grade IV hemorrhoids, and Dr. Lanuti performed a hemorrhoidectomy. On 8 February 1997, Dr. Timothy Moses ("Dr. Moses") provided a consultation for plaintiff for urinary retention, fever, and severe perineal pain. Dr. Moses suspected a perirectal abscess.

Dr. Moses performed a cystourethroscopy with bilateral urethral cath placement. On 9 February, Dr. Lanuti performed a diverting end

colonoscopy with Hartman's Pouch on plaintiff. Plaintiff was discharged from Scotland Memorial Hospital by Dr. Lanuti on 18 February 1997 with final diagnoses of hemorrhoids, a presacral abscess, and insulin-dependent diabetes mellitus. Plaintiff returned for a follow-up with Dr. Lanuti where Dr. Lanuti made a diagnosis of "status post rectal perforation."

On 21 May 1997, Dr. Lanuti performed a rigid proctoscopy and lateral sphincterotomy and diagnosed anal stenosis. Plaintiff was seen by Dr. Lanuti on 29 May 1997 and 26 June 1997 for anal stenosis. Dr. Lanuti admitted plaintiff to Scotland Memorial Hospital for a House Anal Advancement Flap operative procedure. On 27 August 1997, Dr. Lanuti performed another colon and rectum operative procedure on plaintiff. On 11 September 1997, plaintiff was seen in follow-up by Dr. Lanuti where Dr. Lanuti found a wound abscess at the surgical incision. Plaintiff was seen again by Dr. Lanuti on 23 September, 9 December, and 30 December 1997 for continued complaints related to her lower gastrointestinal tract.

On 3 May 1998, plaintiff was admitted to the emergency room where she was diagnosed with an ileus and an incarcerated ventral hernia. Dr. Lanuti performed a repair of plaintiff's hernia. On 22 December 1998, plaintiff was seen by Dr. Delia Chiaramonte ("Dr. Chiaramonte"), who reduced a ventral hernia. Dr. Chiaramonte referred plaintiff back to Dr. Lanuti who performed a repair of multiple incarcerated ventral hernias on 30 December 1997.

On 14 May 1999, plaintiff was again admitted to the Scotland Memorial Hospital. Dr. Lanuti found "a ventral abdominal wall hernia with numerous small bowel loops through the defect in the subcutaneous tissues about the umbilicus." Dr. Lanuti performed a repair of recurrent incarcerated ventral hernias with Gortex mesh. Plaintiff returned to Dr. Lanuti for an open wound which "communicates with" the Gortex mesh and which became infected. Plaintiff was admitted to Duke University Medical Center on 13 July 1999, and was seen by Dr. Salvatore Lettieri and Dr. John P. Grant, who made a diagnosis of infected Marlex mesh and performed a repair of a ventral hernia with persistent post-operative fistula. Plaintiff was discharged from Duke University Medical Center on 28 July 1999. Plaintiff has since undergone further surgery.

B. Procedural History

Plaintiff filed suit against Dr. Lanuti in Robeson County Superior Court on 27 June 2002 alleging Dr. Lanuti was negligent in: (1) remov-

ing viable mucosa tissue on 15 January 1997, which he mistakenly identified as a polyp, causing plaintiff to suffer a rectal perforation which Dr. Lanuti failed to timely diagnose; (2) misdiagnosing the presence of hemorrhoids when plaintiff had a perirectal abscess; (3) failing to possess the requisite knowledge, training, and skill necessary to perform the procedures that were performed upon plaintiff, and failing to adequately diagnose plaintiff's condition; (4) failing to make a timely referral for plaintiff to a tertiary care center when he knew or should have known that plaintiff's condition was deteriorating; and (5) using a Gortex mesh in plaintiff's ventral hernia repairs when Dr. Lanuti knew or should have known the use of such mesh was not indicated for plaintiff's condition.

Defendants moved to dismiss all of plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005). The trial court granted defendants' motion to dismiss by order dated 4 April 2005. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred in: (1) allowing defendants' motion to dismiss; (2) considering matters outside the pleadings over plaintiff's objection when considering defendants' motion to dismiss; and (3) failing to make specific findings of fact and conclusions of law, and refusing to consider plaintiff's timely request for findings and conclusions under Rule 52 of the North Carolina Rules of Civil Procedure with respect to its order allowing defendants' motion to dismiss.

III. Motion to Dismiss

A. Standard of Review

> Our standard of review of an order allowing a motion to dismiss is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint "unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

Holloman v. Harrelson, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (2002). A complaint may be properly dismissed for absence of law to support a claim, absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim. *Sutton v. Duke*, 277 N.C. 94, 102-03, 176 S.E.2d 161, 166 (1970). "If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed." *Id.* at 102, 161 S.E.2d at 166.

We review the trial court's grant of a motion to dismiss *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003), *aff'd*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Statute of Limitations

Defendants contend plaintiff's claims are barred by the statute of limitations. N.C. Gen. Stat. § 1-15(c) (2005) provides the statute of limitations for medical malpractice claims:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person . . . which originates under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin, and the injury . . . is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided *nothing herein shall be construed to reduce the statute of limitation in any such case below three years.*

(Emphasis supplied). Plaintiff filed her complaint against defendants on 27 June 2002. Absent an exception to the three-year statute of limitations, all of defendants' alleged negligent acts occurred prior to 27 June 1999 and are barred. Defendants asserted an affirmative defense of statute of limitations in their answer.

C. Continuous Course of Treatment Doctrine

Plaintiff argues she alleges facts in her complaint to show a "continuous course of treatment," which is an exception to the rule that " 'the action accrues at the time of the defendant's negligence.' "

Stallings v. Gunter, 99 N.C. App. 710, 714, 394 S.E.2d 212, 215 (1990) (quoting *Ballenger v. Crowell*, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978)).

> According to this doctrine, the action accrues at the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action. It is not necessary under this doctrine that the treatment rendered subsequent to the negligent act itself be negligent, if the physician continued to treat the patient for the particular disease or condition created by the original act of negligence.
>
> To take advantage of the 'continuing course of treatment' doctrine, plaintiff must show the existence of a *continuing* relationship with [her] physician, and . . . that [she] received *subsequent* treatment from that physician. Mere continuity of the general physician-patient relationship is insufficient to permit one to take advantage of the continuing course of treatment doctrine. Subsequent treatment must consist of either an affirmative act or an omission, [which] must be related to the original act, omission, or failure which gave rise to the cause of action. However, plaintiff is not entitled to the benefits of the 'continuing course of treatment' doctrine if during the course of the treatment plaintiff knew or should have known of his or her injuries.

Id. at 714-15, 394 S.E.2d at 215-16 (internal citations and quotation marks omitted).

"[T]he doctrine tolls the running of the statute for the period between the original negligent act and the ensuing discovery and correction of its consequences; the claim still accrues at the time of the original negligent act or omission." *Horton v. Carolina Medicorp, Inc.* 344 N.C. 133, 137, 472 S.E.2d 778, 780-81 (1996). Our Supreme Court stated the reason for the rule as follows: "[T]he doctrine rests on the theory that 'so long as the relationship of [physician] and patient continued, the [physician] was guilty of malpractice during that entire relationship for not repairing the damage he had done.' " *Id.* (quoting *Ballenger*, 38 N.C. App. at 58, 247 S.E.2d at 293).

D. Plaintiff Knew or Should Have Known

Defendants argue plaintiff should lose the benefit of the continuous course of treatment doctrine because "plaintiff knew or should have known of . . . her injuries" during the course of Dr.

Lanuti's treatment. *Stallings*, 99 N.C. App. at 715, 394 S.E.2d at 216. We disagree.

"An injury may be readily apparent but the fact of wrong may lay hidden. It is only when the plaintiff knew or should have known that this wrongful act caused his injury that the plaintiff loses the benefit of the continuing course of treatment doctrine." *Whitaker v. Akers*, 137 N.C. App. 274, 280-81, 527 S.E.2d 721, 726 (2000). In *Akers*, this Court held, "while there is no question that the plaintiff knew he was incontinent and impotent, there is some question whether he knew or should have known that the defendant's conduct was wrongful and whether that conduct caused his incontinence and impotence, prior to the running of the statute of limitations." *Id.* at 281, 527 S.E.2d at 726. On its face, the complaint does not establish that plaintiff knew or should have known that Dr. Lanuti's conduct was allegedly wrongful during Dr. Lanuti's course of treatment and whether that conduct allegedly caused plaintiff's injuries. *Id.*

E. Plaintiff's Allegations

Plaintiff's complaint alleges Dr. Lanuti treated plaintiff for several different ailments. Plaintiff was first seen by Dr. Lanuti for complaints of rectal bleeding, weakness, nausea, and vomiting. Dr. Lanuti performed a colonoscopy and EGD procedure on 15 January 1997. Plaintiff alleges Dr. Lanuti was negligent in removing viable mucosa tissue, causing plaintiff to suffer a rectal perforation which Dr. Lanuti failed to timely diagnose. The question remains whether Dr. Lanuti's continuing course of treatment was related to Dr. Lanuti's initial alleged negligence. *Stallings*, 99 N.C. App. at 714-15, 394 S.E.2d at 215-16.

Also, the question remains whether plaintiff's abscess, which was allegedly undiagnosed by Dr. Lanuti, was related to Dr. Lanuti's further and continuous treatment of plaintiff. *Id.*

Plaintiff also alleges Dr. Lanuti was negligent in failing to refer her to a tertiary care center when he knew or should have known her condition was deteriorating. A question remains whether plaintiff remained under the continuous care of Dr. Lanuti, and Dr. Lanuti failed to refer plaintiff to a tertiary care center throughout that time period. *Id.*

Plaintiff also alleges Dr. Lanuti was negligent in repairing her hernias with a Gortex mesh that was not indicated for plaintiff's condition. Plaintiff was subsequently seen by Dr. Lanuti for a "one (1) cm

open wound that communicates with the gortex and was infected." Whether plaintiff was under the continuous care of Dr. Lanuti for the injuries which gave rise to the cause of action also cannot be resolved as a matter of law from the face of plaintiff's complaint. *Id.*

In ruling on a motion to dismiss, the trial court must take all allegations in plaintiff's complaint as true, and every reasonable inference must be drawn in favor of plaintiff. *Grindstaff v. Byers*, 152 N.C. App. 288, 293, 567 S.E.2d 429, 432 (2002). "In general, a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Harris v. NCNB*, 85 N.C. App. 669, 671, 355 S.E.2d 838, 840 (1987) (citation omitted).

Here, taking plaintiff's allegations as true and reviewing them in the light most favorable to plaintiff, it does not appear "to a certainty" that plaintiff is not entitled to the benefit of the continuing course of treatment doctrine to overcome defendants' statute of limitations defense. *Id.* The trial court erred in granting defendants' motion to dismiss.

IV. Conclusion

The trial court erred in granting defendants' motion to dismiss. Viewed in the light most favorable to plaintiff, the allegations of the complaint are sufficient to raise an issue of whether plaintiff is entitled to the benefit of the continuing course of treatment doctrine to toll the expiration of the statute of limitations. In so ruling, we express no opinion on the ultimate merits, if any, of plaintiffs allegations and claims.

In light of our decision, it is unnecessary to address plaintiff's remaining assignments of error. The trial court's order is reversed and this case is remanded for further proceedings.

Reversed and remanded.

Judges HUDSON and GEER concur.

KELLY CHAMBLISS AND CAROLINE CHAMBLISS, PLAINTIFFS-APPELLEES v. HEALTH SCIENCES FOUNDATION, INC., D/B/A COASTAL AREA HEALTH EDUCATION CENTER, D/B/A WOMEN'S HEALTH SPECIALTIES—NORTH, AND JULIE RAMSEY, RNC, NP, DEFENDANTS-APPELLANTS

No. COA04-1687

(Filed 7 March 2006)

1. Appeal and Error— appealability—denial of motion for judgment on pleadings not reviewable

Although defendant-appellants contend the trial court erred in a suit seeking compensatory and punitive damages, as a result of injuries resulting from unwashed sperm specimen in an insemination procedure, by denying defendant-appellants' motion for judgment on the pleadings, this issue is not reviewable on appeal because the trial court rendered a final judgment after a trial on the merits.

2. Damages and Remedies— punitive damages—motion for directed verdict—unwashed sperm specimen in insemination procedure

The trial court did not err in a suit seeking damages as a result of injuries resulting from an unwashed sperm specimen in an insemination procedure by denying defendant-appellants' directed verdict motion at the close of all evidence on the issue of punitive damages because appellant nurse admitted that though she was aware of the safety protocol in place at appellant health center, she violated that protocol in several ways including failing to examine the sperm specimen under a microscope prior to insemination, which evidence alone constituted more than a scintilla of evidence regarding whether to submit the question of punitive damages to the jury.

3. Damages and Remedies— punitive damages—motion for judgment notwithstanding verdict—unwashed sperm specimen in insemination procedure

The trial court did not err in a suit seeking damages as a result of injuries resulting from an unwashed sperm specimen in an insemination procedure by denying defendant-appellants' motion for judgment notwithstanding the verdict on the issue of punitive damages because: (1) appellants failed to assign error to any of the trial court's findings of fact or conclusions of law, and the failure to do so resulted in a waiver of the right to challenge

the sufficiency of the evidence; and (2) finding of fact number seven provided sufficient evidence for the jury to determine that appellant nurse acted willfully and wantonly with reckless indifference to the safety of her patient when she knowingly, consciously, and deliberately used an unlabeled syringe containing an unknown substance in plaintiff's insemination procedure knowing that to do so would expose plaintiff to a risk of harm.

4. Damages and Remedies— punitive damages—motion to reduce or set aside award

The trial court did not err in a suit seeking damages as a result of injuries resulting from an unwashed sperm specimen in an insemination procedure by denying defendant-appellants' request under N.C.G.S. § 1D-50 to set aside or reduce the punitive damages award because: (1) the trial court outlined both the findings of fact and conclusions of law upon which the determination of punitive damages was predicated; (2) since appellants failed to assign error to the pertinent findings and conclusions, they are binding on appeal; and (3) the trial court complied with the dictates of the statute by explaining in detail why punitive damages were justified in the instant case and why such an award was appropriate and not excessive.

5. Damages and Remedies— punitive damages—motion for new trial

The trial court did not err in a suit seeking damages as a result of injuries resulting from unwashed sperm specimen in an insemination procedure by denying defendant-appellants' motion for a new trial, because the trial court acted within its discretion.

Appeal by defendants from judgment entered 24 August 2004 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 13 September 2005.

Shipman & Wright, L.L.P., by Gary K. Shipman and William G. Wright for plaintiffs-appellees.

Cranfill, Sumner & Hartzog, L.L.P., by Edward C. LeCarpentier, III, John D. Martin, Colleen Shea Collis and Meredith T. Black for defendants-appellants.

Comerford & Britt, L.L.P., by Clifford Britt; and Holly M. Bryan, for The North Carolina Academy of Trial Lawyers, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson, for The North Carolina Medical Society, amicus curiae.

CALABRIA, Judge.

Health Sciences Foundation, Inc. ("Foundation"), Coastal Area Health Education Center ("Coastal"), Women's Health Specialties-North ("Specialties"), and Julie Ramsey ("Ramsey") (collectively known as "appellants") appeal the 24 August 2004 judgment in favor of Kelly Chambliss ("Kelly") and Caroline Chambliss ("Caroline") (collectively known as "appellees") for injuries resulting from an unwashed sperm specimen in an insemination procedure). We affirm in part and find no error in part.

Appellees Kelly and Caroline Chambliss, both female, are life partners. Appellees desired to raise a family and concluded their best option was artificial insemination. Appellees looked to appellants Coastal and Ramsey, as well as Dr. Mark M. Pasquarette ("Dr. Pasquarette"), leader of a reproductive endocrinology and fertility practice,[1] for assistance. Appellees decided Kelly would undergo monthly intrauterine insemination procedures[2] whereby Caroline would inject the sample sperm into Kelly's uterus. Appellees obtained, with the help of Dr. Pasquarette, "pre-washed" donor sperm[3] from an accredited sperm bank in California. Non-"pre-washed" sperm had to be placed into a Sperm Select kit for cleansing while "pre-washed" sperm generally did not require such treatment. Once clean, the "washed" sperm remains in the Sperm Select syringe for the eventual insemination procedure). A Sperm Select syringe, which has the non-"pre-washed" sperm, looks completely different than the type of syringe used for "pre-washed" specimens, like those of appellees, that come from sperm banks.

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1. Dr. Pasquarette's practice operates within Specialties which, as part of Coastal, provides educational and clinical services in the areas of obstetric and gynecological care. Coastal maintains and operates several health care facilities including Specialties. Foundation, a non-profit corporation, is the administrator of Coastal. Dr. Pasquarette supervised Ramsey, a reproductive endocrinology and fertility nurse at Specialties.

2. Intrauterine insemination is a form of artificial insemination where a "washed" sperm sample is inserted into the women's uterus via a catheter.

3. Pre-washed sperm, already cleansed, need merely be stored before insemination, while non pre-washed sperm had to be cleansed by the appellants prior to use in insemination procedures.

Appellees attempted, unsuccessfully, to get pregnant eleven times prior to arriving at appellants' facility on 26 August 2002 for their twelfth insemination procedure. On each prior occasion, appellees used the donor sperm from California in the insemination procedures. Two days earlier, 24 August 2002, Karen Hale ("Hale"), a registered nurse who worked at appellants' facility, prepared a sperm specimen for another patient. Hale and another registered nurse at the appellants' facility, Debbie Cushing ("Cushing"), along with Ramsey, were the only three nurses authorized to prepare specimens for artificial insemination procedures. Hale did the following in preparation for the 24 August 2002 procedure: drew a portion of the sperm into a Sperm Select syringe and cleaned it (the sperm used was not pre-washed); drew up a smaller sample of the now cleaned sperm into a second Sperm Select syringe for insemination; transferred a smaller portion of the cleaned sperm from this second syringe into a catheter for actual use; drew up the surplus, unwashed sperm into the second syringe and placed it in the incubator. This unwashed sperm specimen remained in the incubator in the syringe over the weekend.

The policies and procedures in place at appellants' facility for preparing a sperm specimen for insemination included confirming the donor number with the patient, matching the donor number in a log book, logging the donor sperm out of the sperm freezer, having two individuals initial this process, labeling the specimen, showing the vial of sperm to the patient and reconfirming the donor number, checking the specimen under a microscope and charting this process in the patient's medical chart. The intent of these policies and procedures was to protect patient safety and maximize patient health.

On 26 August 2002 Ramsey used the remainder 24 August 2002 unwashed sperm specimen from the incubator in the insemination procedure with Kelly and not Kelly's "pre-washed" donor sperm. The unwashed sperm specimen used by Ramsey was in the same unlabeled Sperm Select syringe. Kelly became violently ill almost immediately. Two days later on 28 August 2002 both Hale and Ramsey recognized the wrong sperm specimen was used in the insemination procedure. Ramsey and Dr. Pasquarette informed appellees of this error immediately. None of the policies and procedures in effect at appellants' facility to prepare a sperm specimen for insemination and protect patient health and safety were performed on 26 August 2002.

Appellees filed suit against appellants on 21 March 2003 seeking both compensatory and punitive damages. After a week long trial (21

June 2004 to 28 June 2004), the jury awarded appellees both compensatory and punitive damages. The trial court entered judgment in favor of appellees on 24 August 2004. On 1 September 2004 the trial court entered an order denying both appellants' motion for judgment notwithstanding the verdict and motion for a new trial as well as affirming a finding that the punitive damages award was in accordance with N.C. Gen. Stat. §§ 1D-1 and 1D-35. Appellants appealed from the judgment and orders on 22 September 2004.

I. Judgment on the Pleadings:

[1] Appellants argue in their first assignment of error the trial court erred in denying their motion for a judgment on the pleadings. Appellants contend the complaint contains no allegations which, as a matter of law, would constitute evidence sufficient to support an award of punitive damages. This Court has held "[a] trial court's denial of . . . defendants' motion[] for . . . judgment on the pleadings is *not reviewable on appeal because the trial court rendered a final judgment after a trial on the merits*." *Wilson v. Sutton*, 124 N.C. App. 170, 173, 476 S.E.2d 467, 470 (1996) (emphasis added).

In the instant case, the trial court rendered a final judgment after a trial on the merits. Thus, we reject appellants' assertion it is reviewable here. This assignment of error is overruled.

II. Directed Verdict:

[2] Appellants next argue the trial court erred in denying their directed verdict motion at the close of appellees' evidence and at the close of all the evidence. The appellants contend the evidence presented was insufficient to support an award of punitive damages. We disagree.

First, appellants waived their initial directed verdict motion at the close of appellees' evidence by presenting evidence. "By offering evidence . . . a defendant waives its motion for directed verdict made at the close of plaintiff's evidence." *Boggess v. Spencer*, 173 N.C. App. 614, 617, 620 S.E.2d 10, 12 (2005) (citation omitted). Second, regarding appellants' renewal of their directed verdict motion at the close of all the evidence, "[i]n deciding whether to grant or deny a motion for directed verdict, 'the trial court must accept the non-movant's evidence as true and view all the evidence in the light most favorable to him.' " *Id.*, 620 S.E.2d at 13 (quoting *Williamson v. Liptzin*, 141 N.C. App. 1, 9-10, 539 S.E.2d 313, 318 (2000)). Further, "[t]he trial court should deny the motion if there is more than a scintilla of evidence

supporting each element of the non-movant's claim." *Id.* (citation and internal quotation marks omitted). "The standard of review of a denial of a motion for directed verdict is whether the evidence, considered in a light most favorable to the non-moving party, is sufficient to be submitted to the jury." *Id.*

In the instant case, a thorough review of the record and trial transcripts and testimony illustrates sufficient evidence existed to support submitting the question of punitive damages to the jury and consequently, to deny appellants' renewed directed verdict motion. In fact, appellant Ramsey admitted that though she was aware of the safety protocol in place at appellant Coastal, she violated that protocol in several ways including failing to examine the sperm specimen under a microscope prior to insemination. This evidence alone qualifies as more than a scintilla of evidence regarding whether to submit the question of punitive damages to the jury. This assignment of error is overruled.

III. Judgment Notwithstanding the Verdict:

[3] Appellants next argue the trial court erred in denying their motion for judgment notwithstanding the verdict ("jnov"). Appellants contend the evidence presented was insufficient to support an award of punitive damages. We disagree.

Appellants failed to assign error to any of the trial court's findings of fact or conclusions of law. "Where findings of fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the *failure to do so results in a waiver* of the right to challenge the sufficiency of the evidence." *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) (citations omitted) (emphasis added). Thus, "[w]here an appellant fails to assign error to the trial court's findings of fact, the findings are presumed to be correct." *Id.* (citation and internal quotation marks omitted). Consequently, "our review . . . is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusion of law and judgment." *Id.*, 136 N.C. App. at 591-92. In its 1 September 2004 order denying appellants' jnov motion, the trial court's finding of fact number seven states, in pertinent part, "[v]iewing the evidence in the light most favorable to the [p]laintiff, and resolving all inferences from the evidence in her favor . . . there was sufficient evidence for the jury to determine that Defendant Ramsey acted willfully and wantonly, i.e. with reckless indifference to the safety of her patient, when she

knowingly, consciously and deliberately used an unlabeled syringe containing an unknown substance in [p]laintiff's insemination procedure . . . knowing that to do so would expose the [p]laintiff to a risk of harm." Therefore, finding of fact number seven supports conclusion of law number one, "there was sufficient evidence to submit the issue of punitive damages to the jury," and consequently, appellants' jnov motion was properly denied. This assignment of error is overruled.

IV. Punitive Damages:

[4] Appellants next argue the trial court improperly denied their request pursuant to N.C. Gen. Stat. § 1D-50 to set aside or reduce the punitive damages award as there was insufficient evidence in the record. We disagree.

N.C. Gen. Stat. § 1D-50 states:

> When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the *court shall address with specificity the evidence*, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter.

N.C. Gen. Stat. § 1D-50 (2005) (emphasis added). The trial court outlined, in exhaustive fashion, both the findings of fact and conclusions of law upon which the determination of punitive damages was predicated. Furthermore, since appellants failed to assign error to the pertinent findings and conclusions, they are conclusive on appeal. The trial court complied with the dictates of the statute in explaining in detail why punitive damages were justified in the instant case and why such an award was appropriate and not excessive. Thus, we hold the trial court committed no error in denying appellants' request pursuant to N.C. Gen. Stat. § 1D-50.

V. New Trial:

[5] Appellants next assign error to the trial court's denial of their motion for a new trial. "An appellate court's review of a trial judge's discretionary ruling denying a motion to set aside a verdict and order a new trial is limited to a determination of whether the record clearly demonstrates a manifest abuse of discretion by the trial judge."

Pittman v. Nationwide Mut. Fire Ins. Co., 79 N.C. App. 431, 434, 339 S.E.2d 441, 444 (1986). "During review, we accord 'great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for new trial.' " *City of Charlotte v. Ertel*, 170 N.C. App. 346, 353, 612 S.E.2d 438, 434 (2005) (citing *Burgess v. Vestal*, 99 N.C. App. 545, 550, 393 S.E.2d 324, 327 (1990)) (quoting *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982)).

In its 1 September 2004 order denying appellants' new trial motion, the trial court reviewed the evidence, including transcripts of jury instructions and trial testimony, and determined no grounds existed to support appellants' motion. We conclude the trial court acted within its discretion. This assignment of error is overruled.

Affirmed in part; no error in part.

Judges HUDSON and LEVINSON concur.

STATE OF NORTH CAROLINA v. ANTHONY DEVON HERRING

No. COA05-265

(Filed 7 March 2006)

Homicide— felony murder—motion to dismiss—sufficiency of evidence—acting in concert—trafficking in cocaine while also possessing deadly weapon

The trial court did not err by denying defendant's motion to dismiss the charge of felony murder based on the theory of acting in concert even though defendant contends there was insufficient evidence to support the underlying felony of trafficking in cocaine by possession of more than 400 grams of cocaine while also possessing a deadly weapon, because: (1) defendant may not have intended to join his cousin in shooting and killing the victim on 18 August 2003, but defendant's intent is of little importance under the circumstances of acting in concert since as long as defendant joined with his cousin in committing a crime, he is responsible for all other crimes committed in a single transaction that are in furtherance of the common purpose or plan; (2) the common plan in the instant case was to obtain or facilitate the

possession of cocaine, and evidence taken in the light most favorable to the State formed the basis that defendant and his cousin acted together to possess, or attempt to possess, the victim's cocaine; (3) the requisite common purpose for acting in concert is not necessarily the intent to commit the crime charged, rather it is sufficient if the crime charged is a natural occurrence of, or flows from a common criminal purpose; (4) defendant's knowledge that his cousin had a gun is irrelevant so long as the cousin killed the victim while possessing or attempting to possess the drugs in the apartment which the State substantially established was the common purpose; and (5) the evidence in the light most favorable to the State shows that the victim was shot and killed within moments of the cousin stepping into the apartment with the gun to complete his drug transaction.

Appeal by defendant from judgment entered 2 July 2004 by Judge James Spencer in Wake County Superior Court. Heard in the Court of Appeals 20 October 2005.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

ELMORE, Judge.

Anthony Herring (defendant) appeals from his judgment of conviction for felony murder arising from the death of Dexter Moore (Moore). The State proceeded to trial under the theory that Moore was killed by Ronald Russell (Russell), defendant's cousin, whom defendant was acting in concert with to rob Moore of his money or drugs. Since Moore's death occurred during the perpetration or attempted perpetration of a felony with the use of a deadly weapon, defendant was indicted for murder. *See* N.C. Gen. Stat. § 14-17 (2005).

In the light most favorable to the State, the evidence at trial showed that defendant and Moore knew each other for some time prior to the shooting. Defendant knew that Moore was a drug dealer and would often find buyers for Moore's drugs. Defendant agreed to "hook up" his cousin Russell with Moore so that Russell could purchase some drugs. Defendant and Russell met in Dunn, where defendant lived, and the two drove separately to the Raleigh apartment where Moore lived.

Defendant arrived first, and went upstairs to Moore's second-floor apartment where he and Moore watched television. Defendant testified that Moore placed a large amount of cocaine on the kitchen counter top. Defendant then got a call from Russell and went downstairs to meet him. When the two came back upstairs, Moore showed Russell the cocaine and they discussed the transaction. Defendant, who had returned to watching television, overheard Russell say he needed to go outside to get more money. Moore and defendant remained inside, and then Russell came back up the steps brandishing a gun and stating that the police were coming.

Defendant then testified that Russell and Moore began fighting over the drugs in Moore's hand. Defendant was ducking for cover, but tried to hide some cocaine he saw in the kitchen under a coat before hearing a gunshot and running downstairs to his car. He testified that he thought Russell was going to shoot him as well. A witness from the apartment complex testified that she heard several gunshots and saw two men leave Moore's apartment, one a bit of time after the other, and go to separate cars. The first man who left was carrying a bag and ducking down, as if he were going to be shot; the second man just went straight to his car.

Moore called his girlfriend, Kandrina Trollinger, and told her he was shot. He also said, "Anthony set me up." Moore died later as a result of gunshot wounds to the chest and right leg. Upon investigation, police determined that a large bag of cocaine, which was found on the kitchen floor near Moore, weighed 750.7 grams. There were several other bags of cocaine throughout the apartment, as well as $27,000.00 in cash in a shaving kit and a gun near the TV.

When presented with this evidence the jury determined defendant was guilty of felony murder, and that trafficking or attempted trafficking in cocaine with a deadly weapon was the underlying felony. The jury rejected the State's alternative theory that Moore's death was the result of an armed robbery or attempted armed robbery. The jury also found defendant guilty of a separate charge of trafficking in cocaine. The trial court sentenced defendant to life in prison without parole on the felony murder conviction and arrested judgment on the separate trafficking conviction.

Defendant appeals, arguing that the State presented insufficient evidence supporting the underlying felony of trafficking in cocaine with a deadly weapon and his motion to dismiss should have been granted. The State argues that when applying the theory of acting in

concert to the evidence, as was presented to the jury, there is sufficient evidence to support presentation of the charges. We agree.

Our review of the trial court's denial of a motion to dismiss is well understood. "[W]here the sufficiency of the evidence . . . is challenged, we consider the evidence in the light most favorable to the State, with all favorable inferences. We disregard defendant's evidence except to the extent it favors or clarifies the State's case." *State v. James*, 81 N.C. App. 91, 93-94, 344 S.E.2d 77, 79-80 (1986).

> Whether the evidence presented is direct or circumstantial or both, the test for sufficiency is the same. . . . 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.' . . . If the evidence supports a reasonable inference of defendant's guilt based on the circumstances, then 'it is for the [jurors] to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.'

State v. Trull, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998) (internal citations omitted); *see also State v. Campbell*, 359 N.C. 644, 681-82, 617 S.E.2d 1, 24 (2005).

"All that is required to support convictions for a felony offense and related felony murder 'is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction.' *Trull*, 349 N.C. at 449, 509 S.E.2d at 192 (quoting *State v. Thomas*, 329 N.C. 423, 434-35, 407 S.E.2d 141, 149 (1991)). Here, the underlying offense was trafficking in cocaine by possession of more than 400 grams of cocaine while also possessing a deadly weapon. In order for the State's evidence to withstand a motion to dismiss it must show that defendant possessed more than 400 grams of cocaine and a weapon. Defendant does not dispute that the cocaine found in the kitchen weighed more than 400 grams; however, he does dispute that he or Russell had possession of it.

To show possession, the State must provide substantial evidence that: 1) defendant had actual possession; 2) defendant had constructive possession; or 3) defendant acted in concert with another to commit the crime. *State v. Garcia*, 111 N.C. App. 636, 639-40, 433 S.E.2d 187, 189 (1993) (citing *State v. Diaz*, 317 N.C. 545, 552, 346 S.E.2d 488, 493 (1986), *overruled on other grounds by State v. Hartness*, 326 N.C. 561, 566, 391 S.E.2d 177, 180 (1990)). There is no

contention by the State that defendant had actual or constructive possession of the cocaine; instead, it contends that *Russell* trafficked in cocaine with a deadly weapon, presumptively by constructively possessing the drugs, and since defendant acted in concert with Russell then defendant is guilty of the felony as well. We ultimately agree.

The doctrine of acting in concert was clarified by our Supreme Court in *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997).

> [I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Westbrook, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *quoted in State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991), *quoted in Barnes*, 345 N.C. at 233, 481 S.E.2d at 71. Defendant may not have intended to join Russell in shooting and killing Moore on 18 August 2003, but his intent is of little importance under the circumstances of acting in concert. *See State v. Barrett*, 343 N.C. 164, 174-76, 469 S.E.2d 888, 894-95 (1996) (In a prosecution for felony murder under a concert of action theory, "[w]hether there is sufficient evidence to show that the defendant either committed the killing himself, intended that the killing take place or even knew that the killing would take place is irrelevant for purposes of determining defendant's guilt under the felony murder rule.") (quoting *State v. Reese*, 319 N.C. 110, 145, 353 S.E.2d 352, 372 (1987)). As long as defendant joined with Russell in committing *a* crime, he is responsible for all other crimes committed in a single transaction that are in furtherance of the common purpose or plan. *See Barrett*, 343 N.C. at 174-76, 469 S.E.2d at 894-95.

The common plan here is one to obtain or facilitate the possession of cocaine. In the case at bar, there is substantial evidence that defendant knew Moore was a large scale drug dealer and had a substantial amount of drugs and money at his apartment. Defendant had gained Moore's trust by facilitating the sale of Moore's cocaine in the past, and as such, Moore would allow defendant to come to his apartment even though he had been previously robbed. The State presented testimony of Darren Wright, a convicted felon incarcerated with defendant, who said that defendant discussed details of the

crime with him. Wright testified that defendant and Russell met and "plotted" to rob Moore of his drugs and money and when Moore resisted Russell shot him. The two were startled and left the apartment without taking anything. Defendant admitted setting up the meeting between Moore and Russell when Russell was out on pretrial release for an armed robbery charge. And, when defendant arrived at Moore's apartment, defendant observed Moore bring out a large amount of cocaine to show Russell. He also saw that Moore had a gun near the TV. Finally, Moore's dying declaration to his girlfriend was that defendant "set him up." This evidence, taken in the light most favorable to the State, forms the basis that defendant and Russell acted together to possess, or attempt to possess, Moore's cocaine.

Defendant contends that evidence proffered by the State must support that he and Russell had a "common purpose" to actually commit the underlying felony; here, that he and Russell had a common purpose to traffic in cocaine by possession with a deadly weapon. This interpretation, however, is inapposite to our case law.

> The theory of acting in concert, as properly defined by the trial court, requires a common purpose to commit a crime. *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979). Thus, before the jury could apply the law of acting in concert to convict the defendant of the crime of assault with a deadly weapon with intent to kill inflicting serious injury, it had to find that the defendant and Lynch had a common purpose to commit *a* crime; it is not strictly necessary, however, that the defendant share the intent or purpose to commit the particular crime actually committed.

State v. Erlewine, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991), *overruling abrogated by State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997). Therefore, the requisite common purpose for acting in concert is not necessarily the intent to commit the crime charged, rather it is sufficient if the crime charged is a natural occurrence of, or flows from a common criminal purpose. *See id.*; *Westbrook*, 279 N.C. at 41-42, 181 S.E.2d at 586.

Defendant's next argument is that the State needed to prove he knew that Russell possessed a gun in order to be convicted of trafficking in cocaine with a deadly weapon under a concert of action theory. We disagree. There is no dispute that Russell did have a gun and did in fact shoot and kill Moore. Defendant's knowledge that Russell had a gun is irrelevant so long as Russell killed Moore while

possessing or attempting to possess the drugs in the apartment, which the State substantially established was defendant and Russell's common purpose. *See State v. Johnson*, 164 N.C. App. 1, 12, 595 S.E.2d 176, 182 (2004) (citing *Erlewine*, this Court stated: "[w]hether or not defendant was aware that a gun was going to be used during the robbery is immaterial to whether he intended to participate in the robbery . . . ."); *Barrett*, 343 N.C. at 174-76, 469 S.E.2d at 894-95.

Defendant also contends that even if he acted in concert with Russell to traffic in cocaine, the State's evidence was insufficient to prove that *Russell* had actual or constructive possession of the cocaine at or during the time Moore was shot, thereby supporting his motion to dismiss. We disagree. A person has constructive possession of an illegal substance "when he has both the power and intent to control its disposition or use, even though he does not have actual possession." *Garcia*, 111 N.C. App. at 640, 433 S.E.2d at 189 (internal quotations omitted). The evidence shows that when Russell wrestled Moore to the ground and shot him three times, he obtained dominion and control over Moore as well as the general area around him, including the cocaine in the kitchen. The fact that Moore was incapacitated before and not after the perfection of the underlying felony of trafficking with a deadly weapon is inconsequential, so long as the two acts—shooting and possession—occur "in a time frame that can be perceived as a single transaction." *See Trull*, 349 N.C. at 449, 509 S.E.2d at 192; *see also State v. Pakulski*, 319 N.C. 562, 571-72, 356 S.E.2d 319, 325-26 (1987) (felony murder still appropriate where the fatal shot occurred prior to the robbery of victim). The evidence in the light most favorable to the State shows that Moore was shot and killed within moments of Russell stepping into the apartment with the gun to complete his drug transaction. This is sufficient for a single transaction.

We have reviewed defendant's argument that the trial court's jury instruction in this case was improper because it allowed him to be convicted of felony murder even if he did not intend to commit the underlying felony. But as discussed earlier, this strict connection is not necessary in concert of action cases. Furthermore, the instructions in this case do not significantly vary from those approved in *Erlewine* and *Barnes*. *See Barnes*, 345 N.C. at 228, 481 S.E.2d at 68; *Erlewine*, 328 N.C. at 635-37, 403 S.E.2d at 285-86.

We are cognizant of the fact that on 18 August 2003 defendant might have intended nothing more than a drug transaction. And, as a result of his companion's actions, defendant now faces life in prison

without parole. But on a motion to dismiss, our review is complete if in the light most favorable to the State the evidence supports a reasonable inference of defendant's guilt; "it is for the [jurors] to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *Trull*, 349 N.C. at 447, 509 S.E.2d at 191. Here, the State met its burden, and the jury determined defendant was guilty beyond a reasonable doubt. We have reviewed defendant's remaining arguments and determined them to be without merit. Accordingly, we find no error in defendant's trial.

No error.

Judges McCULLOUGH and LEVINSON concur.

TONY CONNOR AND JEANNIE W. CONNOR, PLAINTIFFS-APPELLANTS v. DAVID R. HARLESS, SANDRA E. HARLESS, AND DAVID HUFFINE, TRUSTEE DEFENDANTS-APPELLEES

No. COA05-355

(Filed 7 March 2006)

1. Appeal and Error— appealability—second motion for summary judgment—different legal issues from prior motion

Plaintiffs' appeal from the 29 November 2004 order granting summary judgment to defendants is properly before the Court of Appeals because: (1) where a second motion for summary judgment presents legal issues different from those raised in the prior motion, such a motion is appropriate; and (2) defendants' first summary judgment motion revolved around the agreement not complying with the Statute of Frauds whereas the second motion, among other things, questioned whether there was mutual assent between the parties.

2. Contracts— breach—no certain and definite price—no mutual assent

The trial court did not err in a breach of contract to sell property case by granting summary judgment to defendants, because: (1) a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as

a result of future negotiations; (2) the price term was not certain and definite since no mechanism existed with the parties' agreement to address any potential price discrepancies when there were no additional provisions stating how to proceed if the two appraisals produced vastly different property values; (3) each plaintiff admitted by deposition that price was to be determined amongst the parties at a future date and defendants in their depositions agreed; and (4) there was no mutual assent between the parties as to the value of defendants' property, and thus, the purchase price to be paid.

Appeal by plaintiffs from order entered 29 November 2004 by Judge Jack A. Thompson in Brunswick County Superior Court. Heard in the Court of Appeals 2 November 2005.

Charles M. Tighe for plaintiffs-appellants.

Shipman & Wright, L.L.P., by Gary K. Shipman and William G. Wright, for defendants-appellees.

CALABRIA, Judge.

Tony ("Tony") and Jeannie ("Jeannie") Connor[1] (collectively known as "plaintiffs") appeal the 29 November 2004 order granting summary judgment to David ("David") and Sandra ("Sandra") Harless (collectively known as "Harless"), and David Huffine (collectively known as "defendants"). We affirm.

On 20 November 2000, plaintiffs and Harless entered into a written agreement under which Harless leased to plaintiffs 2.3 acres of real property located in Brunswick County at 2801 River Road S.E., Winnabow, North Carolina. Plaintiffs desired to "lease . . . and to operate for [their] own account [both a] general store/variety store and the premises upon which the store is located . . . ." Plaintiffs agreed to lease the property for a period of sixty months with an option to renew for an additional sixty month period and an option to purchase was included. Specifically, paragraph 20 of the written agreement, entitled "option to purchase," states:

"[a]t any time during the term of this lease or, upon termination of this lease, the lessee may at his option purchase said premises at a price of a fair market value, payable as follows: An amount in

1. Jeannie is the daughter of defendants David and Sandra, and her husband Tony is their son-in-law.

> cash fair market value at the time of such purchase (based on at least two appraisals) . . . ."

The purpose of this provision was to provide plaintiffs with an option to purchase the leased premises if defendants ever decided to sell.

On or about 1 March 2003, Tony spoke with David expressing their desire to exercise their option to purchase the leased property. During the next months, plaintiffs discovered one of the conditions required by the lender was a recent appraisal of the property. On or about 15 May 2003, Tony gave David a copy of an appraisal and repeated their desire to purchase the leased premises. According to the first appraisal, the estimated value of the property was $140,000.00.

On 3 July 2003 plaintiffs' attorney gave written notice to Harless that plaintiffs desired to exercise their option to purchase the leased premises. At this point, a second appraisal was commissioned by plaintiffs where the value of the property was determined to be $160,000.00. As part of the 3 July 2003 correspondence, plaintiffs claimed the purchase price as $150,000.00 (the average of the two appraisals employed) to be paid in full at the closing. Following receipt of the letter from plaintiffs, defendants dispatched a letter on 29 July 2003 stating "under no circumstances would they ever agree to sell their old store building and approximately 2.5 acres to their daughter . . . and their son-in-law.".

Plaintiffs filed suit on 1 August 2003 alleging defendants breached their contract to sell the property. Defendants moved for summary judgment on 8 April 2004 citing as grounds that plaintiffs' claims were barred by the Statute of Frauds. On 27 April 2004 Judge William C. Gore denied defendants' motion. Citing legal issues different from those raised in the first motion as well as two depositions taken subsequent to the 27 April 2004 order, defendants moved for summary judgment on 5 November 2004. On 1 December 2004, Judge Jack A. Thompson granted defendants' motion. Plaintiffs appeal.

[1] Initially, we note this appeal is properly before us. "Where a second motion [for summary judgment] presents legal issues . . . *different* from those raised in the prior motion, such [a] motion [is] appropriate." *Carr v. Carbon Corp.*, 49 N.C. App. 631, 635, 272 S.E.2d 374, 377 (1980) (emphasis added). In the instant case, defendants' first summary judgment motion revolved around the agreement not complying with the Statute of Frauds. Conversely, defendants' second

motion, among other things, questioned whether there was mutual assent between the parties. Questioning whether a price term was physically present in the agreement and whether that written price was the amount actually negotiated and agreed upon by the parties to the agreement, are different legal inquiries and as such, present different legal issues. Thus, we address the merits of the case.

[2] Plaintiffs first argue the trial court erred in granting summary judgment to defendants because evidence was produced from which a reasonable jury could determine that the parties intended to contract. We disagree.

Summary judgment is appropriate and "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "The party moving for summary judgment must establish . . . that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Branks v. Kern*, 320 N.C. 621, 623, 359 S.E.2d 780, 782 (1987). The movant can carry this burden "by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974). "All inferences are to be drawn against the moving party and in favor of the opposing party." *Branks*, 320 N.C. at 624, 359 S.E.2d at 782.

"It is essential to the formation of any contract that there be *mutual assent* of both parties to the *terms of the agreement* so as to establish a meeting of the minds." *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 550, 613 S.E.2d 322, 327 (2005) (quotation marks and citation omitted) (emphasis added). Further, "[m]utual assent is normally established by an offer by one party and an acceptance by the other, which offer and acceptance are *essential* elements of a contract." *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998) (emphasis added). Price, along with identification of the parties and the property to be sold, "are the *essential elements* of a contract." *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 600, 173 S.E.2d 496, 503 (1970) (emphasis added). Consequently, as to the essential and material contractual term of price, there must be a meeting of the minds.

"[A] contract is nugatory and void for indefiniteness if it leaves any material portions open for future agreement." *Currituck Assoc.*

Residential P'ship v. Hollowell, 166 N.C. App. 17, 27, 601 S.E.2d 256, 263 (2004), *aff'd*, 360 N.C. 160, 622 S.E.2d 493 (2005) (citation and internal quotation marks omitted). Consequently, "a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (citation omitted). In the instant case, once plaintiffs exercised the "option to purchase" provision in paragraph 20 of the agreement, the price to be paid was "[a]n amount in cash fair market value at the time of such purchase (based on at least two appraisals)." However, no mechanism existed within the agreement to address any potential price discrepancies. Specifically, there were no additional provisions stating how to proceed if the appraisals produced vastly different property values. Plaintiffs produced two appraisals that alone differed $20,000.00 in assessing the value of defendants' property. With no specification in the agreement as to how to address such greatly varying estimates in the value of defendants' property, the price term is not, as it must be, certain and definite. Moreover, each plaintiff admitted in their individual deposition that price was to be determined amongst the parties at a future date and the defendants, in their depositions, agreed. Here, there was no mutual assent between plaintiffs and defendants as to the value of the defendants' property and thus, the purchase price to be paid. " '[A] valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement.' " *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 326, 595 S.E.2d 759, 763 (2004) (quoting *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995)). Because there was no meeting of the minds as to the essential term of price, the agreement between plaintiffs and defendants is not an enforceable contract.

Since we conclude the agreement lacked mutual assent, we need not reach any of the plaintiffs' other arguments.

Affirmed.

Judges HUDSON and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 MARCH 2006

ARMSTRONG & ARMSTRONG, P.A. v. RHODES No. 05-146	Johnston (03CVS915)	Affirmed
BATTS v. BATTS No. 04-1044	Wilson (01CVS1375)	Affirmed
BEST v. MOODY No. 05-883	Wilson (04CVS416)	Affirmed
CONCORD ENG'G & SURVEYING, INC. v. FREEMAN No. 05-550	Cabarrus (04CVD976)	Affirmed
COOK v. ERECT ALL No. 05-861	Ind. Comm. (I.C. #276576)	Affirmed
COORDINATED HEALTH SERVS., INC. v. PRIMARY HEALTH CHOICE, INC. No. 05-783	Wake (03CVS14941)	Affirmed
DEPARTMENT OF TRANSP. v. ANDERSON No. 05-200	Lincoln (01CVS530)	Affirmed
DEUTSCHE BANK TR. CO. AMERICAS v. TRADEWINDS AIRLINES, INC. No. 05-854	Guilford (03CVS12215)	Appeal dismissed and remanded
HONACHER v. EVERSON No. 05-719	Rockingham (03CVS1334)	Affirmed
IN RE A.N.M No. 05-838	Haywood (04J35)	Affirmed
IN RE FORECLOSURE OF HUNT No. 05-178	Cleveland (03SP408)	Affirmed
IN RE J.G.B., J.A.M.B., L.W.B., & T.L.B. No. 05-590	Burke (04J35) (04J36) (04J37) (04J38)	Affirmed
IN RE J.N.C. No. 05-627	Wilkes (02J176)	Affirmed
IN RE S.L.G. & T.R.G. No. 05-458	Halifax (03J10) (03J11)	Affirmed

KLEBBA v. HARRAH'S N.C. CASINO CO. No. 05-749	Haywood (03CVS737)	Affirmed
MAHMOUD v. UNIVERSITY OF N.C. No. 05-806	Watauga (03CVS778)	Affirmed
McLAMB v. CARROLL'S FOODS, INC. No. 05-498	Ind. Comm. (I.C. #986526)	Affirmed
N.C. STATE BAR v. GILBERT No. 04-1013	Wake (02CVD4961)	Affirmed as to the dismissal of defendant's counterclaims; vacated and remanded as to plaintiff's claims
NATIONWIDE MUT. INS. CO. v. GASKILL No. 05-538	New Hanover (03CVS1299)	Affirmed
STATE v. AUTRY No. 05-839	Cumberland (03CRS59676)	No error
STATE v. BRAMMER No. 05-860	Bladen (04CRS51828)	Affirmed
STATE v. BROWN No. 05-17	Burke (02CRS50572)	No error; remanded for resentencing
STATE v. COLEMAN No. 05-716	Gaston (04CRS8587) (04CRS52339) (04CRS52341) (04CRS52344) (04CRS52345)	No error
STATE v. HAIRSTON No. 04-1620	Forsyth (03CRS60683) (03CRS31227)	No error
STATE v. HAMPTON No. 05-910	Catawba (05CRS1452) (05CRS1453)	Remanded
STATE v. HOLDER No. 05-414	Johnston (02CRS6247) (02CRS54284)	No error in part; remand for resentencing
STATE v. LITTLEJOHN No. 05-802	Henderson (04CRS52956) (04CRS52959)	No error
STATE v. LONG No. 05-778	Gaston (04CRS61036) (04CRS61037)	No error

STATE v. MAHONEY No. 05-417	Carteret (03CRS55145) (03CRS55314)	No error
STATE v. MARTIN No. 05-717	Guilford (03CRS98188) (03CRS98189)	No error
STATE v. MARTIN No. 05-579	Forsyth (04CRS54015) (04CRS16989)	No error in defendant's trial; no error in part with respect to judgment; remanded for resentencing on the issue of restitution only
STATE v. MOORE No. 05-848	Henderson (03CRS2282) (03CRS51662)	No error
STATE v. PEAN No. 05-647	Mecklenburg (03CRS249263) (03CRS249264) (03CRS249267) (03CRS249268) (03CRS249271)	No error in the trial, remanded for resentencing
STATE v. PRINGLE No. 05-747	McDowell (04CRS50534)	No error
STATE v. WANCIK No. 05-748	Beaufort (04CRS1944)	No error
SWINEY v. ARVIN MERITOR, INC. No. 05-913	Ind. Comm. (I.C. #189631)	Affirmed
VAUGHN v. VAUGHN No. 05-452	Harnett (03CVD372)	Vacated

STATE OF NORTH CAROLINA v. DONALD JOHN SCANLON, DEFENDANT

No. COA05-119

(Filed 7 March 2006)

1. Homicide— first-degree murder—defendant present at victim's death—evidence sufficient

There was sufficient evidence in a first-degree murder case for a jury to find beyond a reasonable doubt that defendant was present at the time of the victim's death.

2. Homicide— first-degree murder—sufficiency of evidence—cause of death

The State's evidence was sufficient to prove first-degree murder, and the trial court properly denied defendant's motion to dismiss, where the State's expert testified the cause of death was asphyxia (the victim was found with a plastic bag tied over her head) and that the manner of death was homicide, based on information from investigating officers about the scene. Neither the victim's past heart problems nor the traces of cocaine in her blood altered his opinion.

3. Burglary and Unlawful Breaking or Entering— permission to enter victim's home—revoked

The trial court did not err by not dismissing a felonious breaking and entering charge where defendant had had permission to enter the victim's home when he worked for her as a handyman, but had been evicted from the victim's home for stealing her credit cards and forging her checks.

4. Larceny— evidence sufficient—possession of credit cards

There was sufficient evidence for the trial court to deny defendant's motion to dismiss charges of felonious larceny and possession of a murder victim's credit cards.

5. Larceny— sufficiency of evidence—inference that deceased victim did not consent to use of vehicle

The trial court properly denied defendant's motion to dismiss charges of felonious larceny and possession of the victim's automobile where defendant admitted abandoning the victim's car in New Orleans and the jury could infer from the evidence that the victim did not consent to his use of the vehicle.

6. Criminal Law— verdict—stealing credit cards—consistency with indictment

There was no error where defendant contended the State failed to prove that he stole credit cards listed in the indictment but not specified in the verdict form or jury instructions. A verdict is deemed sufficient if it can be properly understood by reference to the indictment, evidence, and jury instructions, and a comparison of the indictment and jury instructions here reveals that they are consistent.

7. Larceny; Possession of Stolen Property— credit cards—duplicative judgments

The trial court erred by duplicating judgments for both larceny and possession of credit cards and an automobile. While a defendant may be charged with larceny, receiving, and possession of the same property, a defendant may be convicted for only one of those offenses.

8. Homicide— first-degree murder—refusal to instruct on involuntary manslaughter

There was no plain error in a first-degree murder prosecution in denying defendant's request to instruct the jurors on the lesser-included offense of involuntary manslaughter. A defendant is not entitled to have the jury consider a lesser offense when his sole defense is one of alibi; this defendant's sole and unequivocal defense was that he was not present at the time of death.

9. Homicide— first-degree murder—failure to instruct on death by accident—no plain error

There was no plain error in a first-degree murder prosecution where the court did not instruct the jury on death by accident. Although a defense expert testified that the victim died of sexual asphyxia, so that the judge should have instructed on accident, the outcome was not affected because defense counsel explained the accident theory in closing argument.

10. Criminal Law— reinstruction—abbreviated statement of elements—no error in context

There was no prejudicial error in a prosecution for first-degree murder where the jury asked for written copies of the elements of the offense, the court gave the jury a simplified element sheet for first-degree murder which excluded proximate causation, neither party objected when given the opportunity to do so,

and the court instructed the jury to put the simplified elements in the context of the charge. Assuming the instruction was improper, isolated erroneous portions of a charge will not alone afford grounds for reversal if the charge as a whole presents the law fairly and clearly.

11. Criminal Law— instructions—conversations with jury

The trial court did not err in a first-degree murder prosecution by not giving the jury written instructions about talking to witnesses or talking among themselves before deliberations. The court gave oral instructions; there is no requirement that they be in writing. N.C.G.S. § 15A-1236.

12. Evidence— hearsay—victim's statements about defendant—residual exception—sufficiency of findings

The trial court in a prosecution for first-degree murder made sufficient findings to support its admission of testimony by the victim's sister relating statements the victim made to her about defendant under the residual hearsay exception set forth in N.C.G.S. § 8C-1, Rule 804(b)(5). Although the trial court made insufficient findings for the admission of testimony by the sister about a statement made to the victim by a third party because the court made no findings as to the third party's unavailability and the reliability of her statement, the admission of such statement was not prejudicial error in light of the overwhelming evidence of defendant's guilt.

13. Evidence— hearsay—victim's statement about defendant—residual exception—sufficiency of findings

The trial court in a prosecution for first-degree murder made sufficient findings to support its admission of statements about defendant made by the victim to a probation officer and to law officers under the residual hearsay exception set forth in N.C.G.S. § 8C-1, Rule 804(b)(5).

14. Evidence— hearsay—victim's statements admitted through testimony of others—state of mind exception

The trial court did not err in a first-degree murder prosecution by admitting statements of the victim through other witnesses. They were admissible, at the least, to show state of mind.

15. Criminal Law— prosecutor's closing argument—not too inflammatory

A prosecutor's closing argument in a first-degree murder prosecution was not so inflammatory as to require the trial court to intervene ex mero motu where the prosecutor argued that defendant had attempted to sexually assault the victim's dead or dying body where evidence was presented that rape kit tests performed on the victim were negative for semen or recent sexual activity.

16. Criminal Law— prosecution's argument—alleged misrepresentations of evidence—not prejudicial

There was no prejudicial error in a first-degree murder prosecution as a result of the prosecutor's alleged misrepresentations of the significance of defendant's pubic hair found in the victim's bed.

17. Criminal Law— prosecutor's argument—characterization of evidence and witnesses

The bounds of permissible prosecutorial argument were not exceeded by an argument that the defense expert's testimony was "from another planet" and "actually cracks me up." Nor were the prosecutor's complimentary remarks about the State's witnesses, specifically the victim's family, so improper as to require ex mero motu intervention.

18. Criminal Law— prosecutor's argument—entry into victim's house

The prosecution in a first-degree murder prosecution properly argued its theory of a duplicate key used to gain entry of the victim's house where evidence was presented that there were no signs of forced entry and that defendant had entered the victim's house.

19. Criminal Law— prosecutor's argument—tampering with evidence—response to defense argument

The trial court did not abuse its discretion by not intervening ex mero motu in the prosecutor's closing arguments about tampering with the evidence. The State's argument was in response to a defense argument, defense counsel did not object or respond, and defendant failed to show prejudice.

20. Criminal Law— motion to remove district attorney's office—removal of evidence—no misconduct

The trial court in a first-degree murder prosecution did not abuse its discretion by denying defendant's motion to disqualify the district attorney's office as a result of the alleged removal of evidence from the police department property room and placement of the evidence in a locked closet in the prosecutor's office.

21. Criminal Law— motion to suppress evidence for prosecutorial misconduct—denied

The trial court did not err by denying a first-degree murder defendant's motion to suppress evidence based upon allegations of professional misconduct by prosecutors.

22. Criminal Law— discussions with jury—mistrial denied

The trial court did not err in a first-degree murder prosecution by denying defendant's motion for a mistrial based on improper jury discussions where there was testimony of two jurors discussing the case outside the courtroom and some evidence that a juror was laughing and talking with a family member of the victim. The court found no substantial or irreparable prejudice to defendant's case.

23. Criminal Law— motion for appropriate relief—prosecutor's misrepresentation of the evidence—defense failure to correct

There was no error in denying a first-degree murder defendant's motion for appropriate relief based on the State's misrepresentation of the evidence and minimization of the life-threatening nature of the victim's medical condition. Defense counsel testified that he had access to the same evidence as the prosecution, but failed to use the information to correct the alleged misrepresentations made by prosecuting witnesses and by the prosecutor.

24. Criminal Law— false evidence—not intentionally misleading—new trial denied

There was no error in denying a first-degree murder defendant's motion for a new trial based on a family member's alleged misrepresentation of the victim's disability status. There was competent evidence to support the trial court's finding that the testimony was not intentionally misleading.

25. Constitutional Law— effective assistance of counsel—defense strategy

The trial court did not err by denying a first-degree murder defendant's motion for a new trial based on ineffective assistance of counsel. Trial counsel's decision to pursue a particular defense strategy cannot be second-guessed on appeal.

Appeal by Defendant from judgment and order entered 9 June 1998, and 25 February 2004, respectively, by Judge Ronald L. Stephens in Superior Court, Durham County. Heard in the Court of Appeals 15 November 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Barry McNeill, for the State.

Staples Hughes, Appellate Defender, and Janet Moore, Assistant Appellate Defender, for the defendant-appellant.

WYNN, Judge.

This appeal arises from Defendant Donald John Scanlon's convictions of first-degree murder, felonious breaking and entering, and felonious larceny and possession. In his appeal, Defendant presents multiple issues challenging the fairness of his trial. After carefully reviewing his appeal, we conclude that Defendant received a trial free of prejudicial error, except that we vacate Defendant's felonious possession charges as being duplicitous with his convictions for felonious larceny.

The facts pertinent to this appeal indicate that: Defendant worked for Claudine Wilson Harris as a handyman from October 1995 through January 1996. Defendant lived at Ms. Harris' residence until she discovered that he had been misusing her credit cards and forging checks on her checking account. After Ms. Harris evicted Defendant from her home and sought to take out warrants against him, Defendant threatened to kill her. Ms. Harris told her sister, Barbara Breeden, that she feared that Defendant had a key to her home and she felt that she should have the locks changed. Ms. Harris never changed the locks to her residence; however, as a result of her fears for her own safety, Ms. Harris' nephew, Carlos Breeden, and his girlfriend came to live with her at the end of January 1996.

At around 9:00 p.m. on 27 February 1996, Carlos Breeden found Ms. Harris' body in her bed with a plastic bag wrapped around her

head and tied in a knot. Ms. Harris' sweatshirt was pushed up, revealing her underclothes, and her sweat pants and under pants were partially pulled down. Near her bed was a soup can punched with holes, described as a pipe for smoking controlled substances, and a torn-up letter to Defendant expressing her feelings for him. A toxicology report revealed that she had cocaine metabolites in her blood.

On 10 March 1996, authorities arrested Defendant in Syracuse, New York (on unrelated charges) and found in his possession several of Ms. Harris' credit cards, as well as a blank check from Ms. Harris' business checking account. The arresting officers also seized pieces of paper containing Ms. Harris' address, date of birth, social security number, and her First Union checking account number. Meanwhile, in New Orleans, where Defendant admittedly abandoned Ms. Harris' car a few days before, police officers found three keys in the car, none of which fit the lock to Ms. Harris' home.

On 18 March 1996, a Durham County Grand Jury returned true bills of indictment charging Defendant with the first-degree murder of Ms. Harris, felonious breaking and entering of her residence, and felonious larceny and possession of certain credit cards and an automobile belonging to her. Defendant was tried at the 7 May 1998 Criminal Session of Superior Court, Durham County before Judge Ronald L. Stephens.

At trial, Dr. Robert Thompson, the forensic pathologist who supervised the autopsy of Ms. Harris, testified that the cause of her death was asphyxiation. Dr. Thompson further testified that the manner of Ms. Harris' death was homicide based upon information he received from investigating police officers, including that she was found in her bed at home with a plastic bag wrapped and tied around her head; sheets and blankets were piled on top of her body on the bed; certain items in her house had been disturbed; and, her car had been stolen.

Dr. Lawrence Harris, the defense forensic pathologist, testified that Ms. Harris died of a cocaine-induced coronary blockage during attempted sexual asphyxiation. He based this opinion on the plastic bag, cocaine metabolites, "new clots" blocking the bypass artery in Ms. Harris' heart, her disarranged clothing, and the round bed where her body was discovered. On cross-examination, Dr. Harris admitted that he never reviewed Ms. Harris' medical records or spoke to her doctor prior to testifying. He also testified on cross-examination regarding evidence showing that Ms. Harris was found underneath

a "mountain of covers" with a plastic bag wrapped and tied in a knot around her head that "[s]omeone else did that. I don't believe she did that."

The State further presented evidence to show that Defendant's DNA was found on a cigarette butt in one of the rooms upstairs, near Ms. Harris' bedroom. Carlos Breeden testified that the cigarette butt was not present on 25 February 1996, the day before the State contends Ms. Harris was murdered. The State presented other forensic evidence, including head hair microscopically consistent with Defendant's found on the bed comforter and pillow case on the bed where Ms. Harris' body was discovered, and one of Defendant's pubic hairs on a bed cover near Ms. Harris' body.

On 3 June 1998, the jury returned verdicts finding Defendant guilty on all charges. At the sentencing phase, the jury returned its recommendation that Defendant be sentenced to death, and Judge Stephens entered the judgment accordingly. Defendant gave notice of appeal in open court, and the Office of the Appellate Defender was appointed to represent Defendant on the direct appeal to the Supreme Court of North Carolina.

On 5 May 2000, Defendant filed a Motion for Appropriate Relief in the Supreme Court, arguing that the prosecutors at trial made numerous misrepresentations that minimized the severity of Ms. Harris' medical condition, despite her medical records showing a history of complaints and treatment for anxiety and depression before her death. In addition, Defendant alleged that the medical records showed Ms. Harris' heart condition was complicated by a number of apparent risk factors, such as smoking, hypertension, and a family history of heart disease; that Ms. Harris sought emergency treatment for chest pain or labored breathing on several occasions in the months before her death; and that Ms. Harris had one emergency hospitalization just "weeks before her death." As a second independent claim for relief, Defendant alleged that he received ineffective assistance of counsel from his trial attorneys because his counsel had access to Ms. Harris' medical records before trial, but neither presented the records to any medical expert for review, nor corrected the prosecutors' alleged misrepresentations about Ms. Harris' medical conditions, nor "brought the truth to the attention of either the Medical Examiner or Defendant's capital jury."

On 15 June 2000, the Supreme Court entered an order remanding Defendant's Motion for Appropriate Relief to Superior Court, Durham

County for an evidentiary hearing. *State v. Scanlon*, 352 N.C. 155, 544 S.E.2d 241 (2000). The order further directed the trial judge at the evidentiary hearing to make findings of fact and conclusions of law, and to transmit the resulting order to the Supreme Court so that Court could "proceed with the appeal or enter an order terminating the appeal."

At the evidentiary hearing in October and November 2002, the trial court heard testimony from several expert witnesses regarding the severity of Ms. Harris' heart condition at the time of her death and expert testimony on the likelihood that the manner of Ms. Harris' death was suicide, accident or homicide. Brian Aus and David Castle, the attorneys that represented Defendant during the guilt/innocence and sentencing phases of his criminal proceedings, also testified about the defense strategy utilized in representing Defendant.

On 25 February 2004, Judge Stephens filed a Memorandum Opinion and Order making findings of fact and conclusions of law granting Defendant a new capital sentencing proceeding due to ineffective assistance of counsel at the sentencing phase of his trial, but denying Defendant relief as to the guilt/innocence phase of his trial. Subsequently, Defendant filed a Renewed Request for Reversal of Judgments and Dismissal of Charges or New Trial and Alternative Motion for Amendment of Appellate Record, Expedite Briefing and New Oral Argument in the Supreme Court. The Supreme Court denied Defendant's motions for dismissal of charges and for a new trial, *State v. Scanlon*, 358 N.C. 549, 600 S.E.2d 463 (2004), and also denied Defendant's motion for expedited rebriefing and new oral argument "without prejudice to refile in the appellate court division after resentencing." *State v. Scanlon*, —— N.C. ——, 600 S.E.2d 463 (2004).

On 23 August 2004, the State elected not to seek the death penalty against Defendant pursuant to its discretion under section 15A-2004(d) of the North Carolina General Statutes, and the trial court resentenced Defendant to life imprisonment without parole. Defendant appeals the judgments for first-degree murder, felonious breaking and entering, and felonious larceny and possession. Defendant also appeals the trial court's order denying him a new trial due to prosecutorial misconduct and ineffective assistance of counsel.

[1] In his first argument on appeal, Defendant contends the trial court erred in denying his motion to dismiss the first-degree murder charge because there was insufficient evidence to prove beyond a

reasonable doubt he was (1) present when Ms. Harris died, (2) responsible for her death, and (3) committed premeditated, deliberate murder. Defendant's argument is without merit.

The test for sufficiency of the evidence in a criminal case is whether there is substantial evidence of all elements of the offense charged that would allow any rational trier of fact to find beyond a reasonable doubt that the defendant committed the offense. *State v. Richardson*, 342 N.C. 772, 785, 467 S.E.2d 685, 692 (1996). Substantial evidence is that relevant evidence which a reasonable mind would accept as sufficient to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449, 439 S.E.2d 578, 585 (1994) (citation omitted). The evidence "must be viewed in a light most favorable to the State, and the State is to receive any reasonable inference that can be drawn from the evidence." *Id.*

To convict a defendant of first-degree murder, the State must prove the following elements (1) the unlawful killing of another human being; (2) with malice; and (3) with premeditation and deliberation. *State v. Haynesworth*, 146 N.C. App. 523, 527, 553 S.E.2d 103, 107 (2001).

Defendant argues the State failed to prove beyond a reasonable doubt that Ms. Harris died in the narrow time frame when Defendant could have been present. The record shows that Ms. Breeden testified that she last spoke with her sister at 1:00 p.m. on 26 February 1996. The State also submitted a receipt at trial, revealing that Defendant used Ms. Harris' Exxon credit card at 3:33 p.m. on 26 February 1996, at a gas station near her home. Thereafter, the evidence shows that Defendant traveled throughout the Southeast in Ms. Harris' car, using various credit cards belonging to her. This evidence tends to support the State's theory that Defendant had the opportunity to murder Ms. Harris some time in the afternoon of 26 February 1996.

Although the State's expert testified that Ms. Harris died "twelve to twenty-four hours" from the time of the autopsy performed on Wednesday, 28 February 1996, at 10:00 a.m., he later testified that Ms. Harris could have died on the early afternoon of 26 February 1996, when Defendant was present in Durham. Dr. Harris, Defendant's expert, also testified on cross-examination that "[g]iven that it was February, and I understand that the window was open, she was under bed clothes . . . I think she was dead from [26 February 1996]."

Moreover, the State presented evidence of Defendant's DNA on a cigarette butt in Ms. Harris' house, which Carlos Breeden testified

was not present in the house on Sunday, the day before the State contends Defendant murdered Ms. Harris. Defendant also pawned a gold ring similar to a ring belonging to Carlos at a Durham pawn shop at 4:12 p.m. on 26 February 1996. Finally, the State presented evidence to show that Defendant admitted that he abandoned Ms. Harris' car in New Orleans and, when he was arrested in Syracuse, he possessed of several of her credit cards. Based on this evidence, we conclude that the State presented sufficient evidence to allow a jury to find beyond a reasonable doubt that Defendant was present at the time of Ms. Harris' death.

[2] Defendant next challenges the sufficiency of the State's evidence to prove homicide, and that Defendant committed premeditated, deliberate murder. The record reveals that the State's expert, Dr. Thompson, testified that the cause of Ms. Harris' death was asphyxia and that the manner of death was homicide. Dr. Thompson based his opinion as to the manner of death on information provided by investigating police officers tending to show that Ms. Harris was found in bed at her home with a plastic bag wrapped around her head and tied around the neck, covered up by bed clothes; and that the house was locked, but things had been disturbed inside the house and her car was stolen. Ms. Harris' past coronary by-pass and heart problems did not change Dr. Thompson's opinion of the cause of death as asphyxia, nor did the traces of cocaine metabolites in Ms. Harris' blood.

As it relates to evidence presented at trial that Defendant committed the murder with a specific intent to kill formed after premeditation and deliberation, Ms. Breeden testified that Ms. Harris told her that Defendant said he was going to kill her "if she didn't stop blaming him for stealing the money and her credit cards." Viewing this evidence in the light most favorable to the State, we conclude the trial court properly denied Defendant's motion to dismiss the first-degree murder charge. Accordingly, Defendant's assignment of error is without merit.

[3] Defendant next argues the trial court erroneously denied his motion to dismiss the felonious breaking and entering and the felonious larceny and possession charges.

To prove a defendant guilty of felonious breaking and entering, the State must present evidence to prove the defendant (1) breaks or enters; (2) without consent of the owner; (3) a building; (4) with the intent to commit larceny therein. N.C. Gen. Stat. § 14-54(a) (2005); *State v. Boone*, 297 N.C. 652, 655, 256 S.E.2d 683, 685 (1979).

Defendant contends the State failed to prove that Ms. Harris did not give consent to him entering her home. Although Ms. Harris gave Defendant permission to enter her home on previous occasions, Ms. Breeden testified that Ms. Harris had evicted Defendant from her home some time in January 1996, because he had been stealing her credit cards and forging her checks. Moreover, the State presented evidence to show that Ms. Harris had complained to police about Defendant's unauthorized use of her credit cards. We hold that a reasonable juror could infer from the evidence showing that Ms. Harris evicted Defendant from her home, and reported that Defendant was forging checks and stealing her credit cards, that she did not consent to him entering her home or to the use of her credit cards on 26 February 1996. Thus, when the evidence is viewed in the light most favorable to the State, we conclude that the trial court did not err in denying Defendant's motion to dismiss the felonious breaking and entering charge.

[4] We also reject Defendant's argument that the trial court erred in denying his motion to dismiss the felonious larceny and possession charges. To prove larceny and possession, the State must prove the defendant (1) took personal property belonging to another; (2) and carried it away; (3) without the consent of the possessor; (4) with the intent to deprive the possessor of its use permanently; and (5) knowing that the taker was not entitled to it. N.C. Gen. Stat. § 14-72 (2005). In addition, for the larceny and possession of the credit card to be classified as a felony, the State must prove the defendant committed the larceny pursuant to a breaking or entering of a building. N.C. Gen. Stat. § 14-72(b)(2). To classify the larceny and possession of the automobile as a felony, the State must prove the value of the automobile was greater than $1,000.00. N.C. Gen. Stat. § 14-72(a).

In this case, when Defendant was arrested in Syracuse after leaving a trail of forged credit card receipts signed "C.W. Harris" throughout the Southeast, Defendant was found in possession of Ms. Harris' Visa, Sears, Exxon, and Best credit cards. At trial, the State presented evidence to show that Ms. Harris had complained to police about the forged checks by Defendant and his unauthorized use of her credit cards, stating that her credit cards would disappear overnight and then reappear the next day. There is no evidence in the record that Defendant had been authorized to use any credit card other than Ms. Harris' Lowe's or Home Depot credit cards. In viewing this evidence in the light most favorable to the State, we hold there was sufficient evidence for the trial court to deny Defendant's motion

to dismiss the charges of felonious larceny and possession of Ms. Harris' credit cards.

[5] As it relates to the felonious larceny and possession of Ms. Harris' automobile, we again find there was sufficient evidence in the record for the State to withstand Defendant's motion to dismiss. Defendant admittedly abandoned Ms. Harris' car in New Orleans. A jury could infer from the testimony regarding Ms. Harris' evicting Defendant, reporting him for forging her checks and reporting him for using her credit cards, that she did not consent to him using her vehicle on 26 February 1996. Thus, when the evidence is viewed in the light most favorable to the State, the trial court properly denied Defendant's motion to dismiss the felonious larceny and possession of automobile charges. We, therefore, reject Defendant's assignments of error.

[6] Defendant also contends the State failed to prove that he stole the specific credit cards listed in the indictment, but not specified in the verdict form or jury instructions. However, our "statutes do not specify what constitutes a proper verdict sheet[,] . . . [n]or have our Courts required the verdict forms to match the specificity expected of the indictment." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240-41 (2002). A verdict is deemed sufficient if it "can be properly understood by reference to the indictment, evidence and jury instructions." *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986), *aff'd*, 319 N.C. 392-93, 354 S.E.2d 238-39 (1987) (per curiam). With regard to the challenged jury instructions, a comparison of the indictment and the jury instructions on the larceny and possession of the credit cards reveals that they are consistent. *See State v. Kornegay*, 313 N.C. 1, 32, 326 S.E.2d 881, 903 (1985) (holding there is no fatal variance between the indictment and jury instructions where a comparison between the language of the indictment and the jury instructions on the charges reveals they are entirely consistent). Thus, Defendant's assignment of error is without merit.

[7] Defendant next contends the trial court erred by duplicating judgments on larceny and possession for the credit cards and the automobile. We agree, and note that the State failed to address this argument in its brief which leads us to conclude that the State acknowledges that the law in North Carolina supports Defendant's contention on this issue.

While a defendant may be charged with larceny, receiving, and possession of the same property, a defendant may only be convicted

for only one of those offenses. *State v. Perry*, 305 N.C. 225, 236-37, 287 S.E.2d 810, 817 (1982). In *Perry*, our Supreme Court stated:

> The prosecutor may of course go to trial against a single defendant on charges of larceny, receiving, and possession of the same property. However, having determined that the crimes of larceny, receiving, and possession of stolen property are separate and distinct offenses, but having concluded that the Legislature did not intend to punish an individual for receiving or possession of the same goods that he stole, we hold that, though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses.

Id.

In the case *sub judice*, the jury found Defendant guilty of felonious larceny and possession of Ms. Harris' automobile and credit cards. Under *Perry*, while Defendant could be indicted and tried on both charges, he can be convicted only on one charge to avoid double jeopardy. *See id.* Because Defendant was convicted on both charges, we vacate Defendant's additional convictions for possession of the automobile and the credit cards. *See State v. Andrews*, 306 N.C. 144, 148, 291 S.E.2d 581, 584 (1982).

[8] In his next assignment of error, Defendant contends the trial court committed plain error in denying his request to instruct the jurors on the lesser-included offense of involuntary manslaughter. Defendant argues that the jury may have concluded that he was, indeed, present at the time of Ms. Harris' death, but that there was no premeditation or deliberation or malice aforethought. Defendant's argument is without merit.

A defendant is not entitled to have the jury consider a lesser offense when his sole defense is one of alibi. *State v. Corbett*, 339 N.C. 313, 335, 451 S.E.2d 252, 264 (1994). Indeed, our Supreme Court has held:

> where a defendant's sole defense is one of alibi, he is not entitled to have the jury consider a lesser offense on the theory that jurors may take bits and pieces of the State's evidence and bits and pieces of defendant's evidence and thus find him guilty of a lesser offense not positively supported by the evidence.

Id. Here, Defendant's sole and unequivocal defense was that he was not present at the time of death. Because Defendant's only defense to

the murder charge was that he was not present at the time of Ms. Harris' death, the trial court did not err in failing to submit an involuntary manslaughter instruction to the jury.

[9] Defendant next contends the trial court committed plain error by failing to instruct the jury concerning death by accident as it relates to the first-degree murder charges.

It is the duty of the trial court to instruct the jury on all of the substantive features of a case notwithstanding the absence of a request by one of the parties for a particular instruction. *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988). Our Supreme Court has held, "[a]ll defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Id.* (citations omitted).

In this case, Dr. Harris, an expert for the defense, testified that Ms. Harris died of a heart attack in association with cocaine use and oxygen deprivation. Dr. Harris' "sexual asphyxia" theory of the case was such as to warrant the defense of accident, a substantive feature arising upon the evidence presented. Accordingly, even in the absence of a specific request therefore, the trial judge was duty bound under our case law to instruct the jury on the accident defense. However, we must further determine whether the trial court's error rises to the level of plain error.

"[T]o reach the level of 'plain error' . . ., the error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). Here, the trial judge's omission of the instruction on death by accident does not rise to the level of plain error. Defendant's counsel explained the accident theory in his closing argument to the jury, noting that the defense did not have to prove that Ms. Harris' death was an accident. Thus, even if the trial judge had given the admittedly called-for instruction on death by accident, we conclude that the presence of the death by accident instruction would not have affected the outcome. Accordingly, Defendant's assignment of error is without merit.

[10] Defendant next contends the trial court erroneously reinstructed the jury on the elements of first-degree murder by providing to the jury an inaccurate four-point list.

Preliminarily, we note that Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure states that "[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[.]" N.C. R. App. P. 10(b)(2). Because Defendant concedes that he did not object to the trial court's instructions, our review of Defendant's contention is limited to plain error. *See* N.C. R. App. P. 10(c)(4).

A review of the record reveals that after the trial judge verbally instructed the jury on each element of the first-degree murder charge, the jury requested written copies of the provable elements of each of the charges against Defendant. The Court asked whether either party had any objections to giving the jury a simplified form of the elements without any explanation. Neither party objected. The trial court told the jury that he would grant their request for a simplified form, but emphasized, ". . . I will remind you now, you will need to put [the simplified elements] in the context of the charge that I gave you, too, because I'm not going to go through in what I give you and expand upon what each of those things, in fact, meant."

The following morning, the trial judge provided the jury with a simplified element sheet for first-degree murder which provided:

FIRST DEGREE MURDER

Elements:

(1) an unlawful killing (with a deadly weapon)

(2) Of another living human being

(3) with Malice

(4) And with a specific intent to kill formed after premeditation and deliberation.

Defendant contends that this list, which was the last word guiding the jury's deliberations, eliminated the element of proximate causation; collapsed the separate elements of intent, premeditation, and deliberation; and, therefore, reduced the State's burden of proof. Defendant's contention is without merit.

Although the element sheet for first-degree murder excludes proximate causation, we do not interpret this instruction as reducing the State's burden of proof. The trial court previously explained these elements correctly to the jury and offered to further instruct the jury if they had questions about the required proof for the charges against

Defendant. Indeed, our Supreme Court has held, "[i]f the [jury] charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal." *State v. Chandler*, 342 N.C. 742, 751-52, 467 S.E.2d 636, 641 (1996) (citation omitted). Even assuming *arguendo* that portions of these instructions were improper, we cannot conclude that a reasonable probability exists that the jury would have reached a different result. Thus, Defendant's assignment of error is rejected.

[11] Defendant next contends the trial court erroneously failed to give written cautionary instructions to the jury under North Carolina General Statute section 15A-1236. We disagree.

Section 15A-1236 mandates cautionary instructions to jurors about talking to witnesses or discussing the case among themselves until deliberations begin. N.C. Gen. Stat. § 15A-1236 (2005). Here, the trial judge verbally gave cautionary instructions to each individual juror, and, at other times during jury selection, the trial judge gave cautionary verbal instructions to the *venire*. Because Defendant cites to no proposition of law to support his assertion that the trial court must give *written* instructions to the jury, and our independent research reveals no such requirement, Defendant's assignment of error is overruled.

[12] Defendant next argues that the trial court erred by overruling his objections to inadmissible hearsay testimony given by several State witnesses under N.C. R. Evid. 804(b)(5).[1]

Rule 804(b)(5) of the North Carolina Rules of Evidence allows the introduction of a hearsay statement where, even though the statement is not covered by a specific exception, the statement's declarant is unavailable and the statement possesses "circumstantial guarantees of trustworthiness" equivalent to other hearsay exceptions. *See* N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2005). To allow the admission of a hearsay statement under this "residual" exception, the trial court must find that the declarant is unavailable. *State v. Triplett*, 316 N.C. 1, 8, 340 S.E.2d 736, 740 (1986). Thereafter, the trial court must determine:

1. We note that the hearsay statements Defendant contends were erroneously admitted into evidence at trial are non-testimonial. Thus, we need not address any *Crawford* implications in our analysis of these hearsay statements. *See Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004) ("[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[.]").

> (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
>
> (2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);
>
> (3) That the statement possesses 'equivalent circumstantial guarantees of trustworthiness';
>
> (4) That the proffered statement is offered as evidence of a material fact;
>
> (5) Whether the hearsay is 'more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means'; and
>
> (6) Whether 'the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence.'

State v. Ali, 329 N.C. 394, 408, 407 S.E.2d 183, 191-92 (1991) (quoting *Triplett*, 316 N.C. at 9, 340 S.E.2d at 741) (alterations in original). To determine whether a hearsay statement possesses the requisite "equivalent circumstantial guarantees of trustworthiness," the trial court considers:

> (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability.

State v. Nichols, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988) (citation omitted). "The trial court should make findings of fact and conclusions of law when determining if an out-of-court hearsay statement possesses the necessary circumstantial guarantee of trustworthiness to allow its admission." *State v. Swindler*, 339 N.C. 469, 474, 450 S.E.2d 907, 910-11 (1994) (citation omitted).

In this case, Defendant contends that the trial court erred in allowing Ms. Breeden to testify about conversations she had with her sister about Defendant, including that he was living at a homeless shelter; stealing and forging her checks; causing her checks to bounce; and fraudulently using her credit card. Defendant further argues that Ms. Breeden's testimony that Ms. Harris had taken warrants out against him should have been excluded as in-

admissible hearsay, as well as, Ms. Breeden's statement that Ms. Harris told her that Kim Senter said Defendant made a duplicate key to her house.

The record reveals that before Ms. Breeden's testimony about conversations she had with Ms. Harris, the State gave the Court notice pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) and under *Triplett*. The trial court noted that it had reviewed the notices and, as opposed to recalling Ms. Breeden to the stand on *voir dire*, it allowed the State to proffer the notices as the substance of what Ms. Breeden's expected testimony would be. Defendant objected on grounds that there were no dates, times, or circumstances in which the statements were made, and also because there was no indication that Ms. Harris had personal knowledge of the facts in the statements. Defendant also objected to the double hearsay of Senter's statement that Defendant had a key to Ms. Harris' house.

Subsequent to arguments by counsel for both parties, the trial court made the following findings:

> The Court does make findings that the statement is offered as evidence of a material fact, and the statement is more probative on performance offered, for which it's offered, than any other evidence which the proponent can produce through reasonable efforts. And the general purposes of these rules of evidence in the interest of justice will be served by the admission of this statement.
>
> The Court does find that the statement was given under circumstances in which it is not only probative but has trustworthiness and has the—was given under circumstances under which it has the circumstantial guarantee of trustworthiness that would be required of an otherwise hearsay statement.
>
> So based upon these findings, the Court is going to deny the defendant's motion to suppress these statements and will allow the State to proceed forward with the asking of these questions and the giving of these answers.

We conclude the trial court made sufficient findings under *Triplett* to admit Ms. Harris' statements through Ms. Breeden, with the exception of Ms. Breeden's testimony that Ms. Harris told her that Senter said that Defendant made a duplicate key to her home. Because the trial court failed to make any findings as to Ms. Senter's

availability to testify and the reliability of her statements, we conclude the trial court erred in allowing Ms. Breeden to testify to those statements.

Notwithstanding, not every constitutional violation necessarily requires a new trial. N.C. Gen. Stat. § 15A-1443(b) (2005). Instead, where the State demonstrates that the constitutional violation was "harmless beyond a reasonable doubt," the error is deemed non-prejudicial, and reversal of a conviction is not required. *State v. Morgan*, 359 N.C. 131, 156, 604 S.E.2d 886, 901 (2004), *cert. denied* —– U.S. —–, 163 L. Ed. 2d 79 (2005). Our courts have previously concluded that "the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (citation omitted); *State v. McKeithan*, 140 N.C. App. 422, 432, 537 S.E.2d 526, 533 (2000), *disc. review denied and appeal dismissed*, 353 N.C. 392, 547 S.E.2d 35 (2001). After reviewing the record in this case, we conclude that the trial court's error in admitting Ms. Breeden's testimony regarding the duplicate key does not necessitate reversal of Defendant's conviction. *See State v. Champion*, 171 N.C. App. 716, 723, 615 S.E.2d 366, 372 (2005).

[13] Defendant next contends the trial court erred in admitting Ms. Harris' statements to probation officer Arnold Foy. We disagree.

The trial court ruled:

> COURT: All right. The Court is going to find that testimony by Arnold Foy will be allowed in regards to statements made by Ms. Harris to Arnold Foy, the substance of which appears in this notice of intent under Rule 804(b)(5), that appears of record, filed the 30th of March, 1998 by the prosecution giving notice to the defendant, through counsel of the intention to offer this evidence as an exception to the hearsay rule under the Evidence Rule 804, wherein the declarant is unavailable. The Court will find that this does, in fact, meet the exception of Rule 804(b)(5) and finds from what's proffered that the requirements of 804(b)(5) have been met and that the interest of justice would allow and require the admission of this evidence and will allow the admission of this evidence and will allow the witness to testify in regards to statements of Ms. Harris.

Because the trial court made sufficient findings under *Triplett* to admit the testimony of Officer Foy, we conclude the trial court did

not err in allowing Officer Foy to testify as to statements Ms. Harris made to him.

Similarly, with regard to the testimony of the various investigating officers to whom Ms. Harris complained about Defendant forging checks and fraudulently using her credit cards, the trial court ruled as follows:

> And in regards to each of the last witnesses who testified, [Officers] Grissom, Page, Rose, McDowell, O'Brien, and now Officer Calvin Smith, we will note that the Court has given the defendant a continuing objection to hearsay testimony. And from time to time, the defendant, through counsel has objected but the Court has noted objections to each of these witnesses' testimony in regards to anything said by Ms. Harris to these witnesses.
>
> The Court does find that there were notices of intention under Rule 804(b)(5) in regards to each of these witnesses. And the Court has overruled each of the objections of counsel on behalf of the defendant, to the testimony in regards to hearsay testimony by Ms. Harris to these witnesses.

We conclude the trial court made sufficient findings under *Triplett* and did not err in allowing the other investigating officers testify as to statements Ms. Harris told them.

[14] Finally, as it relates to the testimony of Carlos Breeden, Ed Hicks, and Barbara Royster, we conclude the trial court did not err in the admission of Ms. Harris' statements through these witnesses. Even if these statements were improperly admitted under Rule 804(b)(5), they were admissible under Rule 803(3), which allows a trial court to admit hearsay to show Ms. Harris' state of mind. *See State v. Burke*, 343 N.C. 129, 145, 469 S.E.2d 901, 908 (1996) (hearsay statements that the victim had been threatened by defendant showed victim's state of mind and relationship with the defendant); *State v. Jones*, 337 N.C. 198, 209, 446 S.E.2d 32, 38 (1994) ("evidence tending to show the state of mind of the victim is admissible as long as the declarant's state of mind is relevant[.]" (citation omitted)). Accordingly, all of Defendant's assignments of error relating to the trial court's admission of inadmissible hearsay are without merit.

[15] In his next assignment of error, Defendant argues that the State's improper guilt-phase closing arguments suggesting that he had attempted to sexually assault Ms. Harris' dead or dying body rendered

his trial unfair and unreliable in violation of due process, requiring a new trial under *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994). We disagree.

"In both the guilt-innocence and the sentencing phases of a capital trial, counsel is permitted wide latitude in his argument to the jury. He may argue the facts in evidence and all reasonable inferences therefrom as well as the relevant law." *Id.* at 15, 442 S.E.2d at 42 (citations omitted). Counsel's argument is proper where counsel argues the law, the facts in evidence, and all reasonable inferences to be drawn therefrom. *State v. Shank*, 327 N.C. 405, 407, 394 S.E.2d 811, 813 (1990). Moreover, where a defendant fails to object to the closing argument by the prosecutor, our Supreme Court has held that the trial court is required to intervene *ex mero motu* only if the remarks are grossly improper. *State v. Hill*, 311 N.C. 465, 472, 319 S.E.2d 163, 168 (1984).

In this case, the prosecutor argued in closing that Defendant's hair on Ms. Harris' bedding, including a pubic hair on a bedcover "right near her pubic area," showed a sex attempt at the time of death. However, testimony had already been presented to the jury to show that a rape kit was performed on Ms. Harris and the results were negative for any kind of semen or recent sexual activity. We therefore conclude that the prosecutor's closing arguments were not so inflammatory as to require the trial court to intervene *ex mero motu*. *See Hill*, 311 N.C. at 472, 319 S.E.2d at 168. Thus, Defendant's assignment of error is without merit.

[16] In his next assignment of error, Defendant contends that the prosecutor misrepresented to the jury in his closing argument that Defendant's hair was deposited at the time of Ms. Harris' death, that Defendant was there when she died, and that the pubic hair was "near Ms. Harris' pubic area[.]" Defendant argues that because the trial court ruled that the hair samples did not prove that Defendant was present when Ms. Harris died and Defendant's pubic hair was found on bedding found behind Ms. Harris' body, not near her pubic area, the prosecutor's statements were unfairly prejudicial and entitle him to a new trial. A review of the record reveals that before the prosecutor's alleged misrepresentations about the significance of Defendant's hairs, Special Agent Gregory had testified that it could not be determined when Defendant's hairs were deposited on the bed. Furthermore, there were several instances at trial where the jury was informed exactly where Defendant's pubic hairs were found as it relates to Ms. Harris' body. Thus, we conclude there was no prejudi-

cial error as a result of the prosecutor misrepresenting the significance of the hair evidence, and the exact location of Defendant's pubic hairs on the bed where Ms. Harris' body was discovered. *See* N.C. Gen. Stat. § 15A-1443(a) (2005) (providing that in order to demonstrate prejudicial error, a defendant must show that there is a reasonable possibility a different result would have been reached had the error not occurred); *State v. Rosier*, 322 N.C. 826, 829, 370 S.E.2d 359, 361 (1988) (no prejudicial error where the prosecutor argued the defendant's expert was paid to testify when there was no evidence that the expert had been paid anything).

[17] Similarly, we reject Defendant's argument that the State impermissibly injected opinion and name-calling into the closing argument, stating that Dr. Harris' opinion "actually cracks me up," and describing his expert testimony as being "from another planet." While the prosecutor's comments challenged the limits of the wide latitude permitted for argument, we do not find that this attempt to distinguish the State's expert testimony from Defendant's expert testimony prohibitively exceeded the bounds of permissible argument.

Moreover, the prosecution's characterization of the State's witnesses, specifically Ms. Harris' family, as "credible, decent witnesses" from "one of the finest families . . . in Durham . . . the most attentive . . . faithful . . . nicest, cleanest cut people you ever would want to meet" was not so improper as to require *ex mero motu* intervention by the trial court. *See State v. Peterson*, 350 N.C. 518, 531-32, 516 S.E.2d 131, 139-40 (1999) (prosecutor argued victim was "a fine woman. She was a beautiful women[,]" held not to require intervention by trial court). Accordingly, Defendant's assignments of error are without merit.

[18] Defendant next argues that he is entitled to a new trial because the prosecutors misrepresented that he possessed a key to Ms. Harris' house, whereas the only keys in evidence that had any connection with him (the keys found in Ms. Harris' car in New Orleans) did not fit the lock on Ms. Harris' house. Contrary to Defendant's assertion, a review of the record reveals that the State never argued that any of the keys found in Ms. Harris' car fit the lock. Given that the State presented evidence to show that there were no signs of forced entry and that Defendant had entered Ms. Harris' house, the prosecutors properly argued its theory that he used a duplicate key, not necessarily any of the keys presented at trial, to gain entry into her house. Defendant's assignment of error is therefore rejected.

[19] Defendant next contends the State misrepresented the facts of the case by arguing that defense counsel had the last opportunity to tamper with the keys obtained from Ms. Harris' car in New Orleans before trial. Specifically, Defendant argues that the certified photocopy of the exhibit shows that the lead investigator was the last person to have access to the keys, and the State's misrepresentation in the jury's presence prejudiced Defendant entitling him to a new trial.

However, a review of the trial transcript reveals that the prosecutor's arguments that defense counsel had the last opportunity to tamper with the keys in evidence were in response to defense counsel's assertion that the prosecution tampered with the same evidence. Defense counsel did not object to the prosecutor's argument, nor did he respond to the prosecutor's argument. Furthermore, Defendant fails to show how he was prejudiced as a result of these arguments. We therefore conclude that the arguments relating to alleged tampering with the evidence did not infect Defendant's trial with unfairness such that they rendered his conviction or sentence fundamentally unfair. Accordingly, the trial court did not abuse its discretion by failing to intervene *ex mero motu*. *See State v. Fleming*, 350 N.C. 109, 144-46, 512 S.E.2d, 720, 743-45 (1999).

[20] In his next argument, Defendant contends that the State illegally sequestered physical evidence in that there were originally three keys found in Ms. Harris' car (none of which fit her home), but then two keys "mysteriously" appeared at trial, one of which fit Ms. Harris' house. Defendant contends there was a break in the chain of custody as it relates to the keys found in Ms. Harris' car and that the trial court erred in denying Defendant's motion to disqualify counsel, motion to suppress the evidence, and motion to dismiss the charges against him since the State's theory relied on Defendant using a copy of a key to enter her home. We disagree.

Defendant filed a motion to disqualify the Office of the District Attorney as a result of the removal of evidence from the Property Room of the Durham Police Department to a locked closet in the prosecutor's office. Defendant argued that the prosecutor's removal of this evidence violated N.C. Gen. Stat. § 15-11.1(a) (2005), as well as his state and federal constitutional rights to due process of law and to confront the witnesses against him. The trial court held a hearing about the chain of custody of the evidence, and denied Defendant's motion to disqualify, concluding that the prosecutors' actions were not professional misconduct. Subsequently, our Supreme Court

denied Defendant's petitions for a temporary stay for a writ of certiorari, and for a writ of supersedeas seeking review of the trial court's decision.

At trial, Defendant renewed his motions to suppress the evidence, to dismiss the charges, and to set aside the verdicts based on the allegedly improper conduct of the prosecutors in sequestrating the evidence. The trial court denied Defendant's motions.

Defendant argues the trial court erred in denying his motion to disqualify counsel for improperly sequestering evidence for trial. This Court has held that absent a showing of an abuse of discretion, a decision regarding whether to disqualify counsel "is discretionary with the trial judge and is not generally reviewable on appeal." *In re Lee*, 85 N.C. App. 302, 310, 354 S.E.2d 759, 764-65, *disc. review denied*, 320 N.C. 513, 358 S.E.2d 520 (1987). As Defendant has not shown any abuse of the trial court's discretion in denying his motion to disqualify counsel, and we can discern no such abuse, Defendant's assignment of error is rejected.

[21] Likewise, we reject Defendant's argument that the trial court erred in denying his motion to suppress the evidence of the keys. "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) (internal quotation and 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).

In this case, the trial court found there was no evidence of prosecutorial misconduct regarding the handling of the items of evidence and no evidence that any item of evidence had been improperly or inappropriately tampered with or changed in any way. The trial court further found that Defendant, through his counsel, had been afforded access to the items of evidence upon request, and the Durham Police Department, through Officer Joe Williams and other technicians, had been available to accompany counsel to the prosecutor's office "at times in which the items [were] examined by [the] parties in preparation for this trial." After careful review of the record, we conclude there is competent evidence to support the trial court's findings of fact and they are therefore binding on appeal. We also hold that the trial court's findings of fact support its conclusion of law that "there

was no violation of any substantive or procedural due process of law or any other constitutional violations of law in regards to any rights or privileges of the defendant." Thus, Defendant's assignment of error is rejected.

Because we hold the trial court did not err in concluding there was no prosecutorial misconduct in the prosecution's handling of evidence, we need not address Defendant's related argument that the trial court erroneously denied Defendant's motion to dismiss based on these same grounds.

[22] In his next assignment of error, Defendant argues the trial court erred in denying his motion for a mistrial based on improper jury discussions. Defendant's argument is without merit.

The decision to grant a mistrial on the ground of juror misconduct rests largely within the discretion of the trial court, and its decision will not be disturbed unless there is a clear showing that the court abused its discretion. *State v. Perkins*, 345 N.C. 254, 277, 481 S.E.2d 25, 34 (1997) (citation omitted).

Upon Defendant's motion for a mistrial, the trial court held a hearing in which defense counsel's legal assistant testified that she overheard two jurors discussing the case outside the courtroom. Particularly, as she approached the two jurors, one said, "I believe that he is . . .," and then stopped talking as she approached. Defendant also submitted affidavits and eyewitness accounts of Juror #1 laughing and talking with Ms. Breeden, Ms. Harris' sister, and another family member. The trial court called Ms. Breeden to testify and she denied having any conversation with any jurors other than "good morning," etc. The trial court found that there was no substantial or irreparable prejudice to Defendant's case and denied Defendant's motion. As we can discern no abuse of discretion, we uphold the trial court's denial of Defendant's motion for a mistrial.

[23] We now review the trial court's order resolving the issues raised by Defendant in his motion for appropriate relief. We preliminarily note that Defendant does not challenge the trial court's conclusion that Defendant received ineffective assistance of counsel during the 1998 sentencing proceeding. Accordingly, the issues before this Court are: (1) whether the State misrepresented the evidence to minimize the life-threatening nature of Ms. Harris' medical condition in the months before her death; and (2) whether Defendant's trial counsel rendered ineffective assistance of counsel during the guilt/innocence phase of Defendant's 1998 trial.

The trial court's findings of fact in a hearing on a motion for appropriate relief are "binding upon the [defendant] if they were supported by evidence." *State v. Stevens*, 305 N.C. 712, 719-20, 291 S.E.2d 585, 591 (1982) (citations omitted). Our inquiry is limited to determining "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *Id.*

Defendant contends the trial court erred in determining that he is not entitled to a new trial due to the prosecutors making material misrepresentations of fact about and withholding exculpatory evidence relating to Ms. Harris' true state of health at trial. Defendant cites to the prosecutor's opening statement which conceded that Ms. Harris "was not in perfect health, but she was in good enough health to have gone to her business and be working regularly[;] . . . she was just worn out." In closing arguments, one of the prosecutors commented on Ms. Harris' "getting around pretty good for her age. She was getting around pretty good and able to keep up with all the activities she had. She was a very active and independent woman." Defendant also cites to Ms. Breeden's testimony in response to defense counsel's questions about Ms. Harris' health, stating Ms. Harris "had a heart problem," but that Ms. Harris was "able to get up and go because I have a heart problem, too, but it doesn't stop me."

"When a defendant shows that testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction, he is entitled to a new trial." *State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 423-24 (1990) (internal quotation and citation omitted). Perjured testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*

As it relates to the prosecution's withholding of evidence, in *Brady v. Maryland*, the United States Supreme Court held that the prosecution must disclose exculpatory evidence to the defense. *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). However, *Brady* requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation. *Barnes v. Thompson*, 58 F.3d 971, 975 n.4 (4th Cir. 1995) ("Brady requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation." (citation omitted)).

The trial court found that defense counsel obtained Ms. Harris' medical records prior to trial, and that Mr. Aus made notes and "tabbed" certain pages of the medical records after reviewing them. The trial court's finding of fact twenty-four states in pertinent part:

> 24. . . . The copy received by Mr. Aus was introduced at the evidentiary hearing, and he identified it by a number of "Post-it greenish tabs" that were affixed to a number of pages. . . . [Mr. Aus] would place the tabs on the pages after reviewing the records . . . The tabbed pages 'were areas that [Mr. Aus] noted of interest that might be of some potential value in the defense of [Defendant]'s case' . . . Mr. Aus was looking for information concerning Ms. Harris' 'bad heart,' psychological or mental health issues, or anything that could explain Ms. Harris' death 'other than homicide.' . . . Mr. Aus placed tabs on various pages of Ms. Harris' medical records, noting 'depression' five times, 'anxiety', 'hypertension', heart attack on September 16, 1987, 'currently on disability', '100% medical disability since 1990 for coronary artery disease', and that Ms. Harris was being seen by a psychiatrist[.]

The record reveals that Mr. Aus testified that he obtained and reviewed Ms. Harris' medical records from Duke University Medical Center on or about 23 March 1998. Mr. Aus said that after receiving, reviewing, and tabbing the medical records, he did not seek to have the records reviewed by a cardiologist or other heart specialist. However, on or about 3 April 1998, Mr. Aus delivered Ms. Harris' medical records to Dr. James Hilkey, a psychologist, "for the purpose of seeing if a psychological autopsy could be conducted based on [the] medical records." Mr. Aus testified that once Dr. Hilkey informed him that the psychological autopsy of Ms. Harris was a "dead end," Mr. Aus "forgot about the existence of those records" until after the trial.

After careful review of the record, we conclude there is competent evidence to support the trial court's findings of fact. Based on these findings of fact, the trial court concluded:

> 48. . . . there is no violation of due process resulting from prosecutorial non-disclosure of or failure to correct allegedly false testimony if defense counsel is aware of it and fails to object to or cross-examine the witness concerning the alleged false or misleading testimony.

Here, Mr. Aus testified that he had access to the same evidence as the prosecution (Ms. Harris' medical records), but failed to use this

information to correct the alleged misrepresentations made by prosecuting witnesses and by the prosecutor. Defendant cannot now assign error to the testimony. *See Barnes*, 58 F.3d at 976, n.4. Because we conclude the trial court's findings of fact are supported by competent evidence in the record, and the trial court's findings of fact support its conclusion of law, we find no error. Thus, Defendant's assignment of error is rejected.

[24] Defendant next contends the trial court erred in denying his request for a new trial due to Ms. Breeden's misrepresentations at trial about Ms. Harris' disability status. Specifically, Defendant argues that Ms. Breeden's testimony that Ms. Harris was on short-term disability, never revealing the Social Security order ruling Ms. Harris completely disabled from 1990 until her death, was a material misrepresentation by the prosecution entitling Defendant to a new trial.

The trial judge made the following finding of fact related to Ms. Breeden's testimony at the evidentiary hearing and at trial regarding Ms. Harris' social security disability benefits:

> 46. . . . At the evidentiary hearing, Mrs. Breeden testified, and the Social Security records themselves show that Ms. Harris' Social Security disability benefits were only approved posthumously in 1997, after Ms. Harris had been murdered. . . . Mrs. Breeden considered such Social Security disability benefits as long-term disability benefits, . . . and this Court has specifically found as fact that Mrs. Breeden was not trying to conceal the fact that Ms. Harris' estate was, at the time of the trial, receiving Social Security disability benefits. . . . Therefore, her testimony was not intentionally misleading. Ms. Harris' Durham City School records show that Ms. Harris, in fact, received state short-term disability payments from March 16, 1990 until February 28, 1991, and that on April 9, 1991 Ms. Harris was approved for state long-term disability payments. . . . Ms. Harris' state long-term disability benefits ended on May 31, 1996 . . . These long-term state disability benefits are apparently what Mrs. Breeden was referring to in her trial testimony. More importantly, Mrs. Breeden was never asked the question directly whether Ms. Harris' estate eventually had been posthumously awarded the Social Security disability benefits.

The record reveals that Ms. Breeden testified at the evidentiary hearing that she "[didn't] know the difference between short-term and long-term [disability benefits]". She further testified that it was her

understanding that Ms. Harris was repeatedly denied for social security benefits while she was alive, and that she was not approved for social security benefits until after her death, which Ms. Breeden considered death long-term benefits. We conclude there is competent evidence in the record to support the trial court's findings of fact.

Based on these findings of fact, the trial concluded:

> 46. . . . the mere fact Mrs. Breeden indicated that her sister was on 'short term disability' and did not volunteer that Ms. Harris['] estate was receiving Social Security disability benefits was not material, was not so misleading as to rise to the level of a state or federal due process violation, and could not have affected the jury's judgment.

Here, we cannot conclude that Ms. Breeden's testimony about Ms. Harris' social security benefits was a material misrepresentation that "could have affected the judgment of the jury." *Sanders*, 327 N.C. at 336, 395 S.E.2d at 424. Because we conclude the trial court's findings of fact are supported by competent evidence in the record, and the trial court's findings of fact support its conclusion of law, we find no error. Accordingly, Defendant's assignment of error is overruled.

[25] In his final argument on appeal, Defendant contends that the trial court erred in denying his request for a new trial based on ineffective assistance of counsel which violated his constitutional rights. Specifically, Defendant argues that his trial attorneys failed to present evidence about the time of Ms. Harris' death and Ms. Harris' lifestyle and associates; failed to object to or correct prosecutorial misrepresentations about Ms. Harris' health and other evidence; failed to present Kim Senter's report that Ms. Harris' hospitalization resulted from a suicide attempt by failing to take medication; and, failed to exhaust peremptory challenges. Defendant contends that his trial counsel's performance was objectively unreasonable under *Strickland v. Washington*.

The United States Supreme Court outlined a two-part test in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), to determine if an ineffective assistance of counsel claim has merit. The Supreme Court of North Carolina adopted the *Strickland* test in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). In *Braswell*, our Supreme Court held that the defendant must first establish that his counsel's performance was deficient in that it fell below an "objective standard of reasonableness." *Id.* at 561-62, 324 S.E.2d at 248. Second, the defendant must show that a reasonable probability exists that

but for the error, the result of defendant's trial would have been different. *Id.* at 563, 324 S.E.2d at 248. Further, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d 249.

The trial court made the following findings of fact relating to whether Defendant was entitled to a new trial based on his trial counsel's alleged ineffective representation during the guilt/innocence phase of his trial:

> 54. . . . this Court has found from the evidence presented at the evidentiary hearing that Ms. Harris' medical records were reviewed by Mr. Aus, who even attached tabs and wrote notes thereon, highlighting Ms. Harris' documented depression, anxiety, hypertension, and disability, among other things. Therefore, Mr. Aus did more than just request and obtain the medical records; he reviewed them for content. Mr. Aus also gave the records to Dr. Hilkey on or about April 3, 1998 for the specific purpose of developing a possible suicidal theory of defense. Mr. Aus and Mrs. [sic] Castle interviewed both Dr. Thompson and Dr. Rudner about the possibility of the suicide theory and the sexual asphyxiation theory. The evidence before this Court, though minimal in many regards, shows a reasonably sufficient investigation by Mr. Aus and Mr. Castle for the guilt phase of the trial.
>
> ***
>
> 55. . . . the defense strategy clearly was to attempt to create reasonable doubt about the cause of Ms. Harris' death by suggestion that [she] died either: (1) naturally, as a result of a cocaine-induced heart attack while engaged in some unspecified sexual activity; or (2) accidentally, by sexual asphyxiation from the plastic bag wrapped around her head . . . . Under these circumstances, the medical records showing Ms. Harris' history of anxiety and depression would not likely have bolstered the defense, at least to any significant degree. The severity of Ms. Harris' heart condition was substantially before the jury.

(Emphasis omitted).

A review of the record reveals that defense counsel obtained and thoroughly reviewed Ms. Harris' medical records. Mr. Aus testified at

the evidentiary hearing that he first interviewed Dr. Thompson, the forensic pathologist who supervised the autopsy of Ms. Harris, in June 1997, and asked Dr. Thompson about the possibility of Ms. Harris' death being suicide. When asked why he asked Dr. Thompson about the possibility of suicide, Mr. Aus testified, "I was looking for any reason that it was not a homicide . . . . As a matter of fact, by that point, one of the things that came to my attention was the manner in which her body was found. And I was thinking along the lines of autoerotic asphyxiation at that time, based on the position of the body and what I understood the crime scene to show."

Mr. Aus also testified that he recalled Mr. Castle, his co-counsel, asking Dr. Thompson about Ms. Harris' heart condition and its possible effect on the case. Mr. Castle testified that the defense team was interested in the toxicology report showing signs of cocaine in Ms. Harris' body and sexual asphyxiation because "approaching our theory of a possible accidental death, someone with a heart problem or a coronary problem already, who was regularly using cocaine, there would be a greater risk of a cocaine-induced coronary attack. And if you coupled that with asphyxiation of any type, whether it be sexual, or self-applied, or by someone else, it would increase the chances of a coronary occurring." After raising the sexual asphyxiation theory with Dr. Thompson, Mr. Castle testified that Dr. Thompson "insisted . . . that [Ms. Harris'] death was homicide," and Dr. Thompson was no longer cooperative, except that he suggested that their best strategy in representing Defendant was to focus on the time of Ms. Harris' death and to show that Defendant was no longer in North Carolina at that time.

After careful review of the record, we conclude that there is competent evidence to support the trial court's findings of fact. We now determine whether the trial court's findings of fact support its conclusion of law.

The trial court made the following conclusion of law relating to Defendant's claim of ineffective assistance of counsel at the guilt/innocence phase of his trial:

> 56. Therefore, on the face of the current record and the evidence presented at the evidentiary hearing, this Court concludes that, even if his trial attorney's inactions were objectively unreasonable, [Defendant] was not prejudiced concerning the medical records or other alleged failures, and [Defendant] is not entitled

> to relief under *Strickland* and *Braswell*, as to the jury verdict in the guilt/innocence phase of the trial.

(Emphasis omitted).

We conclude the trial court did not err in concluding that, even if trial counsel's actions were objectively unreasonable, Defendant was not prejudiced concerning the defense counsel's use or non-use of Ms. Harris' medical records or any other alleged failures. Trial counsel's decision to pursue a theory of sexual asphyxiation or accident instead of suicide is a defense strategy that cannot be second-guessed on appeal. *See State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002) ("decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court."). Because we find that the trial court's findings of fact are clearly supported by competent evidence of record, and those findings of fact adequately support the trial court's conclusion of law, we find no error. Accordingly, Defendant's assignment of error is overruled.

In sum, we hold that Defendant received a trial free of prejudicial error, except that we vacate Defendant's convictions for possession of the automobile and the credit cards. We also affirm the trial court's order denying Defendant a new trial based on prosecutorial misconduct and ineffective assistance of counsel.

No Prejudicial Error, Vacated in part.

Judges STEELMAN and JOHN concur.

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, AND NICOLE RIPELLINO, PLAINTIFFS-APPELLANTS v. THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; AND THE JOHNSTON COUNTY BOARD OF EDUCATION, DEFENDANTS-APPELLEES

No. COA04-1681

(Filed 7 March 2006)

1. Schools— traffic gate closing on car—automobile exclusion clause in insurance policy—not applicable—immunity waived

The automobile exclusion clause in a school board's insurance policy did not apply to a traffic control gate closing on plaintiffs' car, sovereign immunity was waived, and summary judgment should have been granted for plaintiffs rather than defendants. Although the injured plaintiff was traveling in a car, the gate malfunction would have occurred if she had been walking or riding a bicycle.

2. Pleadings— unequal treatment in immunity waiver decisions—sufficiency

Plaintiffs' allegations about unequal treatment in waiver of immunity decisions by a school board amounted to more than conclusory, unwarranted deductions of fact or unreasonable inferences, complied with North Carolina's standard of notice pleading, and stated a claim for violation of their equal protection rights.

3. Civil Rights; Schools— § 1983 action—school board a person—Eleventh Amendment

In a case of first impression, a local school board was held to be a "person" within the meaning of 42 U.S.C. § 1983. It is well

settled that neither the State of North Carolina nor its respective agencies are "persons" within the meaning of § 1983 when the remedy is monetary damages, but whether school boards are local entities or part of the State is not clear from Supreme Court authority, the underlying structure of the school system, the selection of school board members, or the financing system. As for Eleventh Amendment considerations, there is no argument that any recovery would come from the State treasury, and a suit against a local school board that performs important but local functions and is its own corporate body will not hinder the State's integrity within the federal system.

4. Constitutional Law— unequal application of immunity waiver—no adequate remedy in negligence action

There was no adequate state remedy in a negligence action for a claim involving the alleged arbitrary and unequal application of a school board's immunity, and plaintiffs could proceed directly under the State Constitution.

5. Immunity— unequal protection in immunity waivers— material issue of fact—sufficiency of pleadings

There was a material issue of fact as to whether a school board applied reasonable criteria in waiving immunity, and judgment on the pleadings was not appropriate.

6. Civil Rights— unequal immunity waiver decisions—issues of fact—judgment on pleadings inappropriate

Judgment on the pleadings was inappropriate in a 42 U.S.C. § 1983 action arising from a traffic control arm closing on plaintiffs' car and a school board's decision not to waive immunity.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by plaintiffs from orders entered 3 September 2004 and 8 September 2004 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 23 August 2005.

Mast, Schulz, Mast, Mills, Johnson & Wells, P.A., by Bradley N. Schulz and Don R. Wells, for plaintiffs-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by Stephanie Hutchins Autry and Rachel B. Esposito, for defendant-appellee Johnston County Board of Education.

Yates, McLamb & Weyher, L.L.P., by Barbara B. Weyher, for defendants-appellees Trust Defendants.

CALABRIA, Judge.

Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino (collectively "plaintiffs") appeal from orders granting summary judgment and judgment on the pleadings to the Johnston County Board of Education ("the Board") and to the North Carolina School Boards Association, Inc.; the North Carolina School Boards Trust; 1982 North Carolina School Boards Association Self-Funded Trust Fund; 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund; and the 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund (collectively "Trust Defendants"). We reverse and remand.

A summary of the facts in this case are set out in *Ripellino v. North Carolina School Board Association, Inc.*, 158 N.C. App. 423, 425, 581 S.E.2d 88, 90 (2003) ("*Ripellino I*") as follows:

> At the end of classes on 9 March 1998, [Nicole Ripellino ("Nicole")] was departing from Clayton High School in Johnston County in her parent[s'] vehicle. A traffic control gate owned by the Johnston County Board of Education ("the Board") swung closed, struck the vehicle, and injured Nicole. In October 1998, the Ripellinos were paid $2,153.18 for property damage. The Board refused to pay medical expenses or other compensation.
>
> On 26 March 2001 . . . plaintiffs filed suit against the Board, and [the Trust Defendants]. Plaintiffs alleged (1) a negligent personal injury claim against the Board on the part of Nicole, (2) a medical expenses claim on the part of Nicole's parents against the Board, (3) declaratory judgment that immunity had been waived through (a) participation in the trust and (b) the payment of property damages, (4) unfair and deceptive trade practices against all defendants, (5) 42 U.S.C. § 1983 claim . . . and constitutional claims against all defendants, and (6) punitive damages.
>
> Upon motion of the Board, the trial court bifurcated the trial allowing the issues of whether the Board was immune from suit and whether the Board had waived sovereign immunity to be resolved while the other claims were stayed. . . . [T]he trial court granted summary judgment in favor of all defendants on all claims. Plaintiffs appeal[ed.] . . .

In *Ripellino I*, this Court held, *inter alia*: (1) the Board waived sovereign immunity to the extent that its insurance policies covered claims in excess of $100,000 and less than $1,000,000; (2) the Board could not use sovereign immunity as a defense against constitutional and 42 U.S.C. § 1983 claims; and (3) the Board was immune from punitive damages claims because it is a governmental entity. *Id.*

On remand to the trial court after *Ripellino I*, the Board and the Trust Defendants filed motions for summary judgment for all non-constitutional claims and judgment on the pleadings for claims under 42 U.S.C. § 1983 and the North Carolina Constitution. The trial court entered orders for summary judgment and judgment on the pleadings. Plaintiffs appeal.

I. Summary Judgment as to the Non-Constitutional Claims

[1] Plaintiffs argue the trial court erred by granting the Board's and the Trust Defendants' motions for summary judgment regarding the non-constitutional claims. Summary judgment is appropriate where "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). "In ruling on such motion, the trial court must view all evidence in the light most favorable to the non-movant, taking the non-movant's asserted facts as true, and drawing all reasonable inferences in her favor." *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 611, 538 S.E.2d 601, 607 (2000). On appeal, we review the granting of a summary judgment motion *de novo*. *Granville Farms, Inc. v. County of Granville*, 170 N.C. App. 109, 111, 612 S.E.2d 156, 158 (2005).

Plaintiffs specifically argue that the trial court erred by granting the Board's and the Trust Defendants' motions for summary judgment regarding the non-constitutional claims because the plaintiffs presented evidence on all the elements of a negligence claim and sovereign immunity is waived to the extent the Board's insurance policy provides coverage for claims in excess of $100,000 and less than $1,000,000. Plaintiffs additionally contend that their claim is within this monetary range and included in the broad wording of the Trust Agreement, which provides coverage for:

> all or part of a Claim made or any civil judgment entered against any of its members . . . when such Claim is made or such judgment is rendered as Damages on account of any act done or omis-

sion made . . . in the scope of their duties as members of the local board of education or as employees.

The Board responds the trial court properly granted summary judgment because Exclusion Number 18 in the Coverage Agreement excludes coverage for "any Claim arising out of the ownership, maintenance, operation, use, loading or unloading of any Automobile" and Nicole was hit by a gate while driving an automobile. Plaintiffs contend, however, that the malfunctioning of the gate could have occurred even if Nicole had not been driving a car and the gate would have injured her even if she had been walking or riding a bicycle. We agree with plaintiffs and reverse because the forecast of evidence leaves no material dispute over the fact that plaintiffs' injuries did not "arise out of" the use of an automobile.

Our Supreme Court has held that "the standard of causation applicable to the ambiguous 'arising out of' language . . . is one of proximate cause. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 74 (1986). "Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Mattingly v. North Carolina R.R.*, 253 N.C. 746, 750, 117 S.E.2d 844, 847 (1961). Viewing the evidence in the light most favorable to defendants, no material dispute exists as to the proximate cause of plaintiffs' injury. Although defendants argue that plaintiff traveled in a car at the time of the incident, they have failed to show an automobile proximate cause, i.e., any action or omission by plaintiffs' automobile that would have resulted in a person of ordinary prudence foreseeing plaintiffs' injuries. Since there is no automobile proximate cause on these facts, plaintiffs' injury did not fall within the language of Exclusion 18, and we reverse the summary judgment in favor of the Board and remand for entry of summary judgment in favor of plaintiffs. Likewise, because the trial court erred in granting summary judgment in the Board's favor, it also erred in granting summary judgment in the Trust Defendants' favor, whose liability is derivative to the Board's liability. Accordingly, we reverse summary judgment in favor of the Trust Defendants and remand for entry of summary judgment in favor of plaintiffs.

II. Judgment on the Pleadings as to the Constitutional Claims

[2] Plaintiffs argue that the trial court erred in granting judgment on the pleadings in favor of defendants regarding the state constitutional

claims and United States constitutional claims under 42 U.S.C. § 1983. "The granting of judgment on the pleadings is proper when there does not exist a genuine issue of material fact, and the only issues to be resolved are issues of law. In reviewing a motion for judgment on the pleadings, [this] court must consider the evidence in the light most favorable to the non-moving party, accepting as true the factual allegations as pled by the non-moving party." *Davis v. Durham Mental Health/Dev. Disabilities/Substance Abuse Area Auth.*, 165 N.C. App. 100, 105, 598 S.E.2d 237, 241 (2004) (citations omitted). Moreover, when reviewing a trial court's granting of a Rule 12(c) motion, this Court considers, "only the pleadings and exhibits which are attached and incorporated into the pleadings[.]" *See id.*, 165 N.C. App. at 104, 598 S.E.2d at 240 (citations omitted).

Plaintiffs argue that their equal protection and due process rights have been violated under our federal and state constitution. Plaintiffs seek to use 42 U.S.C. § 1983 to enforce their federal constitutional rights. *See Gonzaga University v. Doe*, 536 U.S. 273, 285, 153 L. Ed. 2d 309, 322 (2002) ("Section 1983 . . . provides a mechanism for enforcing individual rights 'secured' elsewhere, i.e., rights independently secured by the Constitution and laws of the United States"). Plaintiffs' claims are based on their contentions that: (1) the Board has a "policy and custom of paying some claims but not paying others, when immunity could be raised in each one," and (2) the Board has "paid the property damage, but [has] asserted immunity in the remaining portion of Plaintiff's claim[.]"

They also seek to remedy these alleged deprivations directly under our state constitution, which states:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. I, § 19.

Plaintiffs specifically allege, in pertinent part:

> 15. Upon information and belief, in the past, the Association, Trust Defendants, and The Johnston County Board of Education could have raised the doctrine of immunity on many tort claims, but chose instead, for various reasons that will be proven at trial,

to pay claims even in light of the immunity defense. Upon information and belief, the Association and Trust Defendants, in conjunction with The Johnston County Board of Education, would examine each claim to see if the immunity doctrine could be raised . . . but thereafter some claims were nevertheless paid. This disparate treatment of claimholders is prohibited by the United States and North Carolina Constitutions, as well as 42 U.S.C. § 1983. . . .

44. At all times pertinent hereto, [defendants] . . . in claiming immunity as to the Plaintiffs' claims for personal injury and medical expenses, . . . have subjected these Plaintiffs to the deprivation of their equal protection and substantive due process rights under the United States Constitution, as enforced by 42 U.S.C. § 1983, and Article 1, [§] 19 of the North Carolina Constitution.

45. These Plaintiffs have been denied due process and equal protection of the law as the Defendants have paid the property damage, but have asserted immunity in the remaining portion of Plaintiffs' claim, but have, upon information and belief, customarily waived it for similarly situated individuals who have been compensated for tort damages.

46. [Defendants'] policy and custom of paying some claims but not paying others, when immunity could be raised in each one, has played a part in the violation of federal and state law. Additionally, the Defendants' conduct in this case, of paying the property damage, and assuming liability for the claim, and then refusing to pay the personal injury and medical expense portion of the claim, is a violation of Plaintiffs' federal and state constitutional rights, as a matter of law.

47. Upon information and belief, the [Defendants] have what amounts to be unbridled discretion to resolve claims filed with the local board of education.

48. As a result of the conduct of these Defendants, the Plaintiffs have been deprived of their right to recover for the bodily injury and medical expenses portion of the Ripellino claim.

49. The Fourteenth Amendment to the United States Constitution, Article I, [§] 19 of the North Carolina Constitution, and 42 U.S.C. § 1983 protect these Plaintiffs against intentional and arbitrary discrimination, being the conduct of the [defendants] as to these Plaintiffs.

> 50. As a proximate result of the Fifth and Fourteenth Amendments to the United States Constitution, Article 1. [§] 19 of the Constitution of the State of North Carolina, and 42 U.S.C. § 1983 violations by [defendants], the Plaintiffs are entitled to recover damages.

These allegations amount to more than "conclusory, unwarranted deductions of fact, or unreasonable inferences," *Good Hope Hosp., Inc. v. N.C. Dep't. of Health and Human Serv.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005) (citations omitted), and comply with the liberal standard of notice pleading applied in this State, under which "a claim is adequate if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading." *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724 (1998) (citations omitted).

[3] In regard to the judgment on the pleadings as to the claims under 42 U.S.C. § 1983, we consider an issue of first impression, whether a school board is a person within the meaning of 42 U.S.C. § 1983.

> By federal statute,
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983 (2005).

The Board argues that the trial court properly granted judgment on the pleadings because it is well-settled that neither the State of North Carolina nor its respective agencies are "persons" within the meaning of § 1983 when the remedy sought is monetary damages. In *Will v. Michigan Dep't. of State Police*, the United States Supreme Court held that states are not "persons" within the meaning of § 1983 and further noted that "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration[.]" 491 U.S. 58, 66-67, 105 L. Ed. 2d 45, 55 (1989). In *Howlett v. Rose*, the Supreme Court reemphasized that "the State and arms of the State, which have traditionally enjoyed Eleventh Amendment

immunity are not subject to suit under § 1983 in either federal court or state court." 496 U.S. 356, 365, 110 L. Ed. 2d 332, 346 (1990). The opinion clarified which law applies: "[T]he elements of, and the defenses to, a federal cause of action [such as § 1983] are defined by federal law[,]" *id.*, 496 U.S. at 372, 110 L. Ed. 2d at 352, and "[t]o the extent that the [state] law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law." *Id.*, 496 U.S. at 377-78, 110 L. Ed. 2d at 354. Accordingly, we apply federal law to determine whether our local school boards should be considered "persons" within the meaning of § 1983.

In *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471 (1977), the United States Supreme Court considered "whether [an Ohio city's] Board of Education [was] to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or [was] instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." *Id.*, 429 U.S. at 280, 50 L. Ed. 2d at 479. The Court noted that, "the answer depends, at least in part, upon the nature of the entity created by state law." *Id.* The Court considered that *under Ohio law* the "State" did not include "political subdivisions." Local school boards were expressly considered part of "political subdivisions," and therefore, were not part of the State. The Court also found significant that even though the local school boards received money and guidance from the State, they could also issue bonds and levy taxes. These facts lead the Supreme Court to conclude that the Ohio local school board was "more like a county or city than it is like an arm of the State." *Id.*

Although we recognize that Eleventh Amendment immunity is a separate inquiry from whether or not a given entity is a "person" within the meaning of § 1983, Eleventh Amendment immunity is, nonetheless, a consideration in determining congressional intent under § 1983. *See Will*, *supra.* We, therefore, consider the nature of the local school boards under North Carolina law. *See Mt. Healthy*, *supra.*

There is conflicting authority from our Supreme Court about whether local school boards are considered local entities or part of the State. Our Supreme Court has most recently held, "County and city boards of education serve very important, *though purely local functions.* The State contributes to the school fund, but the local boards select and hire the teachers, other employees and operating

personnel. The local boards run the schools." *Turner v. Gastonia City Bd. of Educ.*, 250 N.C. 456, 463, 109 S.E.2d 211, 216 (1959). In *Turner*, our Supreme Court also held that the Tort Claims Act does not apply to local school boards, except as amended by N.C. Gen. Stat. § 143-300.1, because "[i]n no sense may we consider the Gastonia City Board of Education in the same category as the State Board of Education and the State Highway & Public Works Commission." *Id. See also Crump v. Bd. of Educ. of Hickory Admin. Sch. Unit.*, 326 N.C. 603, 392 S.E.2d 579 (1990) (applying § 1983 to remedy a due process violation by a local school board when it is not clear if the issue of a local school board being "a person" within the meaning of § 1983 was raised by the parties).

However, in an earlier decision, our Supreme Court said:

> The public school system, including all its units, is under the exclusive control of the State, organized and established as its instrumentality in discharging an obligation which has always been considered direct, primary and inevitable. *When functioning within this sphere, the units of the public school system do not exercise derived powers such as are given to a municipality for local government*, so general as to require appropriate limitations on their exercise; *they express the immediate power of the State*, as its agencies for the performance of a special mandatory duty resting upon it under the Constitution and under its direct delegation.

Bridges v. Charlotte, 221 N.C. 472, 478, 20 S.E.2d 825, 830 (1942). *See also Rowan County Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 10-11, 418 S.E.2d 648, 655 (1992) (holding that the doctrine of *nullum tempus* applied to a local school board because it was "acting as *an arm of the State* and pursuing the governmental function of constructing and maintaining its schools." (Emphasis added)).

Since precedent is unclear whether school boards are considered part of the State, we consider the underlying structure of our school system. The North Carolina Constitution emphasizes the importance of education in our state: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." N.C. Const. art. IX, § 1. Our forefathers further provided: "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein

equal opportunities shall be provided for all students." N.C. Const., art. IX, § 2(1).

Pursuant to these constitutional mandates, our General Assembly has enacted legislation for "[a] general and uniform system of free public schools . . . throughout the State." N.C. Gen. Stat. § 115C-1. The State Board of Education is vested with the powers to oversee "general supervision and administration of the free public school system." N.C. Gen. Stat. § 115C-12. Local boards of education responsibilities include the duty "to provide adequate school systems within their respective local school administrative units." N.C. Gen. Stat. § 115C-47(1). By statute, local boards are corporate bodies that can sue and be sued. N.C. Gen. Stat. § 115C-40. Yet, the fact that our local school boards are corporate bodies "does not mean that the Legislature has waived immunity from liability for torts for such boards." *Fields v. Durham City Bd. of Educ.*, 251 N.C. 699, 111 S.E.2d 910 (1960). It is noteworthy, however, that whether an entity has sovereign immunity under state law is not determinative of whether that entity is part of the State for purposes of federal law. For instance, entities, such as counties, have sovereign immunity under state law but are not part of the State under federal law. *See Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 ("As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity. The doctrine applies when the entity is being sued for the performance of a governmental function. But it does not apply when the entity is performing a ministerial or proprietary function"). *But cf. Monell v. Dept. of Social Serv. of New York*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 635 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies").

Also relevant to our discussion is the manner chosen by our General Assembly to select members of local boards of education. The members are elected in local elections. N.C. Gen. Stat. § 115C-37(b). However, there is some authority from our Supreme Court that members of local boards of education hold a public office under the State. *See Edwards v. Bd. of Educ. of Yancey County*, 235 N.C. 345, 70 S.E.2d 170 (1952) (holding a "member of the county board of education holds a public office under the State"). *But see Turner*, *supra*.

The financing of the public school system is provided by State, local, and federal governments. Our General Assembly propounded a state policy "to provide from State revenue sources the instructional expenses for current operations of the public school system as defined in the standard course of study." N.C. Gen. Stat. § 115C-408 (2005). Another constitutional provision provides that the General Assembly has authority to require local governments to contribute to the costs of education. N.C. Const. art. IX, § 2(2). In accordance with this Constitutional provision, our legislature has said, "It is the policy of the State of North Carolina that the facilities requirements for a public education system will be met by county governments." N.C. Gen. Stat. § 115C-408. Moreover, local school boards have authority to have taxes "levied on [their] behalf as a school supplemental tax" by the county. N.C. Gen. Stat. § 115-511. However, "[t]he board of county commissioners may approve or disapprove of this request in whole or in part," *id.*, although local school boards can bring suit to enforce a county's obligation to raise funds. N.C. Gen. Stat. § 115C-431.

In considering the Eleventh Amendment for purposes of determining congressional intent under § 1983, we are mindful of the "twin reasons" for the amendment's adoption: (1) "the States' fears that 'federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin,' " and (2) "the integrity retained by each State in our federal system," which includes the States' sovereignty from suit. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39, 130 L. Ed. 2d 245, 255 (1994) (quotations and citations omitted).

Although both state and local governments contribute to our school systems, there is no argument before us that any recovery in this matter would come directly from our State treasury. Rather, the local school board is a corporate entity that can sue and be sued, N.C. Gen. Stat. §§ 115C-40, and our legislature has empowered local boards to waive sovereign immunity by obtaining insurance, N.C. Gen. Stat. § 115C-42 (2005), which the Johnston County board has done in this case. Moreover, as to the issue of maintaining the integrity of North Carolina within the federal system, we are convinced that suit against a local school board that performs "very important, though purely local functions," *see Turner*, *supra*, and that is its own corporate body separately liable from the State will not hinder our State's integrity within the federal system. Accordingly, we hold that a local school board is a "person" within the meaning of § 1983.

[4] In regard to the state constitutional claims, the Board argues that plaintiffs cannot seek redress under the state constitution because "plaintiffs have an adequate state remedy. But for the Board's assertion of immunity, plaintiffs' cause of action in negligence would redress the complained of injury." Our Supreme Court has said, "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). In considering whether an adequate state remedy exists, we consider whether, if any state remedy, if successful, would compensate a plaintiff for the same injury alleged in the direct constitutional claim. *Rousselo v. Starling*, 128 N.C. App. 439, 447, 495 S.E.2d 725, 731 (1998).

The Board's argument confuses the issues presented. Plaintiffs have claimed damages for *both* negligence and "intentional and arbitrary discrimination" by the Board against the tort claim. Plaintiffs seek to remedy the injury incurred by the alleged arbitrary and unequal application of the Board's immunity. There is no adequate remedy for such conduct in a negligence action or in any other state law cause of action. Accordingly, we hold that plaintiffs have no adequate state remedy and may proceed directly under the State constitution.

[5] Having determined that a local school board is a person within the meaning of § 1983 and that plaintiffs have no adequate state remedy preventing them from proceeding under the State constitution, we consider whether judgment on the pleadings was otherwise appropriate. In *Dobrowolska v. Wall*, this Court held that summary judgment was inappropriate where there was no evidence in the record that the City of Greensboro applied a set criteria in deciding when to settle claims. 138 N.C. App. 1, 18, 530 S.E.2d 590, 602 (2000). Similarly, in this case, viewing the evidence in the light most favorable to the plaintiffs, there is a material issue of fact as to whether the Board applied a reasonable criteria to its evaluation of claims. *See Dobrowolska*, *supra*. Accordingly, judgment on the pleadings was inappropriate as to the constitutional claims. *See Davis*, *supra* ("The granting of judgment on the pleadings is [only] proper when there does not exist a genuine issue of material fact, and the only issues to be resolved are issues of law").

[6] We additionally address the dissent's reliance on *Clayton v. Branson*, 170 N.C. App. 438, 613 S.E.2d 259 (2005). *Branson*, in perti-

nent part, dealt with the issue of whether a trial court properly denied a defendant's motion for *JNOV* regarding claims arising under 42 U.S.C. § 1983. This Court held that on the *Branson* facts the trial court erred in denying the defendant's motion for *JNOV*. The standard of review for a motion for *JNOV* and a motion for judgment on the pleadings are substantially different. When considering a motion for *JNOV*:

all the evidence must be considered in the light most favorable to the nonmoving party. The nonmovant is given the benefit of every reasonable inference . . . from the evidence and all contradictions are resolved in the nonmovant's favor. If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for . . . judgment notwithstanding the verdict should be denied.

Branson, 170 N.C. App. at 442, 613 S.E.2d at 263-64 (citations omitted). As we have previously stated, however, judgment on the pleadings is only proper when there are no genuine issues of material fact, and the only issues to be resolved are issues of law. *Davis*, *supra*. In this case, judgment on the pleadings was inappropriate because there are genuine issues of material fact presented by the pleadings as to whether defendants applied an appropriate, non-arbitrary criteria on an equal basis to all claimants. Accordingly, we remand this issue to the trial court.

Reversed and remanded.

Judge HUDSON concurs.

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

LEVINSON, Judge concurring in part and dissenting in part.

I concur with the conclusion of the majority opinion that plaintiff's injuries did not fall within Exclusion 18 of the Coverage Agreement, and that the trial court's order must be reversed and remanded for entry of summary judgment in favor of plaintiffs in this respect. However, I disagree with the conclusion that the constitutional claims survived defendants' Rule 12(c) motions, and therefore respectfully dissent from these portions of the majority opinion. Because it is unnecessary to do so, I make no comment on whether a

local school board is a "person" within the meaning of 42 U.S.C. § 1983 (2005).

Unlike the majority, I conclude the trial court correctly granted defendants' N.C. Gen. Stat. § 1A-1, Rule 12(c) (2005) motion for judgment on the pleadings with respect to the constitutional claims, and would therefore affirm the trial court's order in this respect.

" 'A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain.' " *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682, 360 S.E.2d 772, 780 (1987) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)). "When a motion for judgment on the pleadings is made, the trial court is required to view the facts and permissible inferences in the light most favorable to the non-moving party, and all well pleaded factual allegations in the non-moving party's pleadings must be taken as true." *Burton v. Kenyon*, 46 N.C. App. 309, 310, 264 S.E.2d 808, 809 (1980).

A motion for judgment on the pleadings has some similarities to motions for dismissal for failure to state a claim for relief, under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005), and summary judgment under N.C. Gen. Stat. § 1A-1, Rule 54 (2005). *See Floraday v. Don Galloway Homes*, 340 N.C. 223, 224, 456 S.E.2d 303, 304 (1995) ("[P]ursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, defendant filed a motion for judgment on the pleadings, requesting dismissal of the action on the grounds that the complaint failed to state a claim upon which relief could be granted."); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) ("Motions under Rules 12(b)(6) and 12(c) can be treated as summary judgment motions, the difference being that under Rules 12(b)(6) and 12(c) the motion is decided on the pleadings alone, while under Rule 56 the court may receive and consider various kinds of evidence."). "The principal difference . . . is that a motion under Rule 12(c) . . . is properly made after the pleadings are closed while a motion under Rule 12(b)(6) must be made prior to or contemporaneously with the filing of the responsive pleading. *Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988). Additionally, in addressing a Rule 12(c) motion, the trial court "may consider . . . 'only the pleadings and exhibits which are attached and incorporated into the pleadings[.]' " *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 104, 598 S.E.2d 237, 240

(2004) (quoting *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996)) (citation omitted).

Plaintiffs herein sought damages "pursuant to 42 U.S.C. §§ 1983, 1988, the Fifth, the Fourteenth Amendments to the United States Constitution and Article I, [§] 19, of the Constitution of the State of North Carolina." I conclude that their complaint fails to set forth facts that, accepted as true and allowing all reasonable inferences from those facts, would entitle them to relief under any legal theory, or would demonstrate a genuine issue of material fact.

In reaching this conclusion, I am mindful that in considering a Rule 12(c) motion, " '[w]e are not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.' " *Good Hope Hosp. v. Dept. of Health*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)). "Though the trial court is obligated to take all of the allegations of the complaint as true in ruling upon the motion, it is elementary that the trial court must draw its own legal conclusions from those facts, and that it may draw conclusions which may differ from those advocated by plaintiffs." *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002). *See also*, *Lewis v. College*, 23 N.C. App. 122, 127, 208 S.E.2d 404, 407 (1974) (upholding dismissal under Rule 12(b)(6) where alleged facts did not state ground for relief and "[o]ther portions of the complaint also contain allegations which, in our view, amount to no more than plaintiff's own unwarranted deductions or conclusions of law").

Thus, this Court's analysis of whether the trial court erred by dismissing plaintiffs' complaint requires us to distinguish between factual allegations and conclusions of law. "Findings of fact are statements of what happened in space and time." *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987). "Matters of judgment are not factual; they are conclusory and based ultimately on various factual considerations. . . . [Facts] can be objectively ascertained by one or more of the five senses or by mathematical calculation." *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. 689, 693, 370 S.E.2d 567, 570 (1988).

The majority cites the following allegations of plaintiffs' complaint in support of its conclusion that the trial court erred by dismissing plaintiffs' claim:

15. Upon information and belief, in the past, the Association, Trust Defendants and the Johnston County Board of Education could have raised the doctrine of immunity on many tort claims, but chose instead, for various reasons that will be proven at trial, to pay claims even in light of the immunity defense. Upon information and belief, the Association, Trust Defendants, in conjunction with the Johnston County Board of Education, would examine each claim to see if the immunity doctrine could be raised. Upon information and belief, if the immunity doctrine would be raised, it was raised, but thereafter some claims were nevertheless paid. This disparate treatment of claimholders is prohibited by the United States and North Carolina Constitutions, as well as 42 U.S.C. § 1983.

. . .

44. At all times pertinent hereto, [defendants] . . . in claiming immunity as to the Plaintiffs' claims for personal injury and medical expenses, . . . have subjected these Plaintiffs to the deprivation of their equal protection and substantive due process rights under the United States Constitution, as enforced by 42 U.S.C. § 1983, and Article I, [§] 19 of the North Carolina Constitution.

45. These Plaintiffs have been denied due process and equal protection of the law as the Defendants have paid the property damage, but have asserted immunity in the remaining portion of Plaintiffs' claim, but have, upon information and belief, customarily waived it for similarly situated individuals who have been compensated for tort damages.

46. [Defendants'] policy and custom of paying some claims but not paying others, when immunity could be raised in each one, has played a part in the violation of federal and state law. Additionally, the Defendants' conduct in this case, of paying the property damage, and assuming liability for the claim, and then refusing to pay the personal injury and medical expense portion of the claim, is a violation of Plaintiffs' federal and state constitutional rights, as a matter of law.

47. Upon information and belief, the [Defendants] have what amounts to be unbridled discretion to resolve claims filed with the local board of education.

48. As a result of the conduct of these Defendants, the Plaintiffs have been deprived of their right to recover for the bodily injury and medical expenses portion of the Ripellino claim.

49. The Fourteenth Amendment to the United States Constitution, Article I, [§] 19 of the North Carolina Constitution, and 42 U.S.C. § 1983 protect these Plaintiffs against intentional and arbitrary discrimination, being the conduct of the [defendants] as to these Plaintiffs.

50. As a proximate result of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, [§] 19 of the Constitution of the State of North Carolina, and 42 U.S.C. § 1983 violations by [defendants], Plaintiffs are entitled to recover damages[.]

In reviewing the trial court's dismissal under Rule 12(c), I rely in part on this Court's recent opinion in *Clayton v. Branson*, 170 N.C. App. 438, 613 S.E.2d 259 (2005), *disc. review denied*, 360 N.C. 174, —— S.E.2d —— (2005). The opinion in *Branson* sets out a comprehensive legal "roadmap" for review of constitutional claims based on a governmental unit's settlement policies and practices. Although (1) the instant case involves a Rule 12(c) motion while *Branson* reviewed the trial court's ruling on a motion for JNOV, and (2) different facts are present in each case, I conclude that *Branson* resolves certain legal issues raised in both cases.

Plaintiffs' factual allegations, considered singly or together, in conjunction with inferences logically drawn from these facts, do not state a claim for relief. Plaintiffs assert in paragraph No. 15 that defendants examined each claim to determine if the defense of governmental immunity would be available. Plaintiffs allege, in paragraphs Nos. 15, 45, and 46, that plaintiffs have paid damages to certain tort claimants, but would not pay plaintiffs' claim. And, in paragraphs Nos. 45 and 46, plaintiffs allege that defendants paid part of their claim, but did not pay all of it. These factual allegations, taken as true, do not give rise to liability as discussed below.

Plaintiffs further allege that by settling some claims defendants thereby "waived" the defense of governmental immunity, and that by refusing to offer plaintiffs a settlement, defendants were "raising" the defense of governmental immunity. Plaintiffs' characterization of defendants' actions is a conclusion of law, which the court is not required to accept as true, and is, in any event, simply an erroneous conclusion of law.

Branson observed that, as an affirmative defense, "governmental immunity cannot, by definition, be raised until there is a lawsuit to defend against." *Id.* at 449, 613 S.E.2d at 268. On this basis, *Branson* held that "the execution of settlement contracts between a municipality and tort claimants do not constitute waivers of the affirmative defense of governmental immunity." *Id.* This reasoning is applicable to the instant case. Accordingly, plaintiffs' allegation, that defendants may have compensated other tort claimants, does not support an inference that defendants raised the defense of immunity in response to a lawsuit, nor that they subsequently waived the defense.

Plaintiffs herein also state that defendants have "unbridled discretion" to decide whether to settle claims. In other words, plaintiffs complain that defendants' authority over tort claims is not subject to regulation, and is constrained only by state and federal constitutional prohibitions on discrimination. Plaintiffs further assert that defendants' "unbridled discretion" violates their constitutional right to substantive and procedural due process. Again, this is not a statement of fact, but is a legal conclusion that need not be accepted at face value.

Plaintiffs' position, that defendants' freedom to decide when to compensate claimants violates their constitutional rights, rests on the premise that there is a right to recover damages that cannot be abrogated without procedural due process, and that such right must be administered according to definite objective criteria. "However, § 1983 does not create constitutional rights, and is available only to enforce constitutional rights whose source may be identified[.]" *Id.* at 451-52, 613 S.E.2d at 269. Consequently, plaintiffs' statement that defendants enjoy the discretion to decide when to settle claims does not support recovery unless plaintiffs also allege facts supporting an inference that they have a constitutionally protected legal right at issue.

As discussed in *Branson*, the right to procedural due process arises only upon the existence of a constitutionally protected property right and, absent a valid waiver of governmental immunity, a plaintiff has no "right" to recover damages from a governmental defendant. Therefore, plaintiffs clearly have no protected property right that would give rise to procedural due process rights:

> Plaintiff herein claims a constitutionally protected property interest in his right to recover damages from the city. . . . . As discussed above, absent a waiver of governmental immunity by the

> purchase of liability insurance, plaintiff is barred from maintaining a lawsuit against the city. As plaintiff has no right to maintain a suit against the city, under the facts set forth in this opinion, he cannot have a "constitutionally protected" property right to do so.

Id. at 452-53, 613 S.E.2d at 270. Inasmuch as plaintiffs have no constitutionally protected right to recover from defendants, and therefore have no procedural due process rights, defendants' freedom to exercise discretion does not support an inference that plaintiffs rights to procedural due process are being violated:

> [I]t is undisputed that settlement offers, if any, are in the discretion of the city. Simple logic dictates that a party cannot have a right or entitlement to a benefit whose dispensation rests entirely in the discretion of the city[.] . . . Accordingly, the city's discretion to choose whether to settle with a claimant is not a constitutional violation of procedural due process[.]

Id.

Moreover, defendants' payment of damages to certain tort claimants does not constitute the granting of a "right" akin to a person's right to, *e.g.*, a license issued by a government zoning board or the receipt of welfare benefits. In each of these circumstances a governmental unit, although not constitutionally required to do so, has extended a right to its citizens, subject to conditions articulated by statute or ordinance. However, in the present case, no "right" to compensation is identified. Where the existence of a right is clearly established, its administration may not depend on the whim or unlimited discretion of a government official. *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000). However, *Dobrowolska* did not hold that, whenever a state or local governmental employee takes any action, makes a decision, or compensates a citizen for any loss, that a new "right" is thereby established, or that such decisions are *per se* unconstitutional if they are discretionary decisions by a government employee.

In the instant case, I conclude that plaintiffs failed to allege facts that would support an inference that they enjoyed a constitutionally protected right to compensation by defendants. The factual allegations of plaintiffs' complaint, reduced to their essentials, are that:

1. Defendants examine tort claims against them to ascertain the applicability of the affirmative defense of governmental immunity to the facts of the case.

2. Defendants customarily pay damages to some tort claimants, but not to all of them.

3. Defendants have the power to decide if and how they will offer a settlement to a tort claimant.

4. Defendants paid part of the damages asserted by plaintiffs, but not the whole claim.

These facts do not give rise to liability, and the remaining paragraphs from plaintiffs' complaint cited above consist of unwarranted legal conclusions that plaintiffs attempt to draw from these facts. For example, plaintiffs make the conclusory statements that defendants' conduct violates their rights to substantive due process, and that defendants violated their rights under the Equal Protection Clause by denying their claim but paying damages to "similarly situated" claimants.

It is true that appropriate factual allegations can support a claim of violation of Equal Protection rights, based on disparate treatment of similarly situated individuals:

> [M]ost laws differentiate in some fashion between classes of persons. The Equal Protection Clause . . . simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.

Branson, 170 N.C. App. at 456-57, 613 S.E.2d at 272 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 12 (1992)). However, in the instant case, as in *Branson*, plaintiffs "[did] not identify any classification upon which [they were] denied equal protection[,] . . . [or allege] the use of any inherently suspect criteria, such as race, religion, or disability status." *Branson*, *id.* Indeed, plaintiffs wholly fail to indicate, even in the most general terms, the kind of discrimination they allege, or the nature of the "relevant respects" in which other tort claimants were allegedly "similarly situated." Consequently, the allegations of their complaint provide no notice to defendants as to what actions or transactions are allegedly discriminatory. Do plaintiffs mean to suggest that defendants only compensate tort claimants if they are from a particular part of the county; are school employees; belong to a particular political party; are of a certain race or gender; go to church with a school board member; or only if the damages claimed are below a certain amount? Because plaintiffs fail to allege any facts, there is no way to know.

The standard for sufficiency of a complaint under our theory of "notice pleading" has been stated as follows:

> In order for plaintiffs' complaint to have withstood defendant's motion to dismiss, the complaint must . . . provide defendant sufficient notice of the conduct on which the claim is based to enable defendant to respond and prepare for trial[.] . . . For the purpose of ruling on a motion to dismiss . . . conclusions of law or unwarranted deductions of fact are not admitted. Under the notice theory of pleadings, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial[.]

Hill v. Perkins, 84 N.C. App. 644, 647, 353 S.E.2d 686, 688 (1987) (emphasis added) (citations omitted). " 'In reviewing a dismissal of a complaint for failure to state a claim, the appellate court must determine whether the complaint alleges the substantive elements of a legally recognized claim and whether it gives sufficient notice of the events which produced the claim to enable the adverse party to prepare for trial.' " *Toomer v. Garrett*, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002) (quoting *Brandis v. Lightmotive Fatman, Inc.*, 115 N.C. App. 59, 62, 443 S.E.2d 887, 888 (1994)).

In the instant case, the "fallacy with plaintiffs' . . . complaint, is that statements of law . . . substitute for alleging sufficient facts from which it may be determined what liability forming conduct is being complained of and what injury plaintiffs have suffered." *Hill*, 84 N.C. App. at 648, 353 S.E.2d at 689. I conclude that plaintiffs failed to state a claim for violation of their equal protection rights, even under the liberal standards of notice pleading.

Finally, I respectfully observe that the majority opinion's statement that the "allegations [in the complaint] amount to more than 'conclusory, unwarranted deductions of fact, or unreasonable inferences' " fails to meet the legal implications of *Branson*. I conclude that, under *Branson* and cases cited therein, plaintiffs failed to allege facts that, if proved, would entitle them to relief under their constitutional claims. Accordingly, I would uphold the trial court's dismissal of plaintiffs' constitutional claims.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS BAUBERGER

No. COA04-1368

(Filed 7 March 2006)

1. Jury— juror misconduct—motion for appropriate relief—improper consideration of dictionary definitions—extraneous information under Rule 606(b)—right to confrontation

The trial court did not err in a second-degree murder and assault with a deadly weapon inflicting serious injury case by denying defendant's motion for appropriate relief seeking a new trial based on juror misconduct arising from the fact that jurors considered dictionary definitions during deliberations, even though defendant contends the juror affidavits contain extraneous information and that his Sixth Amendment right to confrontation was violated, because: (1) although the jury's conduct was improper, the jury's use of the dictionary did not prejudice defendant when there was no reasonable possibility that the verdict would have been different absent the jury consulting the dictionary; (2) definitions in standard dictionaries are not within our Supreme Court's contemplation of extraneous information under N.C.G.S. § 8C-1, Rule 606(b); and (3) the reading of the dictionary definitions did not violate defendant's right to confrontation when the information considered by the jury did not discredit defendant's testimony or witnesses, and it concerned legal terminology rather than evidence developed at trial.

2. Sentencing— prior record level—prior driving while impaired convictions

The trial court did not err in a second-degree murder and assault with a deadly weapon inflicting serious injury case by using defendant's prior driving while impaired convictions in determining his prior record level and sentencing him as a Level II offender, because: (1) although defendant contends his sentence as a Level II offender violates the prohibition against double jeopardy, he failed to cite any supporting case authority; (2) defendant's prior convictions were not aggravating factors, but instead the trial court added points to defendant's prior record level under N.C.G.S. § 15A-1340.14; and (3) the parties do not cite any provisions of the Structured Sentencing Act, nor did the Court of Appeals find any, that prohibited a trial court from using the same prior convictions introduced by the State as

evidence of malice during trial to increase defendant's prior record level at sentencing.

Judge GEER dissenting.

Appeal by defendant from judgment entered 15 August 2003 by Judge John O. Craig, III in Forsyth County Superior Court. Heard in the Court of Appeals 17 August 2005.

Attorney General Roy Cooper, by Assistant Attorney General Patricia A. Duffy and Special Counsel Isaac T. Avery, III, for the State.

Kathryn L. VandenBerg for defendant-appellant.

ELMORE, Judge.

William Bauberger (defendant) was indicted for second-degree murder and assault with a deadly weapon inflicting serious injury. At trial, the State's evidence tended to show that on 3 February 2002 a vehicle operated by defendant collided with a vehicle operated by William Foy. At approximately 8:15 p.m. on 3 February Mr. Foy was driving a Geo Metro on Highway 421 near the Lewisville/Clemmons exit with his wife, Carol Foy, in the passenger seat. Defendant was driving a Cadillac with a Flow Chevrolet dealer's tag. Defendant had attended a Super Bowl party where he consumed in excess of ten beers. While driving, defendant called Andrea True, a friend from work, and told her that he was coming over to her house. Defendant began driving down the Lewisville/Clemmons exit ramp in the wrong direction. There were signs indicating "Do Not Enter" and "Wrong Way."

Audrey Borger testified that she was driving up the Lewisville/Clemmons exit from Highway 421 and saw a car coming straight at her. She blew her horn and then swerved over to avoid a collision. Melissa Borger, Audrey Borger's daughter, testified that she was riding as a passenger in her mother's car when she saw a vehicle coming at them at a speed of over 45 miles per hour and that the driver was accelerating. Jeffrey Hinshaw testified that he was driving on Highway 421 and saw a vehicle's headlights coming down the exit ramp at him. Mr. Hinshaw stated that the vehicle appeared to be weaving and was traveling at over 55 miles per hour. Mr. Hinshaw testified that he slowed down and pulled his car into the breakdown lane and then heard a crash shortly thereafter.

Mr. Foy testified that he observed a vehicle coming the wrong way down the exit ramp and that he tried to brake and swerve onto the shoulder of the road. After the cars collided, Mr. Foy checked on his wife but could not find a pulse. Mr. Foy got out of the car after several attempts but was unable to walk because of a broken leg. Mr. Hinshaw, the chief physician's assistant in the emergency department at Baptist Hospital, testified that he heard the crash and went over to help. Mr. Hinshaw reached Mr. Foy first, who asked Mr. Hinshaw to check on his wife. Mr. Hinshaw found Mrs. Foy unresponsive and with no pulse. When he arrived at the second car, Mr. Hinshaw observed that defendant was slumped back in his seat and appeared sleepy. Defendant responded to Mr. Hinshaw's sternal rub confirming defendant was not unconscious. Mr. Hinshaw detected an odor of alcohol. Stanley Lee testified that he lives near the scene of the crash and that he arrived after hearing the crash. Mr. Lee noticed that defendant had a strong odor of alcohol. State Trooper Daniel Harmon testified that he spoke to defendant in the back of the ambulance and that defendant slurred his last name. Trooper Harmon stated that defendant's eyes were red and glassy and that defendant appeared to be impaired.

Mrs. Foy suffered traumatic injuries to her head, chest, internal organs, and arms and legs. She died within minutes of the crash. Mr. Foy was transported to Baptist Hospital, where he was treated for a broken left hand, and a tibia fracture and bone fragments in his right leg that required reconstructive surgery and seven screws. Defendant was also treated at Baptist Hospital. While there, defendant told the mother of his child, "I really f—— up, they're going to give me the needle, I killed someone tonight, I'm going away forever, I want to see my child[.]" Defendant called his co-worker Andrea True and told her that he had killed someone and that he wished it had been him.

Defendant testified at trial. He stated that he had consumed more than ten beers over the course of five or five and one-half hours on the day of the collision. Defendant admitted that he had been ordered by a court to surrender his license a few months prior to the crash. Defendant testified that he knew that he was impaired when he drove but did not remember going the wrong way on the exit ramp. Prior to trial, defendant had stipulated to the fact that his driver's license was revoked at the time of the crash for a driving while impaired conviction in Guilford County. Defendant had also stipulated that his blood/alcohol concentration was .20 grams per 100 milliliters of whole blood.

The jury returned verdicts of guilty on the charges of second-degree murder and assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant on 15 August 2003. Later that day, the State informed the trial court that one of the jurors may have consulted a dictionary about the meaning of the word "malice." On 18 August 2003 defendant filed a Motion for Appropriate Relief seeking a new trial. In its response to defendant's motion, the State attached affidavits of ten jurors. Juror Collins stated that he looked up the word "malice" at home prior to the final jury charge and that he could not remember during the deliberations what the definition said and did not share it with anyone on the jury. The jury foreman stated that he checked out a copy of Webster's New Collegiate Dictionary during lunch break of the deliberations, brought it back to the jury room, and shared with the jury the definitions of "recklessly," "wantonly," "manifest," "utterly," and "regard." Following a hearing, the trial court denied defendant's motion. Defendant appeals his conviction and sentence for second-degree murder and also the denial of his Motion for Appropriate Relief.

I.

[1] First, defendant contends that he is entitled to a new trial because jurors improperly considered dictionary definitions during deliberations. In the Motion for Appropriate Relief to the trial court, defendant raised the constitutional argument that the jury's conduct violated his Sixth Amendment rights to an impartial jury and to confront the witnesses against him. We review the trial court's order denying a motion for appropriate relief to determine whether the findings of fact are supported by the evidence, the findings support the conclusions of law, and the conclusions support the trial court's order. *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). "The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991) (quoting *State v. Gilbert*, 47 N.C. App. 316, 319, 267 S.E.2d 378, 379 (1980)).

The trial court reviewed the affidavits submitted by the ten jurors and entered findings based upon this evidence. In pertinent part, the trial court found that the jury foreman went to the Forsyth County Public Library during lunch break of the jury deliberations and checked out Webster's New Collegiate Dictionary (1953 edition). The foreman, Mr. Kuley, brought the dictionary to the jury room and read

the following definitions of words contained within the trial court's definition of "malice":[1]

"recklessly"	"lack of due caution"
"wantonly"	"arrogant recklessness of justice or the feelings of others"
"manifest"	"show"
"utterly"	"fully, totally"
"regard"	"respect or consideration for"

In addition, the trial court found that Juror Collins looked up the word "malice" in a pocket dictionary at home prior to deliberations but did not bring a copy of the definition to the jury room. The trial court entered an order determining, *inter alia*, that although the jury's conduct was improper, the jury's use of the dictionary did not prejudice defendant and there is no reasonable possibility that the verdict would have been different absent the jury consulting the dictionary.

In general, a trial court may not receive juror testimony to impeach a verdict already rendered. *See State v. Costner*, 80 N.C. App. 666, 669, 343 S.E.2d 241, 243, *disc. review denied*, 317 N.C. 709, 347 S.E.2d 444 (1986). However, exceptions to this rule are found in N.C. Gen. Stat. § 15A-1240 and N.C. Gen. Stat. § 8C-1, Rule 606(b). Section 15A-1240 states that the testimony of a juror may be received to impeach the verdict when it concerns "[m]atters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him[.]" N.C. Gen. Stat. § 15A-1240 (2003). Section 15A-1240 is applicable to criminal cases only. *See Smith v. Price*, 315 N.C. 523, 534, 340 S.E.2d 408, 415 (1986). Rule 606(b) of the North Carolina Rules of Evidence provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict or indictment or

1. The trial court instructed the jury that "[m]alice arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberatly bent on mischief."

> concerning his mental processes in connection therewith, except that a juror may testify on the question whether *extraneous prejudicial information* was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

N.C. Gen. Stat. § 8C-1, Rule 606(b) (2003) (emphasis added). Our Supreme Court has interpreted extraneous information under Rule 606(b) as "information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced in evidence." *State v. Rosier*, 322 N.C. 826, 832, 370 S.E.2d 359, 363 (1988).

Defendant contends that the dictionary definitions read to the jury by the foreman were extraneous information within the meaning of Rule 606(b) because the definitions were directed toward the governing law of the case. Defendant cites to *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). In *Barnes*, our Supreme Court held that the trial court did not abuse its discretion in not inquiring into prejudice to the defendant where a juror read aloud from the Bible in the jury room prior to the trial court's instructions to the jury. *Id.* at 228, 481 S.E.2d at 68. The Court explained that the information from the Bible was not an extraneous influence upon the jury because there was no evidence that the reading was directed to "the facts or governing law at issue in the case[.]" *Id.*

In arguing that the dictionary definitions were not extraneous information and thus the affidavits of the jurors were not admissible to impeach the verdict, the State relies upon the reasoning of the dissenting opinion in *Lindsey v. Boddie-Noell Enters., Inc.*, 147 N.C. App. 166, 555 S.E.2d 369 (2001), reversed *per curiam* for the reasons stated in the dissenting opinion, 355 N.C. 487, 562 S.E.2d 420 (2002). In *Lindsey*, a juror consulted a dictionary for the definitions of "willful" and "wanton" during deliberations in a case where the jury was deciding whether to award punitive damages against the defendant based upon willful and wanton conduct. *Lindsey*, 147 N.C. App. at 169, 555 S.E.2d at 372. The jury did not award punitive damages to the plaintiff, and the plaintiff made a motion for a new trial. *Id.* This Court held that the trial court erred in failing to grant a new trial because the plaintiff was prejudiced by the jury misconduct. *Id.* at 174, 555 S.E.2d at 375. In a dissenting opinion, Judge Tyson concluded

that the contents of the juror affidavits submitted to the trial court were not extraneous information under Rule 606(b).

> The majority opinion states that it is "apparent" that the definitions of "willful" and "wanton" in a case involving a claim for punitive damages constitutes "extraneous information" because they pertain to the case being tried and the governing law at issue. I find the reading of the dictionary definitions by Juror Couch is analogous to a situation where one of the jurors informs the jury what "willful" and "wanton" mean, according to his knowledge of the English language. The definition of words in our standard dictionaries has been considered a matter of common knowledge which the jury is supposed to possess.

Id. at 179, 555 S.E.2d at 378.

The dissenting opinion in *Lindsey*, as adopted by our Supreme Court, cites to *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), and *Berrier v. Thrift*, 107 N.C. App. 356, 420 S.E.2d 206 (1992), in concluding that definitions in standard dictionaries are not within our Supreme Court's contemplation of extraneous information. Both *Robinson* and *Berrier* addressed the distinction between internal and external influences on the jury. In *Robinson*, one or more jurors stated in affidavits that they considered the possibility of parole in determining whether the defendant should receive a life sentence. *Robinson*, 336 N.C. at 124, 443 S.E.2d at 329. The trial court concluded, and our Supreme Court agreed, that discussions of parole eligibility are internal influences upon the jury coming from the jurors themselves. *Id.* at 124-25, 443 S.E.2d at 329-30. Accordingly, the Court held that the trial court correctly denied the defendant's motion for appropriate relief where the affidavits could not be used to impeach the verdict under Rule 606(b). *Id.* at 124-25, 443 S.E.2d at 329. In *Berrier*, juror affidavits revealed that the jury foreman incorrectly stated during deliberations that a punitive damages award is an award of symbolic value rather than a collectible money judgment. *Berrier*, 107 N.C. App. at 362, 420 S.E.2d at 210. This Court held that the trial court properly excluded the affidavits under Rule 606(b) because the information allegedly received by the jury was from an internal source, the jury foreman's impression of the effect of a punitive damages award. *Id.* at 365-66, 420 S.E.2d at 210-12.

In both *Robinson* and *Berrier*, the affidavits were inadmissible under Rule 606(b) where the jurors drew upon their own beliefs or ideas, not an outside source of information. *See also State v.*

Quesinberry, 325 N.C. 125, 135-36, 381 S.E.2d 681, 688 (1989) (no allegation that jurors received information about parole from outside source; affidavits stating that jurors believed the defendant would be released in ten years not admissible under Rule 606(b)). Here, the information was from an outside source and not merely a belief or impression of the jury foreman. The information concerned the definitions of words within the court's instruction on malice, an element of the second-degree murder offense being tried. The information in the affidavits, therefore, appears to be within the exception for extraneous information stated in Rule 606(b). *See Rosier*, 322 N.C. at 832, 370 S.E.2d at 363 (extraneous information includes information about the case being tried). However, we are bound by the reasoning of *Lindsey*. As the affidavits attest to the reading of standard dictionary definitions, the matters in the affidavits are not extraneous information under Rule 606(b). *See Lindsey*, 355 N.C. at 487, 562 S.E.2d at 420 (adopting the dissent in *Lindsey*, 147 N.C. App. 179, 555 S.E.2d 378).

Defendant next contends that the jury's consultation of dictionary definitions violated his Sixth Amendment right to confront witnesses against him and that the affidavits may be used to impeach the verdict pursuant to N.C. Gen. Stat. § 15A-1240. We agree with defendant that *Lindsey*, a civil case, is not controlling on this point because it does not discuss N.C. Gen. Stat. § 15A-1240, a provision of the Criminal Procedure Act. Indeed, in *State v. Rosier*, a criminal case where the defendant submitted juror affidavits in support of his motion for appropriate relief, our Supreme Court independently analyzed whether the juror affidavits should have been considered pursuant to Section 15A-1240 and pursuant to Rule 606(b). *See Rosier*, 322 N.C. at 832, 370 S.E.2d at 362-63. Nonetheless, we do not agree with defendant that the reading of the dictionary definitions in the case *sub judice* violated his right to confrontation.

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *State v. Nobles*, 357 N.C. 433, 435, 584 S.E.2d 765, 768 (2003) (internal quotations omitted). Thus, the Sixth Amendment provides the criminal defendant the right to confront witnesses and evidence against him. *See, e.g.*, *State v. Lyles*, 94 N.C. App. 240, 247, 380 S.E.2d 390, 394-95 (1989). In *Lyles*, the jury improperly peeled back paper that was covering a notation on a photographic exhibit, revealing that the defendant had been present at the police station on a date when his alibi witnesses testified that the defendant lived in another

state. *Id.* at 243, 380 S.E.2d at 392. This Court considered the circumstances under which the jury received this information and concluded that the defendant's right to confrontation was violated.

> In this case, it is undisputed that information about the defendant, which had not been admitted into evidence, came to the attention of the jury and that this evidence directly contradicted defendant's alibi witnesses. Because this exposure occurred during the jury's deliberations, defendant had no opportunity to challenge the evidence by cross-examination or to minimize its impact in his closing argument or through a curative instruction by the trial judge. Moreover, the evidence implied that defendant had prior criminal involvement, and the jury was allowed to draw this inference notwithstanding that this is a subject intricately regulated by the rules of evidence.

Id. at 247, 380 S.E.2d at 395. Here, the information considered by the jury did not discredit defendant's testimony or witnesses; it concerned legal terminology, not evidence developed at trial. Under these circumstances, the juror misconduct did not violate defendant's right to confrontation. *Cf. State v. Hines*, 131 N.C. App. 457, 508 S.E.2d 310 (1998) (defendant's right to confrontation violated where prosecutor's notes and typewritten list of statements defendant made, including hearsay statements, were mistakenly published to the jury without being admitted into evidence). We hold that the trial court did not err in concluding that the affidavits did not contain extraneous information and that defendant's right to confrontation was not violated by the juror misconduct.

II.

[2] Defendant also assigns error to the trial court's use of prior driving while impaired convictions in determining his prior record level and sentencing him as a Level II offender. Defendant concedes that he failed to object to the determination of prior record level at trial, but he correctly notes that the issue of the validity of his sentence is deemed preserved under N.C. Gen. Stat. § 15A-1446(d)(18) (2003). *See*, *e.g.*, *State v. Robertson*, 161 N.C. App. 288, 292, 587 S.E.2d 902, 905 (2003).

Defendant argues that his sentence as a Level II offender violates the prohibition against double jeopardy but cites no supporting case authority. We, therefore, do not address this argument. *See* N.C.R. App. P. 28(b)(6) ("The body of the argument shall contain citations of the authorities upon which the appellant relies."). Defendant also

argues that his sentence as a Level II offender violates N.C. Gen. Stat. § 15A-1340.16, which provides as follows:

> Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation.

N.C. Gen. Stat. § 15A-1340.16(d) (2003). Interpreting this section of the Structured Sentencing Act, this Court has held that proof of an element of an offense may not be used to also prove an aggravating factor. *See State v. Corbett*, 154 N.C. App. 713, 717-18, 573 S.E.2d 210, 214 (2002). Here, defendant's prior convictions were not aggravating factors. Rather, the trial court added points to defendant's prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14.

The parties do not cite any provision of the Structured Sentencing Act, nor do we find any, that prohibits a trial court from using the same prior convictions introduced by the State as evidence of malice during trial to increase the defendant's prior record level at sentencing. In contrast, the General Assembly has specifically prohibited a trial court from using prior convictions to increase a defendant's prior record level where those prior convictions are also used to establish the offense of being an habitual felon. *See* N.C. Gen. Stat. § 14-7.6 (2003) ("In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used."); *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996) (plain language of N.C. Gen. Stat. § 14-7.6 prohibits use of same conviction to establish both habitual felon status and prior record level). The trial court's determination of prior record level in the instant case did not violate the plain language of N.C. Gen. Stat. § 15A-1340, and any further argument by defendant should be addressed to the General Assembly.

No Error.

Judge CALABRIA concurs.

Judge GEER dissents by separate opinion.

GEER, Judge, dissenting.

A lynchpin of our judicial system is the principle that the jury will only apply the law as described by the trial judge. A jury is not per-

mitted to engage in a private investigation of the law or to consult outside sources to untangle what the trial judge meant in his instructions. Yet, that is precisely what the jury did in this criminal case. Because I believe defendant was prejudiced by the jury's consideration of extraneous material and, therefore, is entitled to a new trial, I respectfully dissent.

I recognize that in *Lindsey v. Boddie-Noell Enters., Inc.*, 355 N.C. 487, 562 S.E.2d 420 (2002), our Supreme Court, in a per curiam opinion, reversed this Court "for the reasons stated in the dissenting opinion" and that Judge Tyson's dissent held that dictionary definitions do not constitute "extraneous information" for purposes of Rule 606 of the Rules of Evidence. *Lindsey v. Boddie-Noell Enters., Inc.*, 147 N.C. App. 166, 179, 555 S.E.2d 369, 378 (2001) (Tyson, J., dissenting). I firmly disagree with this conclusion, as does the majority, and urge the Supreme Court to revisit it. In any event, I do not believe that this holding—in a civil case—should control in criminal cases.

Significantly, Judge Tyson's dissent stressed the fact that the case before the Court was "a civil action," requiring the trial court to apply a different standard than in criminal cases. *Id.*, 555 S.E.2d at 377-78. The dissent even referenced favorably *State v. McLain*, 10 N.C. App. 146, 148, 177 S.E.2d 742, 743 (1970), and described its holding as follows: "Although it was improper for the jury to obtain and read the [dictionary] definition [of uttering], we held that no reversible error had occurred" when "[t]he trial court instructed the jury to disregard the definition and defendant had not shown any *prejudice* by the jury conduct." *Lindsey*, 147 N.C. App. at 180, 555 S.E.2d at 378-79. *See McLain*, 10 N.C. App. at 148, 177 S.E.2d at 743 ("It was improper for the jury to obtain and read a dictionary definition of one of the offenses charged in the bill of indictment; however, the able trial judge properly instructed the jury to disregard the definition taken from the dictionary and the defendant has not shown that he was prejudiced in any way by the conduct of the jury."). Judge Tyson's dissent contains no indication that he believed *McLain* should be overruled. Nor am I willing to conclude that the Supreme Court intended to do so *sub silentio*.

Both the federal and state constitutions set forth various rights unique to criminal trials, including the right of the defendant to be present in person during the course of his trial. *State v. Buchanan*, 330 N.C. 202, 209, 410 S.E.2d 832, 836 (1991) (observing that the defendant's right to be present throughout his trial arises out of the accused's Sixth Amendment right to confront witnesses and other evi-

dence against him and his due process "right to a 'fair and just' hearing"). Under the federal constitution, a defendant is guaranteed the right to be present at each critical stage of his trial. *Id.* at 217, 410 S.E.2d at 841. The North Carolina constitution, N.C. Const. art. I, § 23, is broader, assuring the accused "the right to be present in person at *every stage* of his trial." *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987) (emphasis added). *See also Buchanan*, 330 N.C. at 217, 410 S.E.2d at 841 ("Under the state constitution, defendant's actual presence is required throughout his trial, not just at particularly important junctures.").[2]

Our Supreme Court has held that the state constitutional right to be present was violated in a number of instances involving interactions with the jury. In *Payne*, the Court held that the right was violated when the trial judge gave admonitions to the jury in the jury room without the defendant being present. 320 N.C. at 140, 357 S.E.2d at 613. In *Monroe*, the Court ordered a new trial when the trial judge conducted unrecorded conferences at the bench with jurors. 330 N.C. at 850, 412 S.E.2d at 654. Likewise, the Court found error when the trial judge passed a note to an alternate juror without revealing its contents to defendant or its counsel, although the Court held the error to be harmless because the transcript reflected the benign nature of the note. *State v. Jones*, 346 N.C. 704, 710, 487 S.E.2d 714, 718 (1997).

As these cases reflect, a defendant is entitled to be present whenever the jury is instructed. When a jury engages in self-help and consults with sources other than the trial judge to clarify the governing the law, it is effectively instructing itself. I do not believe that the *Lindsey* holding, which appears to permit a jury to consult a dictionary, can be reconciled with a criminal defendant's constitutional right to be present when the jury is instructed. At the least, I believe that *Lindsey's* holding that a dictionary does not constitute extraneous material would deny a defendant the fair and just hearing mandated by the Due Process Clause of the federal constitution. *See State v. Williamson*, 72 Haw. 97, 102, 807 P.2d 593, 596 (1991) (holding that the right to a "fair trial by an impartial jury" includes the requirement that "the jury be free from outside influences" such as a dictionary); *State v. Harris*, 340 S.C. 59, 62-63, 530 S.E.2d 626, 627 (2000) ("The

2. The North Carolina Supreme Court has distinguished between capital and non-capital cases by providing that this right may be waived only in non-capital cases. *State v. Monroe*, 330 N.C. 846, 849, 412 S.E.2d 652, 654 (1992). In all cases, however, the State may show that any violation of this right was harmless beyond a reasonable doubt. *Payne*, 320 N.C. at 140, 357 S.E.2d at 613.

Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors. . . . To safeguard these rights, the jury must render its verdict free from any outside influences," including dictionary definitions.); *State v. Richards*, 195 W. Va. 544, 550, 466 S.E.2d 395, 401 (1995) (holding that in order to ensure a criminal defendant a fair trial, the trial court was required to determine what effect a juror's misconduct in referring to a dictionary had upon the jury's verdict).

I would also note that *Lindsey* appears to stand alone with respect to its "extraneous information" holding. I have located no other decision in any jurisdiction, state or federal, holding that a dictionary does not constitute extraneous material. Although the *Lindsey* dissent adopted by our Supreme Court cites two cases, neither one reaches that conclusion. In *Dulaney v. Burns*, 218 Ala. 493, 497, 119 So. 21, 25 (1928), *overruled on other grounds by Whitten v. Allstate Ins. Co.*, 447 So. 2d 655 (Ala. 1984), the Alabama Supreme Court specifically concluded that a dictionary considered during a jury's deliberations was extraneous matter, but held "the question is whether such extraneous matter, in this instance a Webster's School Dictionary, was prejudicial to appellant." The second case, *State v. Asherman*, 193 Conn. 695, 737, 478 A.2d 227, 252 (1984), *cert. denied*, 470 U.S. 1050, 84 L. Ed. 2d 814, 105 S. Ct. 1749 (1985), only held that use by a jury of a dictionary does not give rise to a presumption of prejudice; a defendant must still demonstrate actual prejudice. The Connecticut Supreme Court continued:

> We hasten to add that the fact that we have found no error in this case does not mean that a trial judge is authorized to furnish a dictionary to a jury upon their request. There may be situations where furnishing a dictionary to a jury may create a presumption of prejudice arising out of injecting unauthorized informational and definitional material into the jury instructions; but that is not this case.

Id. at 738, 478 A.2d at 252 (internal citation omitted).

Indeed, with the exception of *Lindsey*, the universal rule appears to be that a dictionary constitutes extraneous material that may not be consulted by a jury. As the Maryland Court of Appeals has explained, the only debate elsewhere revolves around whether prejudice must be shown and, if so, how.

> The problem of the effect on proceedings where one or more jurors have consulted a dictionary during deliberations has been

> presented in a number of decisions in other states. It appears to be the near universal consensus that a new trial is not awarded simply because a dictionary was before the jury. The court must conclude that there was prejudice to the complaining party. Analysis by other courts, however, diverges in the approach taken to determine whether use of a dictionary was prejudicial. . . .
>
> Some decisions require that the movant for a new trial essentially prove prejudice in fact. In the absence of such a showing, the new trial is denied. . . .
>
> Other courts have presumed prejudice based solely on use of a dictionary during jury deliberations, with the burden on the adversary to rebut. Under these cases the court may conclude that there is prejudice without proof of the purpose for which the book was consulted.

Wernsing v. Gen. Motors Corp., 298 Md. 406, 414-15, 470 A.2d 802, 806-07 (1984) (internal citations omitted). *See also United States v. Gillespie*, 61 F.3d 457, 459 (6th Cir. 1995) ("A jury's use of a dictionary to define a relevant legal term is error, but it is not prejudicial per se."); *Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 924 (10th Cir. 1992) (upholding district court's conclusion that the jury's unauthorized consultation of a dictionary was sufficiently prejudicial to warrant a new trial); *Fulton v. Callahan*, 621 So. 2d 1235, 1248 (Ala. 1993) (holding that definitions of legal terms and concepts from general reference books, such as dictionaries, are extraneous matters); *Wiser v. People*, 732 P.2d 1139, 1141-42 (Colo. 1987) (en banc) (holding that "[t]he court of appeals correctly determined that the resort of one of the jurors to a dictionary for a definition of the crime with which the defendant was charged was improper," but that the court should have applied an objective test to determine whether there was a "reasonable possibility" that the dictionary affected the verdict (internal quotation marks omitted)); *Williamson*, 72 Haw. at 103, 807 P.2d at 596 (holding that "a juror's obtaining of extraneous definitions or statement of law differing from that intended by the court is misconduct which may result in prejudice to the defendant's constitutional right to a fair trial"); *Pietrzak v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 284 Ill. App. 3d 244, 251, 670 N.E.2d 1254, 1259 (1996) ("When the jury consults outside sources for definitions of words contained in jury instructions, the court must determine whether the definitions conflict or substantially differ from the instructions."), *leave to appeal denied*, 171 Ill. 2d 585, 577 N.E.2d 971 (1997); *People v. Messenger*, 221 Mich. App. 171, 176, 561 N.W.2d 463,

466 (1997) (adopting the Sixth Circuit rule "that a jury's use of a dictionary to define a relevant legal term is error, but it is not prejudicial per se"), *leave to appeal denied*, 456 Mich. 955, 577 N.W.2d 688 (1998); *Allers v. Riley*, 273 Mont. 1, 8, 901 P.2d 600, 605 (1995) ("probable prejudice and potential injury was apparent from the fact that the jury used extraneous materials—two dictionaries—to redefine a critical element of this negligence case"); *Priest v. McConnell*, 219 Neb. 328, 337-38, 363 N.W.2d 173, 179 (1985) (holding that a jury's use of dictionary definitions constitutes misconduct, but that a new trial is warranted only when a party demonstrates prejudice); *State v. Melton*, 102 N.M. 120, 123, 692 P.2d 45, 48 (N.M. Ct. App. 1984) (holding that when one juror consulted a dictionary and related the definitions to other jurors, the jury was exposed to extraneous information, giving rise to a presumption of prejudice); *Hillier v. Lamborn*, 740 P.2d 300, 305 (Utah Ct. App.) ("the dictionary was 'extraneous information' " under Utah's Rule 606(b), requiring a determination whether use of the dictionary was prejudicial), *cert. denied*, 765 P.2d 1277 (Utah 1987); *State v. Ott*, 111 Wis. 2d 691, 696, 331 N.W.3d 629, 632 (Wis. Ct. App. 1983) (concluding that "given the nature of the extraneous material [a dictionary definition] brought to the jury's deliberations, the probable effect upon a hypothetical average jury would be prejudicial"). *See generally* Jean E. Maess, Annotation, *Prejudicial Effect of Jury's Procurement or Use of Book During Deliberations in Criminal Cases*, 35 A.L.R.4th 626 (1985 & Supp. 2005) (collecting and analyzing state and federal cases discussing the prejudicial effect of the jury's procurement or use of a book, including a dictionary, during deliberations in a criminal case when the book consulted was not formally introduced into evidence at trial).

In sum, if I were writing on a blank slate, I would hold in accordance with the rest of the country that a jury's unauthorized consultation of a dictionary constitutes consideration of extraneous information under Rule 606. Nevertheless, in criminal cases, I believe that such consultation necessarily constitutes a violation of a defendant's constitutional rights.

As such, the State should have been required to demonstrate that the jury's conduct was harmless beyond a reasonable doubt.[3] *See*

3. I recognize that, in *McLain*, this Court did not apply the harmless beyond a reasonable doubt standard. In that case, however, the jury's consultation of the dictionary was discovered prior to the conclusion of the trial and the trial court instructed the jury to disregard the dictionary definition. Since we presume that a jury follows the trial court's instructions, the constitutional concerns existing in this case were not present in *McLain*.

Marino v. Vasquez, 812 F.2d 499, 505 (9th Cir. 1987) ("[U]nauthorized reference to dictionary definitions constitutes reversible error which the State must prove harmless beyond a reasonable doubt."). I do not believe that the State has met its burden.

The critical issue in this case was whether the State had proven malice. This Court set out the various methods of proving malice in *State v. Fuller*, 138 N.C. App. 481, 484, 531 S.E.2d 861, 864, *disc. review denied*, 353 N.C. 271, 546 S.E.2d 120 (2000) (internal quotation marks omitted):

> The element of malice may be established by at least three different types of proof: (1) express hatred, ill-will or spite; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief; or (3) a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

The State, in this case, relied upon the second type of malice, also called "depraved-heart malice." *Id.* (internal quotation marks omitted). The trial court instructed the jury consistent with that definition.

Following those instructions, it is undisputed that the jury foreman read to the rest of the jury a series of dictionary definitions regarding key words contained in the trial judge's definition of the word "malice," including "recklessly" and "wantonly." Using the dictionary, the jury foreman told the other jurors that "recklessly" means "lack of due caution," while "wantonly" means "arrogant recklessness of justice or the feelings of others." Because the definition of "wantonly" refers back to "recklessness," it thus incorporates the concept of a "lack of due caution." In other words, based on the dictionary, the jury could believe that both the "reckless" and "wanton" components of the trial court's definition of "malice" could be met if the jurors concluded that there had been a "lack of due caution."

I believe that the dictionary diluted the degree of recklessness necessary for a finding of "malice." Both this Court and the Supreme Court have recognized that "recklessness" encompasses a range of conduct of various degrees of severity. The Supreme Court stated in *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000), that "[t]he distinction between 'recklessness' indicative of murder and 'recklessness' associated with manslaughter 'is one of degree rather than kind' " and that instructions must ensure that the jury does not confuse the "high

degree of recklessness" required for second degree murder with "mere culpable negligence." *Id.* at 393-94, 527 S.E.2d at 303 (quoting *United States v. Fleming*, 739 F.2d 945, 948 (4th Cir. 1984), *cert. denied*, 469 U.S. 1193, 83 L. Ed. 2d 973, 105 S. Ct. 970 (1985)). The Court has emphasized that, standing alone, culpable negligence supports only a verdict of involuntary manslaughter. *See id.* at 395, 527 S.E.2d at 304; *State v. Wilkerson*, 295 N.C. 559, 582, 247 S.E.2d 905, 918 (1978). The Court found no error in *Rich* because the trial court "never mentioned culpable negligence" and, in light of the instructions, the Court could not "conclude that the jury could have confused malice with culpable negligence." 351 N.C. at 396, 527 S.E.2d at 304.

I believe that the juror's reference to the dictionary created the potential for just such confusion. The focus on "lack of due caution" risks blurring the distinction between involuntary manslaughter and second degree murder. As this Court has explained, the recklessness referred to in second degree murder instructions "continues to require a high degree of recklessness to prove malice" and the instructions to the jury must ensure that the jurors understand "the high degree of recklessness required for murder as opposed to the lesser degree required for manslaughter." *State v. Blue*, 138 N.C. App. 404, 410, 531 S.E.2d 267, 272, *aff'd in part, rev'd in part on other grounds, per curiam*, 353 N.C. 364, 543 S.E.2d 478 (2000).

Although I recognize that the trial judge's instructions included terms and phrases that ordinarily would be sufficient to ensure that the jury found the requisite high degree of recklessness, the incorporation of the milder concept of "lack of due caution" into both recklessness and wantonness risks allowing a verdict based on the lesser standard of "culpable negligence." "Culpable negligence" is "[n]egligent conduct that, while not intentional, involves a disregard of the consequences likely to result from one's actions." *Black's Law Dictionary* 1062 (8th ed. 2004).

Because I do not believe that the State can demonstrate that the jury's reference to the dictionary definitions of "recklessly" and "wantonly" was harmless beyond a reasonable doubt, I would remand for a new trial. Based on the record in this case, I simply cannot conclude that the jury would have convicted defendant of second degree murder no matter what.

I know of no words that would sufficiently condemn defendant's conduct, and he should be severely punished. He is, however, entitled

to be convicted of second degree murder based on a trial judge's instructions rather than on a dictionary definition.

TAMMY P. FROST, EMPLOYEE, PLAINTIFF v. SALTER PATH FIRE & RESCUE, EMPLOYER, AND VOLUNTEER SAFETY WORKERS' COMPENSATION FUND, CARRIER, DEFENDANTS

No. COA05-445

(Filed 7 March 2006)

1. **Workers' Compensation— injury at morale boosting event—compensable**

   There was competent evidence to support the conclusion that a morale boosting event was paid for by the Town (although not from its operating budget), and the Industrial Commission did not err by finding that an EMT captain sustained a compensable injury arising from her employment where she was injured at the event.

2. **Workers' Compensation— morale boosting event—benefit to employer—employee urged to attend**

   In a workers' compensation case brought by an EMT captain injured at a morale boosting event, there was competent evidence supporting the finding that the Town received a benefit and that EMT volunteers were urged to attend, including plaintiff's undisputed testimony that her Chief wanted her to attend.

3. **Workers' Compensation— morale boosting event—*Chilton* factors**

   In a workers' compensation case brought by an EMT captain injured at a morale boosting event, there were findings supporting the presence of at least four, if not all six, of the factors to be considered in awarding workers' compensation from a recreational event. There is no requirement that all six questions be answered affirmatively.

4. **Workers' Compensation— disability—burden of proof—carried**

   The Industrial Commission did not err by finding and concluding that an EMT captain injured at a morale building event had met her burden of proving disability. There was testimony to a reasonable degree of medical certainty that plaintiff's pain was

related to her accident and that her inability to work as a waitress (a second job) was related to her accident.

5. Workers' Compensation— disability—continuation—insufficient proof

The Industrial Commission did not err by concluding that plaintiff's entitlement to temporary total disability ended on 1 July 2002. The *Watkins* presumption of continuing disability did not apply and plaintiff did not prove the extent to which she was unable to work after she was released by her doctor for restricted sedentary work.

Judge TYSON dissenting.

Appeals by plaintiff and defendants from opinion and award entered 8 February 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 November 2005.

Ward and Smith, P.A., by S. McKinley Gray, III and William A. Oden, III, for plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by Jonathan C. Anders and Meredith T. Black, for defendants.

HUDSON, Judge.

Plaintiff Tammy P. Frost, an employee of defendant Salter Path Fire and Rescue ("Salter Path"), claimed an injury as a result of a go-cart accident which occurred during a Fun Day event on 3 October 2001. Following a hearing on 31 March 2003 the deputy commissioner issued an opinion and award on 29 April 2004, denying plaintiff's claim for benefits. Plaintiff appealed, and on 8 February 2005, the Full Commission issued an opinion and award unanimously reversing the Deputy Commissioner's opinion and award, and awarding plaintiff temporary total disability benefits for her compensable injury. Defendants and plaintiff appeal. As discussed below, we affirm.

Plaintiff was employed by Salter Path as a volunteer emergency medical technician ("EMT"), eventually becoming captain of emergency medical services ("EMS"). Plaintiff also worked as a waitress at The Crab Shack in the Town of Salter Path. On 3 October 2001, Salter Path held an annual Fun Day event at Lost Treasures Golf and Raceway. Salter Path sponsored and paid for the event and encouraged volunteers to attend. The Chief of Salter Path EMS encouraged plaintiff to attend in her capacity as captain of EMS. Plaintiff planned

to give a "pep" speech to volunteers during the event, but was injured in a go-cart accident at Lost Treasures. Plaintiff was transported to the hospital and diagnosed with cervical strain and thoracic strain and contusion. Plaintiff and her husband testified, and she presented evidence from three of her treating physicians.

The Full Commission made numerous findings of fact including those challenged by defendants:

> 2. Plaintiff was injured at the Salter Path Fire and Rescue Fun Day on September 30, 2001. Fun Day was essentially an appreciation day, in which the community thanked volunteer firemen and rescue workers for their contribution and work in the community. The purpose for Fun Day was to boost morale and goodwill for Salter Path volunteers, show appreciation for the unpaid volunteers of Salter Path, and to help develop camaraderie among volunteers. Fun Day was initiated in 2000.
>
> 3. The Fun Day event was put on by Salter Path Fire and Rescue Corporation and paid for out of a Special Donations Fund, rather than out of the Department's operating budget. Salter Path Fire and Rescue Corporation paid for the admission of volunteers and their families to Lost treasures Golf and Raceway ("Lost Treasures"), the private amusement park where Fun Day was held, and provided lunch to the participants while at Fun Day.
>
> 4. Fun Day was a voluntary event, but Salter Path volunteers and their families were urged to attend if possible. Many volunteers did not attend. Those in attendance signed in at the Treasure Island main window and were given passes for free rides and a free lunch. One purpose of this sign-in sheet was to allow Treasure Island to compute the total cost, according to the discount ticket rates provided. Another possible purpose was to give management of the fire and rescue unit an attendance log. Notwithstanding that attendance was voluntary, Salter Path did keep attendance for the event. The employer received a tangible benefit from this event in that it helped to improve morale of volunteers and it provided an opportunity for leaders of the fire and rescue unit to encourage volunteers to continue their participation as volunteers. The volunteers viewed Fun Day as a benefit of their voluntary employment. The Chief of Salter Path, Ritchie Frost, told plaintiff that he wanted her to attend Fun Day.
>
> 5. Plaintiff and her husband then took the Salter Path Fire & Rescue ambulance to Treasure Island and proceeded inside to ride

the go-carts. Plaintiff had signed in as "on duty" prior to her injury and had intended to give a pep speech thanking the EMS volunteers and encouraging their continued participation with Salter Path just as she had done at the previous Fun Day.

We begin by noting the well-established standard of review for worker's compensation cases from the Industrial Commission. We do not assess credibility or re-weigh evidence; we only determine 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). This Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

[1] Defendants first argue that the Commission erred in finding and concluding that plaintiff sustained a compensable injury because the injury did not arise out of and in the course of her employment. We do not agree.

Defendants challenge the Commission's findings 2 through 5, and the conclusions that plaintiff's injury arose out of and in the course of her employment. The Workers' Compensation Act provides compensation only for injuries "arising out of and in the course of the employment." N.C. Gen. Stat. 97-2(6) (2003). This Court has identified a list of relevant factors the Commission and Court may consider when determining whether compensation is appropriate for an injury sustained during an employer's recreational event. *Chilton v. Bowman Gray School of Medicine*, 45 N.C. App. 13, 15, 262 S.E.2d 347, 348 (1980). *Chilton* lists several questions to consider in determining whether to award compensation:

(1) Did the employer in fact sponsor the event?

(2) To what extent was attendance really voluntary?

(3) Was there some degree of encouragement to attend evidenced by such factors as:

a. taking a record of attendance;

b. paying for the time spent;

c. requiring the employee to work if he did not attend; or

d. maintaining a known custom of attending?

> (4) Did the employer finance the occasion to a substantial extent?
>
> (5) Did the employees regard it as an employment benefit to which they were entitled as of right?
>
> (6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

Id. at 15, 262 S.E.2d at 348 (internal citation omitted). In applying these factors, the Commission here made findings, including those quoted above, and after citing *Chilton*, concluded that the evidence established affirmative answers to at least four of the six *Chilton* factors.

Defendants contend that no competent evidence supported finding 3, that Salter Path put on and paid for the Fun Day, because it was funded by a special contribution fund rather than out of Salter Path's regular operating budget. However, three witnesses testified without objection that Salter Path did sponsor the event and defendants do not dispute that the volunteers' admission to the event was paid for by Salter Path's special contribution fund. Because competent evidence supports this finding, it is conclusive on appeal. This finding in turn supports the portion of conclusion 3 stating that "Salter Path organized and sponsored the Fun Day event."

[2] Defendants also contend that finding 4 is not supported by competent evidence. Specifically, defendants assert that volunteers were encouraged to attend the event, rather than urged to attend. This distinction makes no meaningful difference. In addition, plaintiff's undisputed testimony established that the Chief of Salter Path told plaintiff he wanted her to attend the event. Defendants claim that no evidence supports the finding that defendant received a tangible benefit through morale boosting and increased volunteer retention. Defendants draw our attention to language in *Chilton* stating that

> Personal camaraderie and respect between the faculty and students involved in professional education greatly enhance the educational experience. We cannot say that this vague benefit transforms an annual social occasion into a business meeting.

Id. at 18, 262 S.E.2d at 350. Here, testimony indicated and the Commission found as fact that the event served the purpose of

encouraging volunteers to continue their participation with defendant, not merely of fostering personal camaraderie. Without the continuing participation of volunteers, defendant here would have no organization. Keeping the fire and rescue organization operational with volunteers is tangible indeed. Thus, the benefits of building morale and camaraderie are more tangible for a volunteer fire and rescue organization like defendant than for the medical school in *Chilton*. This evidence supports finding 4 which in turn supports the portion of conclusion 3 stating that

> Plaintiff justifiably believed that her attendance at Fun Day was mandatory . . . . Fun Day was not really voluntary for Plaintiff due to the extra responsibility she undertook and the request from the Chief that she attend.

The finding also supports the portion of the conclusion stating that Salter Path tangibly benefitted through increased volunteer retention.

[3] Defendants also challenge the statement in finding 5 that plaintiff was "on-duty" at the event, alleging that as a volunteer EMS worker, plaintiff was always "on-duty." Defendants contend that "to the extent [finding 5] insinuates that plaintiff's status as 'on-duty' is relevant to this analysis, it is unsupported." We see no such insinuation in the Commission's opinion and award, nor do we find this relevant to the Commission's conclusion that plaintiff suffered a compensable injury.

The findings discussed above, which are supported by the evidence, in turn support the Commission's conclusion that at least four, if not all six, of the *Chilton* factors are present here. We note that *Chilton* did not establish a requirement that all six questions must be answered affirmatively in order to support an award of compensation. Rather, the Court found that "these questions are helpful in establishing a structural analysis of when to award compensation." *Id.* at 15, 262 S.E.2d at 348. This Court has affirmed that evidence of four of the six *Chilton* factors "established a sufficient nexus between claimant's injury and her employment to permit the award of compensation." *Martin v. Mars Mfg. Co.*, 58 N.C. App. 577, 580, 293 S.E.2d 816, 819, *cert. denied*, 306 N.C. 742, 295 S.E.2d 759 (1982). This assignment of error is overruled.

[4] Defendants next argue that the Commission erred in making findings and conclusions that plaintiff met her burden of proving disability. We disagree.

The Supreme Court has explained what a plaintiff must prove to obtain an award of benefits for disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

> [I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury. In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree.

Id. (internal citation omitted). The burden is on the employee to show that she is unable to earn the same wages she had earned before the injury, either in the same employment or in other employment. *Id.* at 595, 290 S.E.2d at 684 An employee may meet the *Hilliard* burden in one of the following four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

Here, Dr. Tellis gave his opinion, to a reasonable degree of medical certainty, that the pain that plaintiff was complaining of and for which he was treating her was related to her 30 September 2001 accident. He also testified to his unequivocal opinion that plaintiff's inability to perform her waitress position as indicated in the medical notes was related to the 30 September 2001 accident. Dr. Reece testified that he had last seen plaintiff 21 April 2003, and that prior to that visit the accident required that she be out of work, but could return with some restrictions as of that date. This evidence supports the

Commission's findings 27 and 28 that plaintiff symptoms were caused by the injury during Fun Day and that those symptoms prevented her from returning to work as a waitress. These findings in turn support the Commission's conclusion that plaintiff carried her burden of proving her disability, at least up to 1 April 2003.

[5] Plaintiff argues that the Commission erred in concluding that her entitlement to temporary total disability benefits ended on 1 July 2002. We disagree.

Plaintiff contends that there was no evidence to support any finding of fact which would support a conclusion that her total temporary disability should be terminated on 21 April 2003. An employee seeking disability compensation bears the burden of establishing the existence and extent of her disability. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683.

> It is a well-established legal principle in North Carolina that once the disability is *proven* [by the employee], there is a presumption that [the disability] continues until the employee returns to work at wages equal to those [she] was receiving at the time [her] injury occurred. In cases involving the *Watkins* presumption, the claimant can meet the initial burden of *proving* a disability in two ways: (1) by a previous Industrial Commission award of continuing disability, or (2) by producing a Form 21 or Form 26 settlement agreement approved by the Industrial Commission.

Cialino v. Wal-Mart Stores, 156 N.C. App. 463, 470, 577 S.E.2d 345, 350 (2003) (internal citations and quotation marks omitted) (emphasis in original). Here, plaintiff does not have a *previous* Industrial Commission award of continuing disability, or a Form 21 or Form 26 settlement agreement approved by the Commission. Instead, she argues that the presumption applies where she has been injured at work and has been unable to continue working or find suitable alternative employment. In *Cialino*, the plaintiff argued that "a continuing presumption of total disability arose because she was injured at work, and, thereafter, she was unable to continue working or find suitable alternative employment at the same wages and for same number of hours." *Id.* at 471, 577 S.E.2d at 351. This Court rejected that argument. *Id.*; *see also Clark v. Wal-Mart*, 360 N.C. 41, 619 S.E.2d 491 (2005).

Because the *Watkins* presumption does not apply here, plaintiff was required to prove the extent and existence of her disability

pursuant to the factors in *Hillard*, *supra*. The Commission found and concluded

> 30. Plaintiff has continued to present to Dr. Reese, seeing him on December 5 and 30, 2002, January 30, 2003, February 25, 2003, March 3, 8, and 25, 2003, and April 21, 2003. According to Dr. Reece, plaintiff improved during the December-through-April time period. Dr. Reece indicated in his April 21, 2003, notes that plaintiff could perform sedentary activities at work.
>
> 31. The greater weight of the evidence does not support a finding that plaintiff is now unable to work by reason of her compensable injuries.
>
> ***
>
> 4. Plaintiff is entitled to temporary total disability compensation at the rate of $413.33 for those periods of time when she was unable to work for Salter Path by reason of her compensable injuries. She was unable to work by reason of her compensable injuries from September 30, 2001, through April 21, 2003, when Dr. Reece found that she was capable of sedentary work. Defendants are entitled to credits for unemployment benefits in the amount of: $139.00 per week for a period of 17 weeks (December 29, 2001, through May 4, 2002); $300.00 per week from the period of October 1, 2001 through October 28, 2001, in employer-sponsored disability benefits; and $486.26 per week for the period of October 29, 2001, through July 12, 2002, in employer-sponsored disability benefits. These credits are week for week and dollar for dollar. N.C. Gen. Stat. §97-42.

Dr. Reece released plaintiff to sedentary work with some restrictions as of 21 April 2003. Although Dr. Reece stated that plaintiff would not be able to resume her full-time waitress job at that date because of limitations on her activities, the record does not reflect that she proved the extent to which she was unable to work after that time. Given this record, we cannot conclude that the Commission's findings or conclusion were erroneous. We overrule plaintiff's cross-assignment of error.

Affirmed.

Judge LEVINSON concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion holds, "[g]iven this record, we cannot conclude that the Commission's findings or conclusions were erroneous" and affirms the North Carolina Industrial Commission's ("Commission") award. I respectfully dissent.

I. Background

Volunteers of the Salter Path Fire and Rescue ("department") were invited to attend a "fun day" at a local amusement park on 30 September 2001. Six volunteers attended the event. Tammy P. Frost ("plaintiff") attended the event and was injured while riding a go-cart.

Plaintiff filed a worker's compensation claim, and on 29 April 2004, the deputy commissioner concluded "[a]lthough the Plaintiff suffered an injury by accident on September 30, 2001, her injury did not arise out of and in the scope of her employment with the defendant-employer" and denied plaintiff's claim for benefits. Plaintiff appealed. The Full Commission reversed the deputy commissioner's decision and awarded plaintiff temporary total disability benefits for her compensable injury.

Plaintiff testified that her attendance at the event was purely voluntary. Plaintiff admitted it was not "frowned upon" if volunteers did not attend. Plaintiff also testified: (1) while she felt responsible to attend the event as captain of the department, her attendance was not mandatory; and (2) the department did not assign her any responsibilities at the event.

The event was paid for by community donations. When asked how volunteer members of the department would benefit from fun day, plaintiff answered, "[t]he only way I could say they could would be to keep morale up."

II. Standard of Review

> Our review of a decision of the Commission is limited to two issues: (1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusion of law. The Commission's conclusions of law are reviewable. *Whether an injury arises out of and in the course of a claimant's employment is a mixed question of fact and law, and our review is*

> *thus limited to whether the findings and conclusions are supported by the evidence.*

Hunt v. Tender Loving Care Home Care Agency, Inc., 153 N.C. App. 266, 268, 569 S.E.2d 675, 677-78, *disc. rev. denied*, 356 N.C. 436, 572 S.E.2d 784 (2002) (emphasis supplied) (internal quotations and citations omitted).

This Court has also stated,

> The Commission is the sole judge of the credibility of witnesses and may accept or reject any of a claimant's evidence. However, *the Commission is required to make specific findings as to the facts upon which a compensation claim is based*, including the extent of a claimant's disability.

Grant v. Burlington Industries, Inc., 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985) (emphasis supplied).

On appeal to this Court, "[t]he 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).

III. Conclusion of Law

The Workers' Compensation Act provides, " '[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) (2005).

Our Supreme Court has stated, "the phrase 'out of and in the course of the employment' embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business." *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 198, 128 S.E.2d 218, 221 (1962) (internal quotations and citation omitted).

In *Chilton v. Bowman Gray School of Medicine*, this Court identified six factors for the Commission and the court to consider when determining whether a plaintiff's injuries arose "out of and in the course of her employment" to be compensable. 45 N.C. App. 13, 15, 262 S.E.2d 347, 348 (1980). The factors include:

(1) Did the employer in fact sponsor the event?

(2) To what extent was attendance really voluntary?

(3) Was there some degree of encouragement to attend evidenced by such factors as:

a. taking a record of attendance;

b. paying for the time spent;

c. requiring the employee to work if he did not attend; or

d. maintaining a known custom of attending?

(4) Did the employer finance the occasion to a substantial extent?

(5) Did the employees regard it as an employment benefit to which they were entitled as of right?

(6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

Id. (citation omitted).

In *Chilton*, the plaintiff was injured while playing volleyball at an annual voluntary picnic for medical school faculty. *Id.* at 18, 262 S.E.2d at 350. This Court reversed the Commission's order, which granted plaintiff's claim, and held:

First . . . sponsorship standing by itself would not indicate coverage.

Second, attendance was voluntary. There was testimony from faculty members that they felt they should go, but that they were not compelled to do so. The estimated attendance of around 80% of the department indicates that there was no compulsion.

Third, no record of attendance was taken. The participants were not paid for the time spent, nor was any employee required to work at the medical school if he did not attend.

Fourth, the picnic, while certainly an annual custom, was not an event that employee regarded as being a benefit to which he was entitled as a matter of right.

Id. at 17, 262 S.E.2d at 350.

Here, in applying the *Chilton* factors, the Commission concluded, "the evidence in the instant cause establishes affirmative answers to

at least four of the six *Chilton* questions, and arguably, all six." The Commission stated:

> (1) *Did the employer in fact sponsor the event?*
>
> Yes. Salter Path organized and sponsored the Fun Day event.
>
> . . . .
>
> (2) *To what extent was attendance really voluntary?*
>
> . . . .
>
> Despite the voluntary nature of Salter Path's operations, Plaintiff justifiably believed that her attendance at Fun Day was mandatory.
>
> . . . .
>
> (3) *Was there some degree of encouragement to attend?*
>
> Even the defendant's own witness, Taffie Baysden, testified that volunteers were encouraged to attend if they could. In addition, Ms. Baysden ultimately testified that there was a record of attendance (which she previously had denied on direct). In fact, she acknowledged that the names of attendees were recorded in Salter Path's login book as well as a separate sign-in sheet at the check-in window at [the park].
>
> (4) *Did the employer finance the occasion to a substantial extent?*
>
> Yes. Salter Path paid for the event.
>
> (5) *Did the employees regard it as an employment benefit to which they were entitled as of right?*
>
> Yes. Fun Day was a benefit for the volunteers and their families. If volunteers did not keep their hours up, they could not attend.
>
> (6) *Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?*
>
> Yes . . . Plaintiff was going to make a speech to her EMS workers to thank them for their participation and to encourage continued participation from these volunteers within the department.

The Commission's findings of fact do not support this conclusion of law. *Hunt* at 271, 569 S.E.2d 679 ("The Commission erred in its application of the findings of fact to its conclusions of law.").

The Commission concluded the department "sponsored the Fun Day event." In finding of fact number two, the Commission found that the event was "essentially an appreciation day, in which the community thanked volunteer firemen and rescue workers for their contribution and work in the community." The community, not the department, paid for and sponsored the event.

Under the second *Chilton* factor, the Commission concluded plaintiff's attendance at the event was mandatory. The Commission did not find attendance at the event was mandatory. Plaintiff testified attendance at the event was purely voluntary. Also, in finding of fact number three the Commission found, "Fun Day was a voluntary event."

Regarding the third *Chilton* factor, the Commission concluded that attendance was encouraged, and the department maintained a record of the volunteers who attended. Even if attendance by the volunteers was taken at the event, undisputed evidence reveals names were taken merely to compute costs to pay the amusement park, rather than for any business purpose. The Commission wholly failed to address the remaining factors under this prong. Undisputed evidence shows the volunteers: (1) were not compensated for attending the event; (2) were not required to work if they failed to attend; and (3) there was no longstanding custom of attending the event since this was only the second time the community had sponsored the event.

The Commission's conclusion that the department funded the event is unsupported by the findings of fact. In finding of fact number three, the Commission found the event was "paid for out of a Special Donations Fund, rather than out of the Department's operating budget." The event was paid for with community donations. The community, not the department, funded the event.

In its analysis of the fifth *Chilton* factor, the Commission held the event was a benefit to employees who maintained certain hours. This conclusion was not supported by any findings of fact or any evidence. The Commission failed to find that only "active" volunteers were permitted to take part in the event.

Plaintiff initially testified the active volunteers were entitled as a matter of right to attend the event, but she later recanted her statement and admitted the event was open to every volunteer. *Gutierrez v. GDX Automotive*, 169 N.C. App. 173, 178, 609 S.E.2d 445, 449, *disc. rev. denied*, 359 N.C. 851, 619 S.E.2d 408 (2005). ("Without competent evidence, the Commission's conclusions are likewise unsupported and the opinion and award must be reversed.").

The Commission concluded the department benefitted from the event because plaintiff planned to make a speech. Plaintiff testified her intent was simply to make an impromptu comment regarding her appreciation for the volunteers' work. She testified, "I try to thank my EMTs anytime I can." When asked if she had any role at the event, she testified, "no." Plaintiff admitted the only way the department benefitted from the event was "to keep morale up." In finding of fact number two, the Commission found, "[t]he purpose for Fun Day was to boost the morale and goodwill of Salter Path volunteers." In finding of fact number four, the Commission found, "[t]he employer received a tangible benefit from this event in that it helped to improve morale of volunteers." The Commission's findings of fact do not support the notion that the department benefitted in a tangible way from the event; rather, the department benefitted "merely in a vague way through better morale and good will." *Chilton*, at 18, 262 S.E.2d at 350. Upon *de novo* review of the Commission's conclusion of law, I find error in no competent evidence supports some of the Commission's findings of fact and in some cases undisputed evidence is to the contrary. These unsupported findings do not support the Commission's conclusions of law. *Id.* The Commission's opinion and reward should be reversed.

IV. Conclusion

Upon *de novo* review of the conclusions of law, the Commission misapplied the *Chilton* factors to this case. The Commission's third conclusion of law was not supported by the findings of fact. Plaintiff's injury, which occurred at a purely voluntary event, did not arise out of her employment as a volunteer for the department. N.C. Gen. Stat. § 97-2(6). I vote to reverse the Commission's order. I respectfully dissent.

DONNA L. BROWN, WESLEY R. BROWN AND WIFE, MARTEE U. BROWN, JACK M. FISHER, AND WIFE, CATHEY G. FISHER, ANTHONY N. HUBBARD AND WIFE, FRANCES M. HUBBARD, JAMES M. MECUM, JR., GARNETT L. MIDKIFF, JR., E. RAYMOND NICHOLSON, DONALD W. PETERS, G. FLOYD SIDES AND WIFE, JO ANN SIDES, PETITIONERS v. CITY OF WINSTON-SALEM, RESPONDENT

No. COA05-464

(Filed 7 March 2006)

1. Cities and Towns— annexation—street maintenance

A municipality is in compliance with N.C.G.S. § 160A-47(3)(a) where the street maintenance in the area to be annexed is the same or substantially the same as in the city limits. There was sufficient evidence here to support the trial court's finding that a city would provide the same street maintenance services within the annexed area.

2. Cities and Towns— annexation—subdivision test—evidence

The trial court did not abuse its discretion by ruling in an annexation case that petitioners' spreadsheets could be admitted only for the limited purpose of showing their contentions concerning the disputed number of lots in the area to be annexed.

3. Cities and Towns— annexation—subdivision test—methodology

When a city or municipality has calculated lots one way for an annexation and a challenger argues that they should be counted a different way, the critical question is whether the method utilized is calculated to provide reasonably accurate results, not whether the city followed one method or another. The trial court here properly found that petitioners offered no reliable evidence tending to show that respondent's methodology was inaccurate and not calculated to provide reasonably accurate results.

Appeal by petitioners from the order entered 27 May 2004 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 16 November 2005.

Richard J. Browne, for petitioner-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Roddey M. Ligon, Jr., and Office of Winston-Salem City Attorney, by Ronald G. Seeber and Charles G. Green, Jr., for respondent-appellee.

JACKSON, Judge.

On 24 March 2003, the City of Winston-Salem, North Carolina ("respondent") adopted a "Resolution of Intent of the City Council of the City of Winston-Salem to Consider Annexing Certain Territory And Adopting An Annexation Report." Pursuant to the resolution, respondent intended to annex certain properties located around the city's limits involuntarily. Notices of an informational meeting were sent to all owners of real property within the proposed annexation area. A public hearing was held on the matter on 27 May 2003, and on 23 June 2003 the City adopted amendments to the annexation ordinances. The amended annexation ordinances did not add any new properties to the proposed annexation area, and the effective date of the annexation was to be 30 June 2004.

On 21 August 2003, certain individuals owning real property in the proposed annexation area ("petitioners") filed a petition seeking judicial review of respondent's annexation ordinances pursuant to North Carolina General Statutes, section 160A-50. Respondent's amended annexation ordinances included sixteen separate areas identified by letters A-Q, and excluded the area which originally had been labeled as area D. As none of the petitioners owned property in seven of the areas, the trial court entered an order declaring that annexation as to those areas was to go into effect on 30 June 2004, as specified in the annexation ordinances. These areas were not a part of the instant proceeding before the trial court.

For purposes of qualifying for annexation, respondent divided each area into subareas, and then qualified each of the subareas pursuant to the provisions of North Carolina General Statutes, section 160A-48. During the trial on the matter, which occurred over the course of five days in April and May 2003, the Principal Planner for respondent testified regarding the methodology used by respondent in qualifying the subareas for annexation. The Principal Planner testified that each of the subareas qualified under one of the provisions of section 160A-48. Only specific portions of section 160A-48 were relevant to petitioners' action, and those relevant portions of North Carolina General Statutes, section 160A-48 provide in pertinent part:

> (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 [N.C. Gen. Stat. §] 160A-47. Area of streets and street rights-of-way shall not be used to determine total acreage under this section. An area developed for urban purposes is

defined as any area which meets any one of the following standards:

. . . .

(2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage consists of lots and tracts three acres or less in size and such that at least sixty-five percent (65%) of the total number of lots and tracts are one acre or less in size; or

(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 percent (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. For purposes of this section, a lot or tract shall not be considered in use for a commercial, industrial, institutional, or governmental purpose if the lot or tract is used only temporarily, occasionally, or on an incidental or insubstantial basis in relation to the size and character of the lot or tract. For purposes of this section, acreage in use for commercial, industrial, institutional, or governmental purposes shall include acreage actually occupied by buildings or other man-made structures together with all areas that are reasonably necessary and appurtenant to such facilities for purposes of parking, storage, ingress and egress, utilities, buffering, and other ancillary services and facilities;

N.C. Gen. Stat. § 160A-48(c) (2004). On 27 May 2004, the trial court entered an order declaring the disputed sixteen annexation ordinances to be valid in all respects. Petitioners now appeal from this 27 May 2004 order.

We begin by noting that a

superior court's review of an annexation ordinance is limited to deciding (1) whether the annexing municipality complied with the statutory procedures; (2) if not, whether the petitioners will

> suffer material injury as a result of any alleged procedural irregularities; and (3) whether the area to be annexed meets the applicable statutory requirements.

Hayes v. Town of Fairmont, 167 N.C. App. 522, 523-24, 605 S.E.2d 717, 718 (2004) (citing *In re Annexation Ordinance*, 278 N.C. 641, 647, 180 S.E.2d 851, 855 (1971)), *disc. review denied*, 359 N.C. 410, 612 S.E.2d 320 (2005). Further,

> Where the annexation proceedings show *prima facie* that the municipality has substantially complied with the requirements and provisions of the annexation statutes, the burden shifts to the petitioners to show by competent evidence a failure on the part of the municipality to comply with the statutory requirements or an irregularity in the proceedings that materially prejudices the substantive rights of the petitioners.

Id. at 524, 605 S.E.2d at 718-19. On appeal, our review is limited in that the trial court's findings of fact are binding on this Court where they are supported by evidence. *U.S. Cold Storage, Inc. v. City of Lumberton*, 170 N.C. App. 411, 413, 612 S.E.2d 415, 418 (2005) (quoting *Briggs v. City of Asheville*, 159 N.C. App. 558, 560, 583 S.E.2d 733, 735, *disc. review denied*, 357 N.C. 657, 589 S.E.2d 886 (2003)). A trial court's conclusions of law, however, are entitled to a *de novo* review. *Id.* at 414, 612 S.E.2d at 418.

[1] Petitioners first contend the trial court erred in finding that streets in the proposed annexation area would be maintained in substantially the same manner as the streets in the city's limits prior to annexation.

North Carolina General Statutes, section 160A-47(3)(a) (2004) requires that an annexation report contain a statement that the city will "[p]rovide for extending . . . street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation." Our courts have held that

> the primary duty of street maintenance in the area in question, after annexation, is upon the city, and it must in good faith make plans to maintain the streets, whether paved or unpaved, "on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation."

In re Annexation Ordinance, 255 N.C. 633, 645, 122 S.E.2d 690, 699 (1961).

The city of Winston-Salem's Final Annexation Report, adopted on 23 June 2003, stated that:

> All municipal services will be provided to the annexed areas as required by North Carolina General Statutes Section 160A-47. On June 30, 2004, the proposed effective date of annexation, the City of Winston-Salem will provide each major municipal service on substantially the same basis and in the same manner as such services are provided within the rest of the municipality immediately prior to annexation.
>
> . . . .
>
> **Paved Street Maintenance**
>
> Paved streets in the proposed annexation areas that were constructed to State of North Carolina or City of Winston-Salem standards will be maintained in accordance with city policies. . . .
>
> **Street Paving**
>
> Present city paving policies will apply to the proposed annexation areas. . . .
>
> **Dirt Street Paving**
>
> Dirt streets will be paved to ribbon pavement standards provided adequate dedicated right-of-way exists or is dedicated by abutting property owners. . . . The cost of upgrading dirt streets to ribbon pavement standards will be borne totally by the city. . . .

Petitioners contended at trial that respondent planned to treat ribbon streets in the annexed area differently than it currently treated ribbon streets within the city's limits. Ribbon streets are paved streets that are without curbs and gutters. Petitioners contended that respondent currently maintained ribbon streets within its city limits, however upon annexation, it would not provide the same maintenance to all ribbon streets in the annexed area.

The trial court specifically found that respondent would provide the same street maintenance services within the annexation area as it currently was providing within the existing city limits. As noted pre-

viously, a trial court's findings of fact are conclusive on appeal when they are supported by competent evidence. *U.S. Cold Storage*, 170 N.C. App. at 413, 612 S.E.2d at 418. At trial, respondent's Streets Director testified concerning respondent's plans to maintain streets located within the annexation area. She stated that ribbon streets in the annexed area that currently were maintained by the State would become city-maintained upon annexation. She also testified that respondent currently maintains some ribbon streets within its city limits, but not all of them. Citizens living on those streets not maintained by the city may go through a process of asking the city to inspect the streets and adopt them as city streets, whereby they then would become city-maintained ribbon streets. The Streets Director testified that the same policies and procedures would apply to ribbon streets in the annexation area that were not presently being maintained by the State.

Thus, there is sufficient evidence to support the trial court's finding that respondent would be providing the same street maintenance services within the annexation area as it currently was providing within the existing city limits. Our Supreme Court recently has held that an annexing municipality need not provide *all* of the categories of public services as listed in the annexation statutes. *See Nolan v. Village of Marvin*, 360 N.C. 256, 261-62, 624 S.E.2d 305, 308-09 (2006). Therefore, we hold that where a municipality will be providing the same, or substantially the same street maintenance in the area to be annexed, the municipality is in compliance with the requirements of section 160A-47(3)(a). Therefore, we hold respondent's plans for street maintenance in the annexation area are in substantial compliance with the statutory requirements, and petitioners' assignment of error is overruled.

[2] Petitioners next contend the trial court erred in ruling that certain documents offered as evidence by petitioners could be used only for the limited purpose of demonstrating petitioners' contention as to how respondent should have qualified the areas for annexation, and could not be offered to show that respondent's methodology was not calculated to provide reasonably accurate results.

At trial, petitioners introduced into evidence various spreadsheets which were based upon data provided by respondent to petitioners. The data was comprised of the city's tax database records, including the number of lots, acreage of the lots, occupants per dwelling on the lots, and the classification of each lot as determined by respondent. Petitioners' consultant took the data provided by the

city, and input it into spreadsheets ("ROK spreadsheets"). The consultant did not perform any analysis of the data, and did not attempt to classify any of the lots under North Carolina General Statutes, section 160A-48(c) for purposes of qualifying for annexation under the subdivision or use tests. Petitioners' counsel then used the consultant's spreadsheets and created another set of spreadsheets himself in which he analyzed all of the lots in the annexation area, and classified the lots under sections 160A-48(c)(2) and (3) as petitioners proposed the lots should have been classified. As noted by petitioners' counsel at trial, petitioners and respondent had different methods for determining what a lot was for the purposes of sections 160A-48(c)(2) and (3), and based on petitioners' determination of what should be considered a lot, respondent's annexation plan did not satisfy the requirements of section 160A-48(c).

Prior to trial, the parties stipulated to the admissibility of the spreadsheets created by petitioners' consultant and counsel. The stipulations stated:

> 4. The ROK Spreadsheets were produced from the data compiled within the City's GIS Shape Files of the Lots and Tracts, said GIS shape files having been obtained from the City, pursuant to a public records request, as a CD.
>
> . . . .
>
> 6. In producing the ROK Spreadsheets, ROK, Inc. . . . did not perform any of the analyses under [N.C. Gen. Stat.] § 160A-48(c), including, for any subdivision or use test thereunder, any counting of the Lots and Tracts or any totaling of any Lot or Tract's acreage; or offer any advice or information or opinion as to what constitutes a lot or tract for municipal annexation purposes.
>
> 7. Comparisons of the total acreage and number of dwelling units within the Annexation Areas were made by the Petitioners from the ROK Spreadsheets and City GIS Shape Files . . . .
>
> 8. Analyses of the subdivision and use tests under [N.C. Gen. Stat.] § 160A-48(c)(2) and (3) were performed by Petitioners . . . and the results of those analyses were compiled and summarized by Petitioners on EXCEL-formatted spreadsheets . . . .
>
> . . . .

10. Petitioners contend that, for purposes of the subdivision tests under [N.C. Gen. Stat.] § 160A-48(c), the City incorrectly counted the total number of Lots and Tracts and incorrectly totaled the acreage of those Lots and Tracts consisting of more than one parcel and that Petitioner's . . . Spreadsheets correctly count the total number of Lots and Tracts and correctly total the acreage of those Lots and Tracts consisting of more than one parcel.

11. The City contends that its determination as to what constituted a Lot or Tract is the same as shown on the Forsyth County Tax Office Maps.

. . . .

13. The ROK Comparison and [petitioner's] Spreadsheets shall be admitted into evidence.

In calculating the number of lots and acreage of the lots, respondent used the Forsyth County tax maps. Specifically, respondent pulled the tax records for all of the properties in the annexation area, and counted the number of individual lots. In total, there were approximately twelve thousand, three hundred (12,300) individual lots included in respondent's proposed annexation area. When an individual taxpayer owned multiple lots that were contiguous to one another, these lots had been combined into one tax bill by the county tax office for the convenience of the taxpayer and the tax office. The boundaries of the various lots were set by deeds, plats or recorded survey, and were not set arbitrarily by the tax office. Therefore, one taxpayer may own a four acre piece of property which is subdivided by deed or plat into eight half acre lots. In this example, respondent would have counted the taxpayer's property as consisting of eight separate lots for the purposes of qualifying for annexation under section 160A-48(c). However, petitioners' contention at trial, and through their spreadsheets, was that individual lots that were contiguous and owned by the same person should be counted as one lot for the purposes of section 160A-48(c).

At trial, petitioners attempted to introduce counsel's spreadsheets into evidence for the purpose of showing that the methodology used by respondent in calculating lots based on the county tax maps was erroneous. Counsel for respondent objected, and the trial court sustained respondent's objection. The trial court held that the parties' stipulation that the spreadsheets could be admitted into evidence did not constitute a stipulation by respondent that either the analysis per-

formed by petitioners' counsel or counsel's results were accurate or admissible. The trial court found that the stipulation was merely a stipulation as to what petitioners "contended" the results should have been had respondent analyzed the lots as proposed by petitioners. The court stated that the spreadsheets would be admitted for the purposes proposed by petitioners only after petitioners presented expert testimony regarding the methodology used and the accuracy of the results. However, during the course of the trial, petitioners failed to provide any expert testimony concerning the spreadsheets. Petitioners contended at trial, and contend on appeal, that the testimony by respondent's Principal Planner effectively constituted the necessary expert testimony such that petitioners' spreadsheets should have been qualified as admissible for the purposes proffered by petitioners.

On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion. *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (citing *Carrier v. Starnes*, 120 N.C. App. 513, 519, 463 S.E.2d 393, 397 (1995)), *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005). An abuse of discretion will be found only when the trial court's decision " 'was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at 678, 606 S.E.2d at 439 (citations omitted). In addition, Rule 901 of our Rules of Evidence requires that "as a condition precedent to admissibility" evidence must be authenticated or identified "sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2004). Authentication under Rule 901 may be satisfied through the testimony of a witness who has knowledge of the matter, and who can testify "that a matter is what it is claimed to be." N.C. Gen. Stat. § 8C-1, Rule 901(b)(1) (2004); *see Kroh v. Kroh*, 152 N.C. App. 347, 353, 567 S.E.2d 760, 764 (2002).

In the present case, petitioners failed to produce any evidence or testimony regarding the methodology used in analyzing the data in the way in which petitioners did, and they failed to provide any testimony which would authenticate counsel's spreadsheets and the accuracy of the data contained in them. Although the testimony of respondent's Principal Planner may have somewhat tracked the information in the spreadsheets, her testimony neither referenced the methodology used in creating the spreadsheets nor the analysis and results reached by petitioners' counsel. The Principal Planner's testimony primarily consisted of a review of how respondent determined

what constituted a lot, and the methodology used to classify the various lots under section 160A-48. Although she did testify concerning the number of lots, acreage and respondent's classification of more than 450 separate lots, she in no way testified regarding all of the almost 12,300 proposed lots in the annexation area. She also did not testify regarding petitioners' proposed classification of the various lots. Therefore, we hold the trial court's ruling that petitioners' spreadsheets could be admitted only for the limited purpose of showing petitioners' contentions was proper, and did not constitute an abuse of discretion.

[3] Finally, petitioners contend the trial court erred in finding that "no reliable evidence [was] offered as to the subdivision test percentages except that offered by the City." Specifically, petitioners contend the trial court erred in finding that no reliable evidence had been presented which showed that respondent's methodology in determining which lots qualified for annexation purposes was a method which was not calculated to provide reasonably accurate results.

As held by our Supreme Court, when an annexation ordinance, such as respondent's, recites substantial compliance with the requirements of Chapter 160A, this constitutes a *prima facie* case that the ordinance is in statutory compliance. *Thrash v. City of Asheville*, 327 N.C. 251, 393 S.E.2d 842 (1990). In the present case, the trial court concluded, and we agree, that respondent complied with all statutory requirements in developing the annexation ordinance. Therefore, the burden of proof then shifts to the petitioners who are challenging the ordinance, to show that respondent failed to comply with the statutory requirements, or that there was an "irregularity in proceedings which materially prejudice the substantive rights of petitioners." *In re Annexation Ordinance*, 255 N.C. at 642, 122 S.E.2d at 697; *see also Thrash*, 327 N.C. at 255, 393 S.E.2d at 845. Our statutes require that the methodology used by respondent to qualify properties for annexation be one that is "calculated to provide reasonably accurate results." N.C. Gen. Stat. § 160A-54 (2004). In addition, a superior court reviewing a municipality's classification of property pursuant to section 160A-48

> shall accept the estimates of the municipality unless the actual population, total area, or degree of land subdivision falls below the standards in [N.C. Gen. Stat. §] 160A-48:
>
> . . . .

(2) As to total area if the estimate is based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable map used for official purposes by a governmental agency, unless the petitioners on appeal demonstrate that such estimates are in error in the amount of five percent (5%) or more.

N.C. Gen. Stat. § 160A-54 (2004). When a city or municipality has calculated lots in one way, and a challenger to the annexation argues they should be counted in a different way, "[t]he critical question is not whether the city followed one method or another in calculating the number of lots, but whether 'the method utilized is calculated to provide reasonably accurate results.' " *Thrash*, 327 N.C. at 256, 393 S.E.2d at 846.

In the present case, respondent's Principal Planner testified as to the precise methodology utilized by respondent in calculating the number of lots in each subarea, and how respondent then qualified the lots and ultimately the subareas under the statutory provisions. Petitioners presented into evidence one hundred and twenty-five exhibits consisting of tax records showing the tax bill for a piece of property and the number of lots into which the piece of property was divided. Petitioners' counsel walked respondent's Principal Planner through each of the 125 exhibits, and she testified regarding how many lots were in each tax bill, and how each of the lots was classified pursuant to North Carolina General Statutes, section 160A-48. She testified that respondent relied not only on the county tax maps and aerial photos of each piece of property which were on file with the tax office, but also that employees for respondent personally visited each of the lots proposed for annexation.

Our courts previously have held that the use of county tax maps in qualifying lots for annexation constitutes one of the methods which would be calculated to provide reasonably accurate results in compliance with section 160A-54. *See Sonopress, Inc. v. Town of Weaverville*, 149 N.C. App. 492, 505, 562 S.E.2d 32, 39-40 (2002); *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 20-21, 356 S.E.2d 599, 604 (1987), *aff'd*, 321 N.C. 598, 364 S.E.2d 139 (1988); *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 20-21, 293 S.E.2d 240, 245 (1982); *Adams-Millis Corp. v. Kernersville*, 6 N.C. App. 78, 84, 169 S.E.2d 496, 500 (1969). At trial, petitioners failed to present any evidence showing that respondent used an arbitrary method in calculating lots or that the county tax maps used by respondent were erroneous or incorrect. In addition, as peti-

tioners' spreadsheets properly were not admitted into evidence for the purposes of showing that petitioners' proposed classification of lots was the correct way in which the lots should have been qualified, petitioners therefore failed to present any evidence that the manner in which respondent classified the individual lots was erroneous.

In fact, not one property owner or petitioner testified that they owned any of the property which was illustrated by any of petitioners' 125 exhibits. Further, not one property owner or petitioner testified that respondent had miscalculated the acreage of their property or misclassified it under the statutory requirements. Petitioners' 125 exhibits represented just 457 of the more than 12,300 lots which were included in the proposed annexation ordinances. At trial, only one petitioner testified. He testified about his property, and the fact that he currently lives in a rural part of the county, and that he does not want things to change. He also testified that he has concerns about the annexation, and that he worries that the character of the property around his will change. He did not offer any testimony concerning the acreage of his property, the conditions and use of it, or that respondent's tax information regarding his property was inaccurate.

Petitioners failed to carry their burden of demonstrating a misclassification of the lots by respondent, and have failed to show that the county tax maps relied upon by respondent were flawed or inaccurate. Therefore, we hold the trial court properly found that petitioners offered no reliable evidence which tended to show that respondent's methodology was inaccurate and not calculated to provide reasonably accurate results.

Affirmed.

Judges BRYANT and CALABRIA concur.

PHILIP MORRIS USA, INC., PLAINTIFF v. E. NORRIS TOLSON, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA05-340

(Filed 7 March 2006)

1. Taxation— allocation of multi-state corporate income— alternative calculation

Where the statute setting out the statutory formula for allocating multi-state corporate income to North Carolina was amended, the trial court did not err by finding that existing orders of the augmented Tax Review Board setting out an alternative calculation were independent of the amended statutory formula. N.C.G.S. § 105-130.4(i); N.C.G.S. § 105-130.4(t).

2. Taxation— allocation of multi-state corporate income— prior orders—subsequent statutory amendments

The trial court did not err by not reading prior orders of the augmented Taxpayer Review Board concerning the allocation of multi-state income to North Carolina in para material with subsequent statutory amendments.

3. Taxation— allocation of multi-state corporate income— multiple orders from augmented Tax Review Board

In an action involving the allocation of income to North Carolina from a multi-state corporation, there was no merit to the taxpayer's contentions that orders of the augmented Tax Review Board did not conflict and should both be effective.

4. Constitutional Law— separation of powers—orders of augmented Tax Review Board

Separation of powers was not violated by orders of the augmented Tax Review Board which the taxpayer contended allowed the Board to "encroach" upon the powers of the General Assembly. Moreover, the taxpayer could not challenge the constitutionality of the orders after benefitting from them.

Appeal by Plaintiff from judgment entered 29 October 2004 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 6 December 2005.

Maupin Taylor, PA, by Charles B. Neely, Jr., Nancy S. Rendleman, Kevin W. Benedict, and Terence D. Friedman; and Morrison & Foerster, LLP, by David Agosto, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

WYNN, Judge.

When an alternative tax formula or other method more accurately reflects a corporation's income allocable to North Carolina, the corporation shall allocate its net income for future years in accordance with the Tax Review Board.[1] Here, Philip Morris USA, Incorporated (hereafter "Taxpayer") appeals from a denial of its request of a tax refund of over $30 million based on its claim of entitlement to the benefits of both a "special tax allocation formula" under two Tax Review Board orders and a subsequently enacted corporate tax incentive formula under N.C. Gen. Stat. § 105-130.4(i) (1989). Because we hold that the tax formulas are independent alternatives, we affirm the trial court's order.

The facts pertinent to this appeal indicate that in 1979, Taxpayer began construction of a new cigarette manufacturing facility in Cabarrus County, North Carolina. On 20 March 1979, Taxpayer filed a petition with the augmented Tax Review Board[2] requesting permission to use an alternative method of allocation for North Carolina corporate income tax purposes for 1982 and subsequent years. Specifically, Taxpayer requested that the augmented Tax Review Board allow it to reduce its property and payroll factors in allocating income to North Carolina for tax years during the "start-up phase" of its new facility and then reduce only its property factor for tax years thereafter. Taxpayer specifically disavowed any modification of its sales factor, stating in its petition "[n]o adjustments are requested with respect to the sales factor."

After a hearing on 2 April 1979, the augmented Tax Review Board entered two orders, Orders 350 and 351, intended to fairly apportion Taxpayer's income to North Carolina. The Orders authorized Taxpayer to determine the percentage of its income apportioned to North

1. N.C. Gen. Stat. § 105-130.4(t)(4) (2005).

2. The augmented Tax Review Board is comprised of the Tax Review Board and the Secretary of Revenue as one of the decision makers for the Tax Review Board. The augmented Tax Review Board is used only in specific instances as required in sections 105-122 and 105-130.4 of the North Carolina General Statutes.

Carolina by taking the "arithmetical average" of the property, payroll and sales factors. The Orders described the property, payroll and sales factors and then reference subsections 105-130.4(j), (k), and (l) of the North Carolina General Statutes, respectively, which are the subsections statutorily defining each of the three factors. Order 350 set out a modification of the property and payroll factors for tax years 1983 through 1989, whereas Order 351 set out an indefinite modification of the property factor. Taxpayer applied the reduced property and payroll factors to calculate its income tax as set forth in Order 350 from 1983 through 1988 and paid its income tax accordingly.

Effective 1 January 1989, the General Assembly amended the statutory formula for allocating a multi-state corporation's total taxable income in North Carolina under section 105-130.4(i)to provide as follows:

$$\frac{\text{Property Factor} + \text{Payroll Factor} + \text{Sales Factor (2)}}{4} = \text{percentage of a multi-state corporation's total income taxable in North Carolina}$$

See N.C. Gen. Stat. § 105-130.4(i) (1989). Before the 1989 amendment, the three factors of property, payroll and sales were "weighted" equally in the statutory formula. However, the 1989 amendment changed the statutory formula to multiply the sales factor by two in the numerator and increased the denominator from three to four. The effect of "double-weighting" the sales factor, coupled with increasing the denominator, reduced the overall tax owed by many multi-state corporations in North Carolina.

Based on this new legislation and Taxpayer's interpretation of Orders 350 and 351, beginning in 1989 and through 1991,[3] Taxpayer determined its corporate tax liability by using the amended statutory formula (double-weighting the sales factor and dividing the total of all factors by four) as well as its reduced property factor authorized under Orders 350 and 351.

In 1993, the Department of Revenue audited Taxpayer and informed Taxpayer that the 1989 Amendment allowing corporations

3. Order 350 provided for the reduced payroll factor only through 1989. Therefore, in its 1989 tax filing, Taxpayer used the reduced property factor in conjunction with the amended statutory formula providing for the payroll and the double-weighted sales factor divided by four.

to double-weigh the sales factor and to increase the denominator from three to four did not apply in calculating Taxpayer's taxes. Accordingly, the Secretary of Revenue issued assessments against Taxpayer for tax years 1989 through 1991. Taxpayer challenged the assessments, arguing that it was required to use the three factors, whether calculated as prescribed by statute or reduced by order of the augmented Tax Review Board, in the then-governing statutory formula as amended by the 1989 Amendments. After exhausting all administrative appeals, Taxpayer paid the assessed taxes under protest and filed a refund action in Superior Court, Wake County.

On 24 October 2003, both parties filed motions for summary judgment. The trial court entered an order granting the Secretary of Revenue summary judgment with a partial refund to Taxpayer on 29 October 2004. The trial court concluded that Orders 350 and 351 required Taxpayer to use the pre-1989 statutory formula notwithstanding the 1989 Amendments. For 1990 and 1991, however, the trial court concluded that the tax based on Order 351, which required Taxpayer to use the reduced property factor and the pre-1989 statutory formula, would result in a greater tax on Taxpayer than the tax calculated under the amended statutory formula without the property factor relief. The trial court therefore voided Order 351 for 1990 and 1991, and allowed Taxpayer to apportion its income for 1990 and 1991 using the 1989 amended statutory formula minus the property factor relief granted by Order 351.[4] The trial court also ordered Defendant to refund the income taxes paid for tax years 1990 and 1991 "to the extent the amount paid by [Taxpayer] exceeded the amount due under the statutory apportionment formula for that year." Taxpayer appealed.

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[1] In its first argument on appeal, Taxpayer contends that the trial court erred in ruling that Orders 350 and 351 are entirely independent from the statutory formula set forth in section 105-130.4(i) of the North Carolina General Statutes. We disagree.

North Carolina General Statute section 105-130.4(t)(3) (formerly 105-130.4(s)) provides in pertinent part:

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4. There are two circumstances which may nullify an order of the augmented Tax Review Board: if there is a change in either the "business method of operation of the corporation" or the "conditions constituting the basis upon which the decision was made." *See* N.C. Gen. Stat. § 105-130.4(t) (2005). The trial court determined that the statutory formula produced a more favorable tax result for Taxpayer for 1990 and 1991, and that this was a "condition[] constituting the basis upon which the decision was made." Thus, the trial court voided Order 351 for 1990 and 1991.

> (3) If the corporation shows that any other method of allocation than the applicable allocation formula prescribed by this section reflects more clearly the income attributable to the business within this State, application for permission to base the return upon such other method shall be considered by the Tax Review Board.

N.C. Gen. Stat. § 105-130.4(t)(3) (2005).[5]

Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 388 S.E.2d 134 (1990). The interpretation of a statute given by the agency charged with carrying it out is entitled to great weight. *See High Rock Lake Ass'n v. N.C. Envtl. Mgmt. Comm'n*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981).

The plain language of section 105-130.4(t) demonstrates that the formula set forth in Orders 350 and 351 exists independently from and substitutes the otherwise applicable statutory allocation formula. First, section 105-130.4(t)(3) provides that the augmented Tax Review Board may consider "*any other method of allocation* than the applicable allocation formula prescribed by this section[.]" N.C. Gen. Stat. § 105-130.4(t)(3) (emphasis added). The "applicable allocation formula" is the statutorily prescribed formula in section 105-130.4(i) or, in the case of certain industries, subsections (m) through (s). "[T]his section" in section 105-130.4(t)(3) refers to section 105-130.4 of the North Carolina General Statutes. Accordingly, for Taxpayer, the "other method of allocation" permitted by the augmented Tax Review Board is in lieu of the "applicable allocation formula" in section 150-130.4(i).

The General Assembly has made clear elsewhere in section 105-130.4(t) that an alternative formula authorized by the augmented Tax Review Board substitutes the applicable statutory allocation formula. Subsection (t)(3) further states:

> If the Board concludes that the allocation formula prescribed by this section allocates to this State a greater portion of the net

5. The augmented Tax Review Board is required for consideration of a multistate corporation's request to use an alternative method of allocation of income to North Carolina under North Carolina General Statute section 105-130.4(t). Therefore, as used throughout section 105-130.4(t), the "Tax Review Board" refers to the augmented Tax Review Board. *See In re Cent. Tel. Co.*, 167 N.C. App. 14, 19-20, 604 S.E.2d 680, 684 (2004).

> income of the corporation than is reasonably attributable to business or earnings within this State, it shall determine the allocable net income by *such other method as it finds best calculated to assign to this State for taxation* the portion of the corporation's net income reasonably attributable to its business or earnings within this State.

N.C. Gen. Stat. § 105-130.4(t)(3). Therefore, under section 105-130.4(t)(3), if the augmented Tax Review Board concludes that the statutory formula allocates a greater portion of the net income than is reasonably attributable to a corporation's earnings and business within the State, the augmented Tax Review Board must determine "such other method" as it finds "best calculated" to measure the appropriate portion of the corporation's income.

In the case *sub judice*, the augmented Tax Review Board followed the mandates of section 105-130.4(t)(3) and concluded that the statutorily prescribed formula for Taxpayer to calculate its taxable income in North Carolina was greater than the portion of Taxpayer's net income than was reasonably attributable to Taxpayer's earnings within the State. The augmented Tax Review Board then determined that reducing the property factor and then taking the arithmetical average of the three ratios was the method "best calculated" to measure Taxpayer's income and directed Taxpayer to allocate its income for future years in accordance with its determination. Orders 350 and 351 provide in relevant part:

> B. The net income of the above classes having been separately allocated, the remaining net income of the Company (being its net apportionable income) and the Company's capital stock, surplus and undivided profits apportionable to this State under G.S. Section 105-122(c)(1) shall be apportioned to this State on the basis of the ratio obtained by *taking the arithmetical average of the following three ratios hereinafter prescribed[.]*

(Emphasis added). The augmented Tax Review Board determined in Orders 350 and 351 that the method best calculated to measure Taxpayer's income requires Taxpayer to take "the arithmetical average of the three ratios hereinafter prescribed," and it further defined how the payroll, property and sales factors are to be calculated. Thus, it is implicit that a method consisting of the arithmetical average of *four* ratios, with the *sales factor doubled*, cannot also be the method best calculated to measure Taxpayer's income. Because Taxpayer was already using the method best calculated, as determined by the

augmented Tax Review Board, to allocate its income to North Carolina as required by section 105-130.4(t)(3), the 1989 Amendment was inapplicable to Orders 350 and 351.

Likewise, section 105-130.4(t)(4) of the North Carolina General Statutes reflects the General Assembly's intent for the augmented Tax Review Board to devise methods to calculate income tax as an alternative to the statutory formula. Section 105-130.4(t)(4) provides in relevant part:

> When the Board determines, pursuant to the provisions of this subsection, *that an alternative formula or other method more accurately reflects the income allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its net income for future years in accordance with such determination and decision of the Board* so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the business method of operation of the corporation changes.

N.C. Gen. Stat. § 105-130.4(t)(4) (2005). Thus, under subsection (t)(4), the augmented Tax Review Board creates an entirely new and independent "alternative formula" to which the corporation must adhere except in limited circumstances. *See also Central Tel. Co. v. Tolson*, 174 N.C. App. 554, 621 S.E.2d 186 (2005) (holding that the augmented Tax Review Board is vested with the exclusive authority to allow a corporation to use any method other than the statutory formula for apportioning income in North Carolina). Because the plain language of section 105-130.4(t) demonstrates that a formula in an augmented Tax Review Board Order is independent of, and an alternative to, the statutory formula, Taxpayer's assignment of error is without merit.

[2] Taxpayer next contends that the trial court failed to correctly apply the rules of statutory construction and that Orders 350 and 351 should be read *in pari materia* with the 1989 statutory amendments. We disagree.

In interpreting an agency order, the order "should be read as a whole." *In re Bass Income Fund*, 115 N.C. App. 703, 705, 446 S.E.2d 595, 594 (1994). Where two provisions in separate parts of an order are contradictory, the order is ambiguous. *See McLean v. McLean*, 323 N.C. 543, 548, 374 S.E.2d 376, 379 (1988) (finding that two conflicting sentences in the same section of a statute created an ambiguity in the statute). However, an order that is clear and unambiguous

must be construed using its plain meaning. *See Burgess*, 326 N.C. at 209, 388 S.E.2d at 136.

In this case, Taxpayer argues that Orders 350 and 351 require it to calculate the sales factor in accordance with the amended statute because the Orders refer to the required sales factor as "set forth and defined under G.S. Section 105-130.4(l)." Taxpayer contends this language, on its face, requires Taxpayer to "weigh" the sales factor without deviation from the statute. Taxpayer further argues that Defendant's interpretation of the Orders, that the language "arithmetical average of the following three ratios" requires a single-weighting of the sales factor, creates an ambiguity in the Orders and therefore the rules of statutory construction apply.

However, Taxpayer's argument is misguided in that the reference in the Orders to section 105-130.4(l) simply defines the sales factor and provides instruction for determining which sales must be attributed to North Carolina. *See* N.C. Gen. Stat. § 105-130.4(l) (2005). The "weight" of the factors in the statutory apportionment formula is governed by subsection (i), an entirely separate subsection of North Carolina General Statute section 105-130.4 that is not referenced in either of the Orders. *See* N.C. Gen. Stat. § 105-130.4(i) ("[a]ll apportionable income of corporations . . . shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus twice the sales factor, and the denominator which is four."). Because subsection (l) does not address the *weight* of the sales factor, the augmented Tax Review Board's reference to it in its Orders has no impact on the weight to be given to the sales factor under the Orders as Taxpayer contends.

We therefore conclude the plain language of Orders 350 and 351 that direct Taxpayer's net income to "be apportioned to this State on the basis of the ratio by taking the arithmetical average of the following three ratios" is not ambiguous. The reference in the Orders to the sales factor in section 105-130.4(l) does not require a method of calculation contrary to the Orders' plain terms. Therefore, the rules of statutory construction, including the rule of *in para materia*, do not apply in determining the meaning of Orders 350 and 351. *See Charlotte City Coach Lines, Inc. v. Brotherhood of R.R. Trainmen*, 254 N.C. 60, 68, 118 S.E.2d 37, 43 (1961). Taxpayer's assignment of error is therefore without merit.

[3] Taxpayer next argues that subsequent orders of the augmented Tax Review Board, Orders 455 and 465, clarify that the purposes of

Orders 350 and 351 do not conflict and that both orders should be given effect. This argument is also without merit.

Although Taxpayer believed that Order 351 already granted the relief requested, Taxpayer filed petitions with the augmented Tax Review Board in 1997 and again in 1999 requesting the same modification of the statutory property factor requested in the 1979 Petition, but clarified in the 1997 and 1999 Petitions that the sales factor would be double-weighted. In granting Taxpayer's request to modify the property factor and to double-weight the sales factor in both petitions, Orders 455 and 465 provide that Taxpayer must calculate the tax owed to North Carolina "by using the arithmetical average of the *three* factors of property, payroll and sales, with the sales being doubled." (Emphasis added). However, in calculating its income tax returns for 1995 through 1999, Taxpayer took the sum of the modified property factor, the payroll factor, and the doubled-sales factor, and divided the sum by *four*. Taxpayer asserts that since the Department of Revenue accepted the apportionment formula that Taxpayer used when filing its income tax returns for 1995 through 1999, it confirmed that the purposes of Orders 350 and 351 and the 1989 Amendments are different, and that Orders 350 and 351 and the 1989 Amendments should be given effect.

Contrary to Taxpayer's assertion, the record reveals that the Department of Revenue did not accept the apportionment formula Taxpayer used in filing its income tax returns for 1998 and 1999. The Department of Revenue issued proposed notices of tax assessments against Taxpayer based on its failure to comply with the original language of Order 465 by dividing the sum of the factors by four instead of three, as required by the Order. This proposed assessment also provided that if the augmented Tax Review Board amended the language in Order 465, the assessment would be cancelled.

The augmented Tax Review Board did, in fact, amend the language in both Orders 455 and 465 in subsequent orders issued 10 and 24 October 2003.[6] In the October 2003 orders, the augmented Tax

6. Taxpayer argues in its Reply Brief that Defendant violated provisions of the administrative code in filing its Motion to Amend Orders 455 and 465 with the augmented Tax Review Board because any modification of an order must be initiated by the Taxpayer, citing N.C. Gen. Stat. § 105-130.4(t)(1) (2005) ("[p]etitions to the [augmented] Tax Review Board . . . can only be initiated by the taxpayer."). However, there is no evidence in the record to show that Taxpayer has exhausted all administrative remedies to challenge the validity of Taxpayer's motion or the subsequent orders issued by the augmented Tax Review Board amending Orders 455 and 465. Accordingly, this issue is not properly before this Court.

Review Board struck the language, "shall be apportioned to North Carolina by using the arithmetical average of the *three* factors of property, payroll, and sales with the sales factor being doubled as hereinafter prescribed" in Orders 455 and 465, and substituted the language with the phrase, "shall be apportioned to North Carolina by a fraction, the numerator of which is the property factor plus the payroll factor plus twice the sales factor, all as defined herein, and the denominator which is *four*." Thus, unlike Orders 350 and 351, the amended language in Orders 455 and 465 explicitly provides that Taxpayer should use the sum of the modified property factor, the payroll factor, and the doubled sales factor, and divide the sum by four. Because the amended language of Orders 455 and 465 expressly permits Taxpayer to double the sales factor and divide the sum of all factors by four and the language in Orders 350 and 351 does not, Taxpayer's assignment of error is without merit.

[4] In its final argument on appeal, Taxpayer contends that the trial court erred in its construction of Orders 350 and 351 by effectively granting to the augmented Tax Review Board powers greater than those of the General Assembly, thereby violating the separation of powers doctrine. Taxpayer argues the trial court's interpretation of Orders 350 and 351 creates a fundamental violation of separation of powers because it permits the augmented Tax Review Board, which is part of the executive branch of government, to "encroach" upon the General Assembly, the legislative branch of government. This argument is without merit.

To establish a violation of separation of powers, Taxpayer must demonstrate that one branch of State government has exercised powers that are reserved for another branch of State government. *Ivarsson v. Office of Indigent Defense Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652, *disc. review denied*, 357 N.C. 250, 582 S.E.2d 269 (2003). An improper exercise of properly delegated authority, even if proven, is wholly insufficient to establish a separation of powers violation. Rather, it must be proven that one branch of State government exercised a power reserved for another branch of government. *Id.*

Here, the augmented Tax Review Board only exercised the powers expressly reserved for it by the General Assembly under North Carolina General Statute section 105-130.4(t). The General Assembly specifically set forth the procedures and circumstances under which the augmented Tax Review Board may grant an order, how long, and

under what conditions that order shall remain effective. *See* N.C. Gen. Stat. § 105-130.4(t). In devising a unique formula for Taxpayer to calculate its taxes that was separate and distinct from the statutory formula, the augmented Tax Review Board did not exercise any powers reserved for any other branch of government.

Taxpayer's argument that the trial court's interpretation of Orders 350 and 351 preempted any change the legislature may have enacted, including the 1989 Amendments, is also without merit. As we have already determined, an order of the augmented Tax Review Board stands as an independent, alternative to the statutory formula. Moreover, Taxpayer, at all times, could have sought modification of an order of the augmented Tax Review Board under North Carolina General Statute section 105-130.4(t)(3).

Finally, Taxpayer cannot now challenge the constitutionality of Orders 350 and 351 after Taxpayer has benefitted from the orders. "[O]ne who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question [the statute's] constitutionality in order to avoid its burdens." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999) (quoting *Convent of Sisters of St. Joseph v. Winston-Salem*, 243 N.C. 316, 324, 90 S.E.2d 879, 885 (1956)). "This principle also applies to questioning the rules or actions of state commissions." *Convent of Sisters*, 243 N.C. at 324, 90 S.E.2d at 885.

Here, Taxpayer "sought, received and took full advantage of a variance" from the applicable statutory formula granted under North Carolina General Statute section 105-130.4(t) and is therefore precluded from challenging that variance on constitutional grounds. *See Shell Island*, 134 N.C. App. at 227, 517 S.E.2d at 414 (holding that because plaintiffs "sought, received and took full advantage of" a variance granted pursuant to a regulatory scheme, they were precluded from asserting that the regulatory scheme was unconstitutional).

Accordingly, because the trial court's interpretation of Orders 350 and 351 did not create a separation of powers violation and Taxpayer benefitted from the statute which it now claims is unconstitutional, Taxpayer's assignment of error is without merit.

Affirmed.

Chief Judge MARTIN and Judge STEELMAN concur.

IN RE: A.C.F., MINOR CHILD

No. COA05-764

(Filed 7 March 2006)

1. **Termination of Parental Rights— "left" in outside care more than 12 months after "removal"—triggered only by court order**

   The legislature did not intend that any separation between a parent and child trigger the ground for termination of parental rights set forth in N.C.G.S. § 7B-1111(a)(2) (the child is "left" in placement outside the home for more than 12 months without progress toward correcting the condition which led to "the removal"). The statute refers only to circumstances where a court has entered an order requiring that a child be in foster care or other placement outside the home.

2. **Termination of Parental Rights— more than 12 months in foster care—measuring of time**

   A termination of parental rights on the basis of more than 12 months in foster care or other outside placement cannot be sustained where the "more than twelve months" threshold requirement did not expire before the motion or petition was filed. This is in contrast to the parent's reasonable progress, which is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights. N.C.G.S. § 7B-1111(a)(2)

3. **Termination of Parental Rights— more than 12 months in foster care—initial separation voluntary**

   The trial court's findings in a termination of parental rights proceeding did not support the conclusion that the child had been left in foster care or placement outside the home for twelve months as defined in N.C.G.S. § 7B-1111(a)(2). The fact that there was a voluntary placement agreement in cooperation with a social services agency is not the equivalent of placing the child in foster care or placement outside the home by a court order. Prior uses of "remove" in other proceedings did not have the import associated with the legal ground set forth in N.C.G.S. § 7B-1111(a)(2).

Appeal by respondent-mother from orders entered 8 March 2005 by Judge Burford A. Cherry in Catawba County District Court. Heard in the Court of Appeals 11 January 2006.

J. David Abernethy, for Catawba County Department of Social Services, petitioner-appellee.

Mercedes O. Chut, for respondent-mother.

Mary McKay, Guardian ad Litem.

LEVINSON, Judge.

Respondent-mother (respondent) appeals from the orders of adjudication and disposition terminating her parental rights in A.C.F. The trial court erred in its conclusion that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(2) (failure to make reasonable progress) to terminate respondent's parental rights.

The evidence presented at the termination hearing may be summarized as follows: A.C.F. was born 15 March 2000 and resided with respondent until February 2002, when law enforcement officers searched respondent's residence and discovered she was in possession of various controlled substances. Following the search of respondent's home, respondent voluntarily agreed to have A.C.F. reside in the care of a third party pursuant to a voluntary placement agreement.

On 26 November 2002 Catawba County Department of Social Services (DSS) obtained custody of A.C.F. pursuant to a non-secure custody order. On 4 March 2003 A.C.F. was adjudicated neglected, and his custody remained with DSS. On 11 September 2003 DSS filed a motion to terminate respondent's parental rights, alleging (1) neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), and (2) willfully leaving A.C.F. in foster care or placement outside the home for more than twelve months and failing to make reasonable progress in correcting the conditions which led to the child's removal pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Following a hearing 17 November 2004 and 12 January 2005, the trial court concluded the evidence only supported termination of respondent's parental rights pursuant to G.S. § 7B-1111(a)(2) (failure to make reasonable progress), and entered orders of adjudication and disposition terminating respondent's rights 8 March 2005. Respondent appeals.

Respondent contends the trial court erred by concluding as a matter of law that grounds exist to terminate her parental rights pursuant to G.S. § 7B-1111(a)(2). Respondent contends that A.C.F. had not been "removed" from respondent's home for the requisite period

of time before DSS filed the motion to terminate parental rights. We agree.

A termination of parental rights proceeding is conducted in two stages. Under N.C. Gen. Stat. § 7B-1109(e) (2005), the trial court "shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. § 7B-1111 which authorize the termination of parental rights of the respondent." At the disposition stage under N.C. Gen. Stat. § 7B-1110 (2003), "[s]hould 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 . . . unless the court shall further determine that the best interests of the juvenile require that the parental rights not be terminated."

This Court reviews a termination of parental rights to determine "whether the court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law." *In re Pope*, 144 N.C. App. 32, 40, 547 S.E.2d 153, 158 (2001) (internal quotation marks and citation omitted).

G.S. § 7B-1111(a)(2) (2005) provides that one's parental rights may be terminated where:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. . . .

Respondent's argument presents two questions regarding G.S. § 7B-1111(a)(2): (1) the meaning of "left . . . in foster care or placement outside the home" and "removal of the juvenile"; and (2) how to measure the time frame, "for more than 12 months". Our research reveals these questions have not been specifically addressed by our appellate courts.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003).

> The intent of the legislature controls the interpretation of a statute. . . . When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts

> must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein. But when a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will and the courts will interpret the language to give effect to the legislative intent. . . . [T]he legislative intent ". . . is to be ascertained by appropriate means and *indicia*, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. . . ." Other *indicia* considered by this Court in determining legislative intent are . . . previous interpretations of the same or similar statutes.
>
> Finally, it is a well settled rule of statutory construction that, where a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded.

In re Banks, 295 N.C. 236, 239-40, 244 S.E.2d 386, 388-89 (1978) (citations omitted).

[1] As used in G.S. § 7B-1111(a)(2), the word "left" in "left the juvenile in foster care or placement outside the home" could implicate a broad range of meanings. A parent might have "left" his child in foster care or placement where the same was required by a juvenile court order. A parent might have "left" his child in another adult's home even though the same was neither required by a juvenile court order nor urged by a social services entity. Or a parent might have "left" his child in another's home not because the same was required by a juvenile court order, but because he voluntarily agrees (consistent with a family services plan crafted by a social services entity) that the child should be "left" in someone else's care.

The term "removal" in "removal of the juvenile" in G.S. § 7B-1111(a)(2) could likewise implicate a variety of different meanings. Interpreted narrowly, "removed" from one's home might occur only where the juvenile court has entered an order requiring the same. Interpreted broadly, a parent might "remove" a child from his home anytime he places the child in another's care even though the same was neither required by a juvenile court order nor urged by a social services entity. A third interpretation of "removal" might

include circumstances where a parent agrees, in the absence of a court order, that a child should be placed in another's care as a part of a family services plan crafted by a social services entity.

In determining the meaning of "left in foster care or placement" and "removal" in G.S. § 7B-1111(a)(2), we first consider our Supreme Court's decision in *In re Pierce*, 356 N.C. 68, 565 S.E.2d 81 (2002). In *Pierce*, a significant issue was the application of the "within twelve months" time frame for examining parental progress under former N.C. Gen. Stat. § 7A-289.32(3) (1998):

> The parent has willfully left the child in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child.

In *Pierce*, the child was initially sent to live with her paternal grandmother in June 1997 pursuant to a "protection plan" constructed by the New Hanover County Department of Social Services. *In re Pierce*, 146 N.C. App. 641, 654, 554 S.E.2d 25, 33 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002). Less than one month later, the child returned to live with her parents. *Pierce*, 356 N.C. at 69, 565 S.E.2d at 82. In August 1997, DSS petitioned the court for custody and the child was placed in foster care. *Id.* In December 1998, the child was placed in the care of her father's first cousin and her husband. *Id.* Under these facts, our Supreme Court determined that, for purposes of N.C. Gen. Stat. § 7A-289.32(3) (now substantially codified in G.S. § 7B-1111(a)(2)), the child "was placed outside the home in late July or early August of 1997[,]" *Pierce*, 356 N.C. at 73, 565 S.E.2d at 85, and determined that "[o]ther evidence regarding [the mother's] progress dated back as far as the time the child was removed from the home, in August of 1997." *Pier*ce, 356 N.C. at 74, 565 S.E.2d at 85. Therefore, our Supreme Court observed that the child had not been "placed" or "removed" for purposes of the applicable termination statute until the child had become the subject of a custody order. This was so notwithstanding the fact the child had been separated from her parents pursuant to a DSS protection plan as early as June 1997. Our Supreme Court's analysis of when the child was "placed" outside the home, according to G.S. § 7A-289.32(3), is strong authority that a child is "left in foster care or placement" or "removed" from the parent's care under G.S. § 7B-1111(a)(2) only when the same occurs by virtue of a court order.

Moreover, reading "left . . . in foster care or placement" and "removal of the juvenile" in G.S. § 7B-1111(a)(2) to refer only to placements and removals required by court order is in keeping with the common usage of these words in statutes throughout the Juvenile Code where the juvenile court has asserted jurisdiction over children. *See, e.g.*, N.C. Gen. Stat. § 7B-505 (2005) (Place of nonsecure custody); N.C. Gen. Stat. § 7B-506 (2005) (Hearing to determine need for continued nonsecure custody); N.C. Gen. Stat. § 7B-907 (2005) (Permanency planning hearing); N.C. Gen. Stat. § 7B-507 (2005) (Reasonable efforts); and N.C. Gen. Stat. § 7B-903 (2005) (Dispositional alternatives for abused, neglected or dependent juveniles).

We also observe that, in reading G.S. § 7B-1111(a)(2) in its entirety, the issue of reasonable progress on the conditions which led to the "removal" of the juvenile is necessarily tied to the leaving of a child in foster care or placement. That "removal" suggests that the child was involuntarily taken out of one's home seems obvious to us. As such, "removal" cannot occur within the meaning of G.S. § 7B-1111(a)(2) where the parent has voluntarily agreed, in the absence of a court order, to place his child in another's home. Stated differently, a child cannot be involuntarily "removed" from a parent's home where the parent can withdraw his consent at anytime; this is generally the case when there is not a court order in place.

Finally, an interpretation of "left . . . in foster care or placement outside the home" and "removal" in G.S. § 7B-1111(a)(2) that broadly covers circumstances where parents leave their children in others' care without regard to involvement of the juvenile court may lead to nonsensical results. There are an infinite variety of reasons parents decide to entrust their children's care to others. Oftentimes, these reasons will not implicate the child welfare concerns of the State. To allow the termination ground set forth in G.S. § 7B-1111(a)(2) to be triggered no matter what the cause for a child's separation from his parent is inconsistent with affording parents notice that they are at risk of losing their parental rights. Instead, it is logical that the General Assembly, in adopting G.S. § 7B-1111(a)(2), was primarily concerned with allowing termination where a juvenile court was involved in the "removal" of the child.

Consistent with *Pierce* and principles of statutory construction, we conclude the legislature did not intend for any separation between a parent and a child to trigger the termination ground set forth in G.S. § 7B-1111(a)(2) (failure to make reasonable progress). Instead, we

conclude the statute refers only to circumstances where a court has entered a court order requiring that a child be in foster care or other placement outside the home.

[2] We next address how to measure the time frame, "for more than 12 months" set forth in G.S. § 7B-1111(a)(2). This phrase lends itself to two interpretations: the duration of time beginning when the child was "left" in foster care or placement outside the home pursuant to a court order, and ending when the motion or petition for termination of parental rights was filed; or (2) the duration of time beginning when the child was "left" in foster care or placement outside the home pursuant to a court order, and ending on the date of the termination hearing.

We are guided by this Court's analysis in *In re Baker*, 158 N.C. App. 491, 494, 581 S.E.2d 144, 146 (2003). In *Baker*, this Court interpreted "for more than 12 months" as a period of at least twelve months preceding the date the motion or petition for termination of parental rights was filed:

> In the case *sub judice*, it is undisputed that the juvenile was in foster care for more than twelve months prior to the filing of the petition. However, to sustain the trial court's finding that grounds existed for termination of parental rights under G.S. § 7B-1111(a)(2), we must also determine that there was clear, cogent, and convincing evidence that (1) respondents "willfully" left the juvenile in foster care for more than twelve months, and (2) that each respondent had failed to make "reasonable progress" in correcting the conditions that led to the juvenile's removal from the home."

Baker, 158 N.C. App. at 494, 581 S.E.2d at 146 (citation omitted).

Unlike *Baker*, this Court's recent opinion in *In re O.C. & O.B.*, 171 N.C. App. 457, 615 S.E.2d 391, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005), suggests that the twelve-month period can be measured by including the period leading up to the actual termination hearing. In discussing the provisions of G.S. § 7B-1111(a)(2), the *O.C. and O.B.* panel stated:

> The children were removed from the home pursuant to the petition for non-secure custody filed 13 November 2001 and had been in foster care for more than twelve months at the time of the termination hearing on 2 June 2003 and 2 September 2003. The conditions leading to the removal of the children

were, in large measure, due to domestic violence and respondent's substance abuse.

Id. at 466-67, 615 S.E.2d at 397 (emphasis added). In *O.C. and O.B.*, however, this Court was not presented with the question of whether the twelve-month period must expire before the motion or petition to terminate is filed, and the language quoted above was therefore not necessary to the holding of that case. We conclude that the above language from *O.C. and O.B.* constitutes *dicta* and is not binding precedent. *See State v. Hickey*, 317 N.C. 457, 465, 346 S.E.2d 646, 652 (1986) (*obiter dicta* is not binding authority).

An interpretation of "for more than 12 months" in G.S. § 7B-1111(a)(2) that requires that this time period expire by the date the motion or petition to terminate is filed gives full support to the State's interests in preserving the family, while keeping in place a legislatively-established time frame for moving to termination if a child's return home proves untenable. *See* N.C. Gen. Stat. § 7B-1100 (2003) (legislative policy concerning termination of parental rights). Such an interpretation provides parents with at least twelve months' notice to correct the conditions which led to the removal of their children before being made to respond to a pleading seeking the termination of his or her parental rights. We conclude, consistent with *Baker* and principles of statutory construction, that "for more than 12 months" in G.S. §. 7B-1111(a)(2) means the duration of time beginning when the child was "left" in foster care or placement outside the home pursuant to a court order, and ending when the motion or petition for termination of parental rights was filed. While the child may have continued in foster care or other placement for some period after the date the motion or petition was filed, "more than twelve months" must have expired by this date.

Where the "more than twelve months" threshold requirement in G.S. § 7B-1111(a)(2) did not expire before the motion or petition was filed, a termination on this basis cannot be sustained.[1] Indeed, this threshold requirement is related to the court's jurisdiction or authority to act. *See*, *e.g.*, *Bruce v. Bruce*, 79 N.C. App. 579, 580, 339 S.E.2d 855, 856 (1986) (one year separation occurring before suit filed for divorce is "jurisdictional requirement[]"). It is, of course, a primary

1. We are not presented with circumstances where, *e.g.*, DSS files a motion or petition setting forth G.S. § 7B-1111(a)(2) (failure to make reasonable progress) as a ground for termination before the expiration of the statutory period, but subsequently amends the motion or petition after the expiration of the period to reassert this termination ground.

function of the juvenile tribunal to determine whether the grounds set forth in the motion or petition are proven by the requisite standards. Where the child has not been "removed" and "placed" for more than twelve months as of the filing date of the motion or petition to terminate, the juvenile court is necessarily unable to conclude that, as of that date, the minor child had been outside the home for "more than twelve months." This is in contrast to the nature and extent of the parent's reasonable progress, which is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights. *See In re O.C. and O.B.*, 171 N.C. App. at 466-67, 615 S.E.2d at 396. We are mindful that, in many cases, the juvenile will have been placed outside of the home for the requisite period by the date of the termination hearing. However, we are equally mindful that our social service entities and juvenile courts should not, by virtue of filing a pleading setting forth G.S. § 7B-1111(a)(2) as a termination ground, forecast what the residential placement and circumstances of the juvenile will be for the balance of the twelve-month period that has not yet expired.

[3] We next apply the foregoing principles to the facts of this case. Here, A.C.F. was separated from respondent in February 2002 pursuant to a voluntary "protection plan", not a court order. It is unclear from the record who cared for the child between February 2002 and 26 November 2002. The first non-secure custody order granting DSS custody of the child was not entered until 26 November 2002. Thus, there was no "placement" or "removal" within the meaning of G.S. § 7B-1111(a)(2) until 26 November 2002. The motion to terminate respondent's parental rights was filed 11 September 2003, less than twelve months after this time. As a consequence, the trial court erred by concluding A.C.F. had been "left in foster care [or placement outside the home] for more than 12 months as defined in G.S. 7B-1111(a)(2)." Indeed, A.C.F. was, at the time the motion to terminate parental rights was filed, two months away from circumstances under which G.S. § 7B-1111(a)(2) could be triggered and the parent made to respond to a motion or petition to terminate parental rights.

DSS nonetheless argues that, because unchallenged findings of fact from the termination of parental rights order establish that A.C.F. was "removed" from the home long before 26 November 2002, this Court must sustain the trial court's conclusions. DSS first points to finding of fact number 16: "The minor child was placed outside the mother's home [in February, 2002] pursuant to a voluntary placement

agreement due to [the discovery by law enforcement officers of controlled substances in respondent's home]." However, the trial court merely used the term "placed" in finding of fact 16 as a generic, descriptive term to characterize what happened to A.C.F. in the aftermath of the discovery of controlled substances in respondent's home. And the fact that there was a "voluntary placement agreement" entered into by respondent in cooperation with a social services agency is, again, not the equivalent of placing the child in "foster care or placement outside the home" by virtue of a court order. DSS also relies upon unchallenged finding of fact number 11 in the termination of parental rights order, which incorporates the 4 March 2003 order adjudicating A.C.F. a neglected juvenile. In this earlier order on neglect, the trial court found that, as of 11 February 2003, A.C.F. "ha[d] been removed from the mother for more than eleven months. . . ." Our review of the record suggests that the trial court was not concluding that A.C.F. was "removed" from the home within the meaning of G.S. § 7B-1111(a)(2), but was using the term "remove" as a generic term to describe what occurred with the child. In short, this record completely belies any suggestion that A.C.F. was "removed" from respondent's care by court order at any point before 26 November 2002.

Finally, we observe that language from the prior opinion by this Court regarding this juvenile, *In re A.F.*, COA03-1129 (N.C. Ct. App. 1 June 2004) (unpublished opinion), does not establish that A.C.F. was "placed" outside respondent's home for the requisite period before the motion for termination of parental rights was filed. In *A.F.*, this Court stated, "the child was removed from respondent's custody in February 2002." However, this Court was not giving the term "removed" the import associated with the legal ground set forth in G.S. § 7B-1111(a)(2) (failure to make reasonable progress).

In the instant case, the findings of fact do not support the trial court's conclusion of law that A.C.F. had been "left in foster care [or placement] outside the home for more than twelve months . . . as defined in N.C.G.S. § 7B-1111(a)(2)." Therefore, the order of termination must be

Reversed.

Judges McCULLOUGH and ELMORE concur.

DEREK A. PATE AND MICHELLE D. PATE, PLAINTIFFS v. N.C. DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA05-609

(Filed 7 March 2006)

1. Tort Claims Act— appeal—standard of review

The standard of review for an appeal from the full Industrial Commission's decision under the Tort Claims Act is for errors of law under the same terms and conditions as in ordinary civil actions, and the findings are conclusive if there is any competent evidence to support them.

2. Appeal and Error; Tort Claims Act— preservation of issues—assignment of error—distinction from condemnation

Defendant's failure to assign error meant that it did not preserve for appellate review the question of whether N.C.G.S. § 136-111 provides the sole remedy in an action arising from flooding caused by an undersized drainage pipe. Furthermore, N.C.G.S. § 136-111 addresses actions seeking damages for condemnation, while the Tort Claims Act governs negligence claims.

3. Appeal and Error— appealability—"de facto denial" of motion—no authority to appeal before ruling

There is no authority to support a right of appeal from a "de facto denial" of a summary judgment motion which had not been ruled upon. There is no authority supporting the right to appeal before a motion has been heard or a ruling entered.

4. Tort Claims Act— civil action not alleging negligence—no res judicata

The dismissal of a civil complaint which did not allege negligence did not bar a claim pursuant to the Tort Claims Act under res judicata.

5. Tort Claims Act— interlocutory oral ruling—subject to change during hearing—no stay after appeal

An appeal from an interlocutory oral ruling that an Industrial Commission deputy commissioner could modify or reverse during the hearing did not stay further proceedings.

Judge TYSON dissenting.

Appeal by defendant from Decision and Order entered 17 February 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 December 2005.

Hopf & Higley, P.A., by James F. Hopf, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Amar Majmundar, for defendant-appellant.

LEVINSON, Judge.

Defendant North Carolina Department of Transportation (NCDOT) appeals a decision and order of the Industrial Commission, affirming with modification a deputy commissioner's order awarding damages to plaintiffs. We affirm.

Record evidence establishes the following: In 1999 plaintiffs Derek and Michelle Pate lived at 2738 Stoney Brook Drive on State Rd. 1217, Farmville, in Pitt County, North Carolina. A buried drainage pipe ran under their property and beneath the road. Maintenance of both State Rd. 1217 and of the drainage pipe, including determination of the appropriate diameter for the pipe, is defendant's responsibility. Although defendant's guidelines indicated that the proper diameter for this drainage pipe was forty-two to forty-eight inches, as of 1999 defendant was using an eighteen inch diameter pipe.

In September 1999 Hurricane Floyd passed through Farmville, and plaintiffs' yard and house were flooded. Over six inches of standing water flooded the interior of plaintiffs' home, causing at least $103,000 in damages. Plaintiffs presented unrebutted evidence at the hearing that the flooding was caused by the inadequate capacity of the eighteen inch diameter drainage pipe, which defendant replaced with a forty-eight inch diameter pipe.

On 30 August 2001 plaintiffs filed a complaint in the Superior Court of Pitt County, North Carolina, seeking damages for alleged "inverse condemnation" or wrongful taking of their property, arising from defendant's role in the flooding of their property. Defendant filed a motion for dismissal of plaintiffs' civil complaint on several grounds, including N.C. Rules of Civil Procedure Rule 12(b) (lack of subject matter jurisdiction), Rule 12(b)(6) (failure to state a claim for relief), the doctrine of sovereign immunity; and the Statute of Repose. On 13 October 2003 the trial court granted defendant's motion, entering a summary order that did not indicate the basis for the court's decision.

On 7 September 2001 plaintiffs filed an affidavit setting out a negligence claim pursuant to the Tort Claims Act claim, N.C. Gen. Stat. § 143-291, *et seq.* Many of the facts alleged in plaintiffs' affidavit were also set out in their superior court complaint; however, unlike that complaint, the Tort Claims Act action alleged negligence by a named NCDOT employee. On 17 October 2003 defendant moved for summary judgment on plaintiffs' Tort Claims Act claim. Defendant asserted that the trial court's dismissal of plaintiffs' claim in the superior court constituted a "final judgment on the merits" of plaintiffs' claim, which barred the Tort Claims Act claim under the doctrine of *res judicata*.

Plaintiffs' claim was scheduled for hearing before Industrial Commission Deputy Commissioner George Glenn. Two days before the hearing, defendant appealed to the Full Commission, on the grounds that the commissioner's failure to rule on its summary judgment motion before the scheduled hearing was a "*de facto* denial" of the motion, and that it was entitled to an immediate appeal because the "*de facto* denial" affected a substantial right.

On 5 November 2003 the case was heard by Deputy Commissioner Glenn. Before the hearing on the merits, the commissioner orally denied defendant's summary judgment motion, and defendant announced its appeal. Defendant then argued that its appeal stripped the commissioner of jurisdiction over the case, and refused to participate in the hearing. Consequently, plaintiffs' evidence was unchallenged. When questioned by the Commissioner about the wisdom of its refusal to take part in the hearing on the merits, defendant conceded that, if the procedural issues were resolved against defendant, "[w]e lose, Your Honor."

On 22 December 2003 the commissioner issued a Decision and Order in favor of plaintiffs, and defendant appealed to the Full Commission. On 17 February 2005 the Full Commission affirmed the deputy commissioner's opinion with modifications. Defendant has appealed from this Decision and Order, and timely filed the Record on Appeal. On 18 November 2005 defendant filed a motion seeking to amend the Record on Appeal by adding record page citations to the Assignments of Error. We have granted defendant's motion, and conclude that the procedural issues raised by defendant were properly preserved for review and are now adequately assigned as error. Our opinion in this case does not address substantive issues pertaining to proof of negligence, and thus we have no need to reach the issue of whether defendant properly preserved or briefed such issues.

Standard of Review

[1] Defendant appeals from an Opinion and Award under the Tort Claims Act, N.C. Gen. Stat. § 143-291 *et seq.* Under § 143-291(a), the Industrial Commission has jurisdiction over negligence claims against the State. The Commission is charged with determining "whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina." "Because an action in tort against the State and its departments, institutions, and agencies is within the exclusive and original jurisdiction of the Industrial Commission, a tort action against the State is not within the jurisdiction of the Superior Court." *Guthrie v. State Ports Authority*, 307 N.C. 522, 539-40, 299 S.E.2d 618, 628 (1983).

Regarding the procedural rules governing Tort Claims Act proceedings, "the Commission is authorized to 'adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent of [the Tort Claims Act].' N.C. Gen. Stat. § 143-300 [(2005)]. [However,] the North Carolina Rules of Civil Procedure apply in tort claims before the Commission, to the extent that such rules are not inconsistent with the Tort Claims Act, in which case the Tort Claims Act controls. N.C. Gen. Stat. § 143-300; 4 NCAC 10B.0201(a)." *Doe 1 v. Swannanoa Valley Youth Dev. Ctr.*, 163 N.C. App. 136, 141, 592 S.E.2d 715, 718-19, *disc. review and stay denied*, 358 N.C. 376, 596 S.E.2d 813 (2004).

"The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act 'shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.' N.C. Gen. Stat. § 143-293 [(2005)]. As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding." *Simmons v. Columbus County Bd. of Educ.*, 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005) (citing *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 793 (1998)). "[W]hen considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact

justify its conclusions of law and decision." *Simmons*, 171 N.C. App. at 727-28, 615 S.E.2d at 72.

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[2] Defendant argues first that the Full Commission erred by affirming the Opinion and Award by the deputy commissioner, on the grounds that N.C. Gen. Stat. § 136-111 (2005) affords plaintiffs' "sole remedy, rendering their common law tort action improper[.]" However, by failing to assign this issue as error, defendant did not preserve it for appellate review. *See* 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."). Further, it is undisputed that G.S. § 136-111 addresses actions seeking damages for condemnation, while the Tort Claims Act governs negligence claims. Defendant cites no authority holding that G.S. § 136-111 bars negligence claims, and we find none.

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[3] Defendant next asserts that the deputy commissioner lacked jurisdiction to conduct the 5 November 2003 hearing on the merits of plaintiffs' claim, based on defendant's notice of appeal filed 3 November 2003. This appeal, filed two days before the hearing, purported to appeal from what defendant describes as a "*de facto* denial" of its summary judgment motion. This motion for summary judgment was filed two weeks before the hearing. Defendant repeatedly asserts the deputy commissioner "refused" to rule on its motion for summary judgment, and argues that its appeal of the "*de facto* denial" of summary judgment removed the case from the deputy commissioner's jurisdiction. However, defendant cites no authority supporting the right to appeal before a motion has been heard or a ruling entered, and we find none. We reject this argument.

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[4] Defendant next argues that the Industrial Commission erred by denying its motion for summary judgment, asserting that dismissal of plaintiffs' civil superior court complaint was "an adjudication on the merits" of plaintiffs' claim that barred plaintiffs' negligence claim under the Tort Claims Act. In making its argument, defendant relies on the doctrine of *res judicata*. We disagree.

"Under the doctrine of *res judicata* or claim preclusion, a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (internal quotation marks omitted). " 'The essential

elements of *res judicata* are: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in the prior suit and the present suit; and (3) an identity of parties or their privies in both suits.' " *Branch v. Carolina Shoe Co.*, 172 N.C. App. 511, 518, 616 S.E.2d 378, 383 (2005) (quoting *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 138, 502 S.E.2d 58, 61 (1998)).

Defendant herein contends that plaintiffs' civil complaint for damages for condemnation "asserted the same allegations of negligence found in their Industrial Commission tort claim." "The traditional elements of actionable negligence are the existence of a legal duty or obligation, breach of that duty, proximate cause and actual loss or damage." *McMurray v. Surety Federal Savings & Loan Assoc.*, 82 N.C. App. 729, 731, 348 S.E.2d 162, 164 (1986).

In the instant case, plaintiffs' civil complaint did not allege negligence; accordingly, dismissal of the civil claim does not bar plaintiffs' Tort Claims Act claim. In *Alt v. John Umstead Hospital*, 125 N.C. App. 193, 198, 479 S.E.2d 800, 804 (1997), defendant argued that summary judgment on plaintiff's civil claims for malicious prosecution, false imprisonment and deprivation of due process barred his Tort Claims Act negligence claim. This Court disagreed, holding:

> Although the factual allegations underlying the two claims are the same, different issues are involved. . . . Moreover, . . . exclusive original jurisdiction of claims against the State or its institutions and agencies, in which injury is alleged to have occurred as a result of the negligence of an employee of the State, is vested in the North Carolina Industrial Commission. N.C. Gen. Stat. § 143-291 *et seq.* [(2005)]. Thus, plaintiff's negligence claim . . . could not have been adjudicated in the prior proceeding because the Superior Court had no jurisdiction over a tort claim against the State.

We find the reasoning of *Alt* applicable to the instant case, and conclude that plaintiffs' claim was not barred by the doctrine of *res judicata*. This assignment of error is overruled.

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[5] Finally, defendant argues that, upon its appeal from the commissioner's oral ruling denying defendant's summary judgment motion, all further proceedings were stayed. Defendant's position is based on its interpretation of Industrial Commission Rule 308, which provides that:

> When a case is appealed to the Full Commission or to the Court of Appeals, all Orders or Decisions and Orders of a Deputy Commissioner or the Full Commission are stayed pending appeal.

Defendant, however, did not appeal from an Order, but from an interlocutory oral ruling that the commissioner had authority to modify or reverse during the hearing. *See, e.g.*, *State v. McCall*, 162 N.C. App. 64, 68, 589 S.E.2d 896, 899 (2004) ("A trial court may change its ruling on a pre-trial motion *in limine* during the presentation of the evidence."). Defendant cites no cases allowing immediate appeal before an order is reduced to writing and filed. Because defendant did not appeal from an Order or Decision and Order, the proceedings were not stayed. Thus, we have no need to address, as an alternative basis to evaluate defendant's contention, the authority of the Industrial Commission to waive the provisions of Rule 308. This assignment of error is overruled.

We have carefully considered defendant's remaining assignments of error, and conclude they are either not preserved for appellate review or are without merit. Accordingly, the Decision and Order of the Industrial Commission is

Affirmed.

Judges HUDSON concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

Defendant seeks the review of the North Carolina Industrial Commission's ("Commission") affirmation of Deputy Commissioner Glenn's decision to deny defendant's motion for summary judgment and to award damages to plaintiffs. The majority's opinion grants defendant's motion to amend the record and affirms the Commission's opinion and award. Defendant's violations of the North Carolina Rules of Appellate Procedure ("appellate rules"), warrants dismissal of its appeal. I respectfully dissent.

I. Appellate Rules Violations

Defendant failed to comply with the North Carolina Rules of Appellate Procedure in the following ways: (1) to set forth record citations for its assignments of error in violation of N.C. R. App. P.

10(c)(1); (2) to state without argument the basis for the errors assigned in violation of N.C. R. App. P. 10(c)(1); (3) to object to testimony when offered, in violation of N.C. R. App. P. 10(b) (1), which requires, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make;" and (4) to assign error to the admissibility of evidence presented before Deputy Commissioner Glenn in violation of N.C. R. App. P. 10(a), which mandates, "the scope of review is confined to a consideration of those assignments of error set out in the record on appeal."

On 18 November 2005, after defendant and plaintiff filed their appellate briefs and nineteen days prior to oral argument, defendant moved to amend the record due to its failure to assign error in accordance with N.C. R. App. P. 10. The majority's opinion grants defendant's motion. Because defendant's motion also violates our appellate rules, is untimely, and prejudicial to plaintiff, I vote to deny defendant's motion to amend the record.

Our Supreme Court has stated:

> It is not the role of the appellate courts, however, to create an appeal for an appellant. As this case illustrates, the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule. *See Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913).

Viar v. N.C. Dept. of Transp., 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

In *Viar*, our Supreme Court dismissed the plaintiff's appeal due to appellate rules violations. *Id.* The plaintiff violated N.C. R. App. P. 10(c)(1) and 28(b). *Id.* Regarding N.C. R. App. P. 10(c), the plaintiff failed to number separately the assignments of error "at the conclusion of the record on appeal in short form without argument." The plaintiff also violated N.C. R. App. P. 28(b), which requires, "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" to follow each question. *Id.*

II. Conclusion

"The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dis-

missal.' " *Id.* (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). Defendant's late motion to amend is untimely and prejudicial to plaintiff.

The proper procedure to address defendant's multiple rule violations is to dismiss the appeal. It is unnecessary to reach the merits of defendant's appeal. *Id.* ("It is not the role of the appellate courts, however, to create an appeal for an appellant."). Consistent with our Supreme Court's mandate in *Viar*, I vote to dismiss defendant's appeal. *Id.* I respectfully dissent.

STATE OF NORTH CAROLINA v. JAIME LOPEZ, AKA JARDIEL ALVAREZ AND JOHNNY AHABREHAN SANCHEZ, AKA GENARIO HOLGIN

No. COA05-333

(Filed 7 March 2006)

1. Drugs— conspiracy to traffic—sufficiency of evidence

There was sufficient evidence for charges of trafficking in heroin and conspiracy to traffic where neither defendant had exclusive control of the premises to which a refrigerator containing heroin was shipped, but sufficient other incriminating circumstances were shown to provide evidence of knowledge and constructive possession.

2. Drugs— conspiracy to traffic—instructions—underlying crime named

There was no plain error in a prosecution for conspiracy to traffic in heroin where a review of the trial court's instructions reveals that the court specifically named the crime alleged to be the object of the conspiracy, contrary to defendant-Sanchez's contention on appeal.

3. Drugs— trafficking—awareness of illicit substance—testimony presented—instruction erroneously denied

There was plain error and a defendant convicted of trafficking in heroin was entitled to a new trial where he testified that he was not aware of the heroin in a refrigerator a third party had paid him to receive, he properly requested an instruction that he was guilty only if he knew the refrigerator contained an illicit substance, and he did not receive that instruction.

4. Drugs— trafficking—no awareness of illicit substance—evidence not presented—issue not raised at trial

A heroin trafficking defendant who did not present evidence that he was unaware of the contents of a package and did not raise the issue at trial did not receive the benefit of plain error in the trial court's failure to instruct on knowledge of an illicit substance.

Appeal by defendants from judgments entered 17 September 2004 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 7 December 2005.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kathryn Jones Cooper, and Assistant Attorneys General Donald W. Laton and Allison S. Corum, for the State.

Jarvis John Edgerton, IV for defendant-appellant Jaime Lopez, aka Jardiel Alvarez.

George E. Kelly, III for defendant-appellant Johnny Ahabrehan Sanchez, aka Genario Holgin.

HUNTER, Judge.

Jaime Lopez, aka Jardiel Alvarez ("Lopez"), and Johnny Ahabrehan Sanchez, aka Genario Holgin ("Sanchez"), appeal from judgments entered 17 September 2004 consistent with jury verdicts for trafficking in heroin and conspiracy to traffic. For the reasons stated herein, we grant a new trial as to Lopez, but find no error as to Sanchez.

The State's evidence tends to show that on 15 September 2003, an employee of Overnite Trucking ("Overnite"), a freight company, contacted Detective J. M. Ferrell ("Detective Ferrell"), a High Point police detective and drug enforcement agent, regarding suspicious freight that had arrived. Detective Ferrell went to Overnite's loading docks and investigated the package. The package, a small refrigerator, had been shipped from a location in California near the Mexican border. Detective Ferrell testified that the package appeared suspicious because the shipping location was known as a high narcotics area, an unusually high shipping cost was listed on the label, and the package had been dropped off for shipping rather than picked up at a verifiable address.

Overnite granted Detective Ferrell permission to remove the box to perform a narcotics detection dog sniff. The dog alerted to the package, indicating that there were narcotics in the container. A search warrant was obtained. When searched, the package revealed a small refrigerator containing two bundles packaged in a manner that suggested they contained narcotics. A controlled delivery to the shipping address was arranged.

The package was delivered to 7654 Jackson School Road, Brown Summit, North Carolina. Detective Ferrell posed as a trucking company worker and delivered the package to Lopez, the addressee on the carton. Lopez paid Detective Ferrell for the delivery after it was placed in the living room.

Approximately ten minutes after the delivery was complete, law enforcement officers executed a previously obtained search warrant. Along with other co-defendants, Lopez and Sanchez were standing outside the house near a vehicle with a hidden compartment, and were handcuffed and taken into the house. The officers discovered that the shipping carton had been opened, the small refrigerator removed, and the enclosed bundles laid on top of the refrigerator.

The refrigerator and bundles were dusted for latent prints. Prints were found on both the right and left sides of the refrigerator. An analysis of the prints showed that those taken from the left side of the refrigerator matched Lopez's prints, and the prints from the right side of the refrigerator matched Sanchez's prints. An examination of the bundles revealed a heroin mixture weighing 1,985 grams.

Lopez testified at trial that he did not know the refrigerator contained heroin, and that he had been hired by a man named "Eric" to check on the house at 7654 Jackson School Road and receive the appliance delivery. Lopez stated that he had received a delivery at that address for "Eric" on a previous occasion. Lopez stated that he did not open the box or refrigerator, and did not see the heroin until it was presented as evidence at trial. Sanchez did not testify at trial.

The jury found both Lopez and Sanchez guilty of trafficking by possessing more than twenty-eight grams of heroin and conspiracy to traffic by possessing more than twenty-eight grams of heroin. Lopez and Sanchez were each sentenced to consecutive sentences of 225 to 279 months respectively. Lopez and Sanchez appeal together from their respective judgments.

I.

[1] Lopez and Sanchez first contend the trial court erred in denying their motions to dismiss all charges for insufficient evidence. We disagree.

" '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. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). "The State may meet this burden by either direct or circumstantial evidence. The law makes no distinction between the weight to be accorded to direct or circumstantial evidence." *State v. Jenkins*, 167 N.C. App. 696, 699, 606 S.E.2d 430, 432, *per curiam affirmed*, 359 N.C. 423, 611 S.E.2d 833 (2005). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Barnes*, 334 N.C. at 75, 430 S.E.2d at 918.

The crime of trafficking in heroin "has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount of heroin." *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987). The crime of conspiracy "involves an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002). Lopez contends that insufficient evidence was presented to show that he knowingly possessed heroin, and Sanchez contends that insufficient evidence was presented to show constructive possession of heroin.

"Knowledge may be shown even where the defendant's possession of the illegal substance is merely constructive rather than actual." *State v. Crudup*, 157 N.C. App. 657, 662, 580 S.E.2d 21, 26 (2003). "Constructive possession exists when the defendant, 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the narcotics." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (citation omitted). " 'Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of

knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.' " *Id.* at 552, 556 S.E.2d at 270-71 (citation omitted). " 'However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.' " *Id.* at 552, 556 S.E.2d at 271 (citation omitted).

Here, the evidence, when taken in the light most favorable to the State, shows that the refrigerator containing nearly 2,000 grams of heroin was addressed for delivery to and was received by Lopez. Prior to the entry of the police, the evidence shows that Lopez and Sanchez removed the packaging from the refrigerator, and that its contents, the packaged heroin, were emptied onto the top of the refrigerator. Lopez and Sanchez then exited the house to stand with two other men near Lopez's vehicle, which contained a hidden compartment. Although neither Lopez nor Sanchez had exclusive control of the premises, when taken in the light most favorable to the State, sufficient other incriminating circumstances were shown to provide evidence of knowledge and constructive possession sufficient to survive a motion to dismiss. This assignment of error is overruled.

II.

[2] Sanchez next contends the trial court committed plain error in omitting an element in its jury instruction for the charge of conspiracy. We disagree.

We first note that Sanchez did not object to the jury instructions at trial, and therefore failed to preserve this issue for review. N.C.R. App. P. 10(b)(2). Sanchez requests, however, that the Court review this issue for plain error. "[P]lain error . . . is error 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (citations omitted).

Here, Sanchez asserts that the trial court failed to name the crime alleged to be the object of the conspiracy. However a review of the jury instructions reveals that the trial court specifically instructed the jury that in order to find Sanchez guilty of conspiracy, the State must prove beyond a reasonable doubt that "the agreement was to commit the offense of trafficking in a controlled substance of more than twenty-eight grams of heroin." As the trial court specifically named

the crimes alleged to be the object of the conspiracy, we find this assignment of error to be without merit.

III.

[3] Lopez next contends that the trial court erred in failing to instruct the jury that it must find Lopez knew he possessed heroin in order to convict him of trafficking. Sanchez contends that the trial court committed plain error in failing to give the same instruction. Although we agree the failure to give the instruction requested by Lopez was error entitling him to a new trial, with respect to Sanchez, we do not find that the failure to give the instruction rises to the level of plain error.

The case of *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984), provides the basis for Lopez's requested pattern jury instruction. In *Boone*, the defendant was charged with possession of marijuana after two duffle bags of marijuana were found in the trunk of the defendant's automobile. *Id.* at 286, 311 S.E.2d at 554. The defendant admitted that the duffle bags were found in his automobile, but denied all knowledge of the contents of the duffle bags, which he alleged belonged to a passenger. *Id.* at 293-94, 311 S.E.2d at 558-59. The trial court instructed the jury according to the pattern jury instructions existing at that time, stating:

> "Now, Ladies and Gentlemen of the Jury, I charge that for you to find the defendant guilty of possessing marijuana, a controlled substance with the intent to sell and/or deliver it, the State must prove two things beyond a reasonable doubt. First, that the defendant knowingly possessed marijuana. *And the defendant, and in that connection, the defendant knew or had reason to know that what he possessed was marijuana and marijuana is a controlled substance.* (Emphasis added.)"

Id. at 291, 311 S.E.2d at 557. The defendant contended that the instruction, which was allegedly based on the case of *State v. Stacy*, 19 N.C. App. 35, 197 S.E.2d 881 (1973), was not supported by case law, and our Supreme Court agreed. The Court found that *Stacy* had rejected an instruction similar to the one given in *Boone*, and had instead held that under the evidence in that case, " 'the court should have instructed the jury that the defendant is guilty only in the event he knew the package contained heroin and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty.' " *Boone*, 310 N.C. at 291, 311 S.E.2d at 557 (quoting *Stacy*, 19 N.C. App. at 38, 197 S.E.2d at 882-83).

The Supreme Court then looked to the case of *State v. Elliott*, 232 N.C. 377, 61 S.E.2d 93 (1950), a possession case involving a similar factual circumstance where the defendant raised as a determinative issue his lack of knowledge of the contents of a grass bag which contained an illegal substance, in that case liquor. In *Elliott*, the Court found that "ordinarily, where a specific intent is not an element of the crime, proof of the commission of the unlawful act is sufficient to support a verdict." *Id.* at 378, 61 S.E.2d at 95. *Elliott* further noted that " '[t]he presumption, however, is not conclusive; it is evidence only so far as to prove a *prima facie* case in respect to the intent.' " *Id.* (citation omitted). Because in *Elliott* the defendant specifically pled lack of knowledge and offered evidence in support of that contention, the Court held that

> under the circumstances of this case, guilty knowledge on the part of the appellant is an essential element of the crimes charged, and the law in respect thereto becomes a part of the law of the case which should be explained and applied by the court to the evidence in the cause.

Id. at 378-79, 61 S.E.2d at 95. *Elliott* then reviewed the trial court's jury instruction, stating that:

> The court, it is true, charged the jury that defendants contend the liquor belonged to [another party] and that they had no knowledge the liquor was in their automobile[] . . . [b]ut [also] charged the jury that if they were satisfied beyond a reasonable doubt that the defendant . . . at the time and place in question, was transporting illicit liquor . . . they should return a verdict of guilty on that count.

Id. at 379, 61 S.E.2d at 95. *Elliott* found that such a charge was insufficient and ordered a new trial, finding that:

> Under the circumstances of this case the court should have instructed the jury that the defendant is guilty only in the event he knew the liquor was on his automobile and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty.

Id. The Court in *Boone* applied the same principles as *Elliott*, and similarly concluded that as the defendant had raised his lack of knowledge as a determinative issue of fact:

> Under the circumstances of this case, the court should have instructed the jury that the defendant is guilty only in the event he

knew the marijuana was in the trunk of his automobile and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty.

Boone, 310 N.C. at 294, 311 S.E.2d at 559.

As a result of the Supreme Court's holding in *Boone*, the North Carolina Pattern Jury Instructions were amended. 2 N.C.P.I.—Crim. 260.17 (2003) now directs that an appropriate instruction for Drug Trafficking by Possession states:

> For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant knowingly possessed [heroin]. A person possesses [heroin] if he is aware of its presence and has (either by himself or together with others) both the power and intent to control the disposition or use of that substance.
>
> And Second, that the amount of [heroin] which the defendant possessed was [greater than 28 grams].

Id. However the instruction further directs in Footnote 2 that "[i]f the defendant contends that he did not know the true identity of what he possessed," the first element of the instruction should be amended to read as follows: "First, that the defendant knowingly possessed [heroin] and the defendant knew that what he possessed was [heroin]." *Id.* Thus the proper instruction to be given when a defendant contests lack of knowledge as to the true identity of what he possessed is:

> For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant knowingly possessed [heroin] *and the defendant knew that what he possessed was [heroin]*. A person possesses [heroin] if he is aware of its presence and has (either by himself or together with others) both the power and intent to control the disposition or use of that substance.
>
> And Second, that the amount of [heroin] which the defendant possessed was [greater than 28 grams].

Id. (emphasis added).

Here, Lopez properly requested that the trial court instruct the jury with the amended instruction, as he contended in his testimony

that he was unaware that heroin was in the refrigerator that he had been paid to receive for a third party. Our courts have previously awarded new trials for the failure to properly instruct the jury that a defendant was guilty only if he knew a package contained an illicit substance, when the defendant had presented evidence that he lacked knowledge of the true contents of the package. *See Boone*, 310 N.C. at 295, 311 S.E.2d at 559; *Elliott*, 232 N.C. at 379, 61 S.E.2d at 95; *Stacy*, 19 N.C. App. at 38, 197 S.E.2d at 883. Under the circumstances of this case, therefore, as is required under *Boone*, Lopez is entitled to a new trial.

[4] Sanchez concedes that he did not request the amended instruction, but requests that this Court review the instruction for plain error. As noted above, only 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[,]' " rises to the level of plain error. *Parker*, 350 N.C. at 427, 516 S.E.2d at 118 (citations omitted).

Here, unlike with Lopez, Sanchez presented no evidence that he was unaware of the contents of the package and did not raise the issue of his knowledge as a determinative issue of fact to the trial court, as was the case in *Boone* and *Elliott*. We therefore find that as Sanchez did not contend that he lacked knowledge as to the true identity of what he possessed, based on the evidence before the trial court, the failure to give the requested instruction as to Sanchez was not error.

As the trial court erred in failing to give the requested instruction as to Lopez, we grant a new trial. As there was sufficient evidence to survive a motion to dismiss and as we find no error in the trial court's jury instruction as to Sanchez, we find no error in the judgments.

New trial as to Lopez, no error as to Sanchez.

Judges McCULLOUGH and GEER concur.

SHANNON DANIEL DOYLE, PLAINTIFF v. LAURA PATRICIA DOYLE, DEFENDANT

No. COA05-788

(Filed 7 March 2006)

Collateral Estoppel and Res Judicata— domestic violence protective order—subsequent child custody proceeding

Collateral estoppel binds the parties and precluded a judge making a custody determination from making findings contrary to those made by a prior judge who ruled on cross-petitions for domestic violence protective orders.

Appeal by plaintiff from judgment entered 22 October 2004 by Judge Amy R. Sigmon in Catawba County District Court. Heard in the Court of Appeals 12 January 2006.

David Shawn Clark, P.A., by D. Shawn Clark, for plaintiff-appellant.

Sherwood Carter, for defendant-appellee.

TYSON, Judge.

Shannon Daniel Doyle ("plaintiff") appeals from the trial court's order granting primary physical custody of his minor child, S.D.D. ("minor child") to Laura Patricia Doyle ("defendant"). We reverse and remand.

I. Background

Plaintiff and defendant were married in June of 2001. Defendant had five children from a previous marriage. The minor child of the parties was born on 30 September 2002, and the parties separated in November 2003. After separating, the parties alternated physical custody of the minor child pursuant to an oral agreement.

On 3 March 2004, plaintiff filed a complaint against defendant in Catawba County District Court seeking custody of the minor child and child support. Defendant filed a counterclaim seeking custody and child support. Communications broke down between the parties and the oral custody agreement ceased.

On 18 April 2004, plaintiff went to defendant's residence to pick up the minor child for visitation. After plaintiff entered the residence, defendant sought to prevent plaintiff from leaving with the child and

attempted to remove the child from plaintiff's arms. Defendant struck plaintiff in the groin, after which he released the minor child to defendant. Plaintiff struck defendant repeatedly on the side of her face with his fist. Defendant's son struck plaintiff in the forehead with a hammer in an attempt to get plaintiff off of his mother. Eventually plaintiff exited the residence through the front door and called 911. Both parties sustained injuries as a result of the altercation. Plaintiff suffered a concussion and a cut on his head that required six staples.

Subsequent to this incident, defendant filed a complaint and motion for a domestic violence protective order. Defendant was granted an *ex parte* domestic violence protective order. Plaintiff counterclaimed and requested he be granted a domestic violence protective order against defendant.

The district court entered a temporary custody order on 6 May 2004. Temporary custody of the minor child was awarded to defendant and plaintiff was awarded visitation. The court ordered both parties to obtain anger management assessments and attend parenting classes.

The parties' requests for domestic violence protective orders against each other were heard before the Honorable John Mull on 19 May 2004. Judge Mull found that defendant had initiated the 18 April 2004 altercation by kicking plaintiff in the groin. Judge Mull dismissed defendant's complaint for a domestic violence protective order, and granted plaintiff's complaint for a domestic violence protective order against defendant.

The issues of child custody, child support, and visitation were heard before the Honorable Amy R. Sigmon. Judge Sigmon entered a judgment/order for visitation, child support, and custody on 21 October 2004. Judge Sigmon specifically found that she disagreed with Judge Mull's findings in the domestic violence protective order "with regards to the nature and circumstances surrounding the altercation that occurred on April 18, 2004." The court ordered the parties to share joint legal child custody with defendant having primary physical custody and plaintiff having visitation. Plaintiff appeals.

II. Issues

Plaintiff argues: (1) the trial court violated the doctrine of collateral estoppel when it relitigated a previous judicially determined issue; (2) findings of fact Numbers 33, 67, and 78 are not supported by competent evidence; and (3) sufficient and competent findings of fact

do not support the trial court's order awarding primary physical custody to defendant.

III. Collateral Estoppel

Plaintiff argues the doctrine of collateral estoppel prevents Judge Sigmon from re-adjudicating an issue of ultimate fact previously determined by Judge Mull in the 19 May 2004 domestic violence protective order. We agree.

A. Elements

"Under collateral estoppel as traditionally applied, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 428-29, 349 S.E.2d 552, 557 (1986). Our Supreme Court has stated " '[o]nce a party has fought out a matter in litigation with the other party, he cannot later renew that duel.' " *State ex rel. Lewis v. Lewis*, 311 N.C. 727, 730, 319 S.E.2d 145, 148 (1984) (quoting *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 598, 92 L. Ed. 898, 906 (1948)).

The following requirements must be met to bar relitigation of specific issues in a subsequent non-identical action involving the same parties:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

King v. Grindstaff, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973). The issues resolved in the prior action may be either factual issues or legal issues.

B. Precedents

In *Lewis*, our Supreme Court held a father's criminal conviction for willful neglect and non-support of his minor children collaterally estopped him from relitigating the issue of paternity in a subsequent civil action for child support. 311 N.C. at 734, 319 S.E.2d at 150. Similarly, this Court recently held that collateral estoppel barred a

plaintiff from relitigating in state court "identical underlying factual issues" as those resolved against her in federal court even though her state causes of action were entirely distinct from her federal causes of action. *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 193, 614 S.E.2d 396, 401 (2005).

C. Analysis

Plaintiff argues that defendant was collaterally estopped from relitigating in the later custody action the question of who committed domestic violence on 18 April 2004. Judge Mull presided over the prior Chapter 50B litigation between plaintiff and defendant involving cross-petitions for domestic violence protective orders. He found that on 18 April 2004, defendant placed plaintiff in fear of imminent serious bodily injury by "initiating an assault by kicking him in the groin and later hitting him in the back; every act of aggression on this occasion was initiated by the Defendant or some member of her family, and ultimately resulted in the Defendant's son hitting the Plaintiff with a hammer, giving the Plaintiff a concussion and a cut on his forehead requiring 6 staples." Further, Judge Mull found that defendant "failed to prove by the greater weight of the evidence that [plaintiff] committed any acts of domestic violence against her [or] her children" and dismissed her claim. He then concluded that defendant had "committed acts of domestic violence against the Plaintiff" and ordered, among other things, that defendant attend and complete an abuser treatment program.

Judge Sigmon, who presided over the later custody action, was required to consider "acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the party and shall make findings accordingly." N.C. Gen. Stat. § 50-13.2(a) (2005) In accordance with that requirement, Judge Sigmon made various findings of fact regarding the events of 18 April 2004, including the following ultimate findings relating to Judge Mull's order:

> 43. That the parties' injuries are consistent with the Defendant's version of the altercation and are inconsistent with the Plaintiff's version of events.
>
> 44. That the Plaintiff has taken no responsibility for the altercation . . . .
>
> . . . .

46. That subsequent to this incident, the Defendant filed criminal charges against the Plaintiff and obtained an Emergency Domestic Violence Protective Order against the Plaintiff. The Emergency Order was issued by the Honorable Judge C. Thomas Edwards. The Defendant's complaint for the domestic violence protective order was set for hearing and the criminal charges were set for district criminal court.

47. That the Plaintiff filed an answer and counterclaim to the Defendant's complaint for a domestic violence protective order in which he alleged that the Defendant had committed acts of domestic violence against him and he requested that he be granted a domestic violence protective order against the Defendant. The Court takes judicial notice of the pleadings and court orders in this file 04-CVD-1168 and the file is herein incorporated by reference.

. . . .

53. That the parties' requests for domestic violence protective orders against one another were heard on May 17, 2004 in front of the Honorable Judge John Mull during a scheduled session of domestic violence protective order hearings.

54. That at the hearing Judge Mull dismissed the Defendant's complaint for a domestic violence protective order and granted the Plaintiff's complaint for a domestic violence protective order against the Defendant.

55. That Judge Mull made findings that the Defendant and or the Defendant's minor children were the aggressors in the altercation and that the Defendant had committed acts of domestic violence against the Plaintiff.

56. *That this Court, after hearing the case on its merits, respectfully disagrees with the findings of the Honorable Judge John Mull with regards to the nature and circumstances surrounding the altercation that occurred on April 18, 2004.*

. . . .

78. That the Defendant does not suffer from any anger management or control issues. The Defendant has been identified as a victim of domestic violence and is in need of further counseling and therapy to address this issue.

(Emphasis added).

Both Judge Mull's prior order and Judge Sigmon's order addressed the acts of domestic violence on 18 April 2004. The issue is whether collateral estoppel precluded Judge Sigmon from revisiting Judge Mull's factual determinations.

Each of the requirements set out in *King* for identity of issues is met. 284 N.C. at 358, 200 S.E.2d at 806. The issues relating to the events of 18 April 2004 addressed by Judge Mull were identical to those considered by Judge Sigmon, as Judge Sigmon's custody order indicates on its face. Judge Sigmon simply disagreed with Judge Mull's prior resolution of the issues.

Further, the question of who was the perpetrator and who was the victim of the domestic violence on 18 April 2004 was: (1) actually litigated before Judge Mull; (2) material and relevant to the disposition of that action; (3) necessary and essential to the resulting judgment; and (4) the sole reason for the Chapter 50B proceeding. Since Judge Mull's order involved the same parties litigating the same specific issues, collateral estoppel bars defendant from relitigating the factual issues relating to the 18 April 2004 events in the subsequent custody proceeding.

Defendant, however, argues that Judge Mull's order was not a final judgment and that collateral estoppel does not, therefore, apply. We disagree. Judge Mull's order was a final determination from which defendant could have appealed. Chapter 50B proceedings normally involve two stages: an order granting emergency *ex parte* relief, followed by a later full evidentiary hearing and entry of a final order resolving the Chapter 50B action. An appeal from the initial *ex parte* order generally is interlocutory. *See Smart v. Smart*, 59 N.C. App. 533, 536, 297 S.E.2d 135, 137-38 (1982) (holding that a party could not appeal from an order under Chapter 50B granting temporary emergency relief because he would be protected by a timely appeal from the trial court's "final decree" following an evidentiary hearing on the domestic violence complaint). Once the final decree is entered after the evidentiary hearing, a party must appeal or is bound by the factual determinations made by the trial judge.

In *Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001), this Court specifically held that a party against whom a domestic violence protective order had been entered under N.C. Gen. Stat. § 50B-1(a)(2) could appeal even though the order was effective for only six months. The "collateral legal consequences" of the order became final, precluding reconsideration of the order in any subse-

quent custody action under N.C. Gen. Stat. § 50-13.2. *Id.*; *Thomas M. McInnis & Assocs., Inc.*, 318 N.C. at 434, 349 S.E.2d at 560 ("Plaintiff did not appeal the adverse determination and the judgment became final" for purposes of collateral estoppel.). Since defendant could have appealed from Judge Mull's 19 May 2004 order, the issues resolved in that order were finally determined and binding on Judge Sigmon. *Id.*

Defendant argues nonetheless that "a temporary order entered under the act 'shall be without prejudice,' and nothing precludes a *de novo* hearing under Chapter 50," citing "G.S. § 50B-(4)." It appears that defendant is actually referring to N.C. Gen. Stat. § 50B-3(a1)(4), which provides:

> (a1) Upon the request of either party at a hearing after notice or service of process, the court shall consider and may award temporary custody of minor children and establish temporary visitation rights as follows:
>
> . . . .
>
> (4) A temporary custody order entered pursuant to this Chapter shall be without prejudice and shall be for a fixed period of time not to exceed one year. Nothing in this section shall be construed to affect the right of the parties to a de novo hearing under Chapter 50 of the General Statutes. Any subsequent custody order entered under Chapter 50 of the General Statutes supercedes a temporary order issued pursuant to this Chapter.

Judge Mull's order was not a temporary custody order and did not include findings, conclusions, or decrees relating to custody.

The plain language of this provision indicates that when the trial court makes a temporary custody determination under Chapter 50B, the issue of custody may be heard *de novo* under Chapter 50. Nothing in the statute suggests any legislative intent to allow a *de novo* hearing on the central factual question regarding whether a party committed domestic violence. Such a result would undermine the statute's mandate that "[i]f the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence." N.C. Gen. Stat. § 50B-3(a). A defendant could negate the effect of the Chapter 50B order by relitigating the issues in Chapter 50 proceedings. This relitigation would cause judicial inefficiency.

As N.C. Gen. Stat. § 50B-3(a1)(4) indicates, Judge Mull's order did not preclude Judge Sigmon from awarding primary physical custody to defendant if the custody decision was supported by proper findings of fact. Judge Sigmon's order included 19 separate findings of fact relating to issues previously resolved by Judge Mull. The order appealed from is reversed and remanded for further proceedings in which the custody determination respects Judge Mull's final determination that defendant was the perpetrator of the domestic violence on 18 April 2004 and plaintiff was the victim. Although N.C. Gen. Stat. § 50-13.2 specifically required Judge Sigmon to consider the events of 18 April 2004, collateral estoppel renders Judge Mull's findings of fact binding on the subsequent child custody proceeding regarding those events.

VI. Conclusion

Collateral estoppel binds the parties and precludes the trial court from making contrary findings of fact regarding the 18 April 2004 acts of domestic violence between plaintiff and defendant. In light of our decision it is unnecessary to consider plaintiff's remaining assignments of error. The trial court's order is reversed, and this case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HUDSON and GEER concur.

MARY BETH FOX, PLAINTIFF v. TRACY GIBSON, DEFENDANT

No. COA05-826

(Filed 7 March 2006)

1. Appeal and Error— appealability—denial of motion to dismiss—personal jurisdiction

The denial of a motion to dismiss for lack of personal jurisdiction is statutorily deemed to be immediately appealable. N.C.G.S. § 1-277(b).

2. Jurisdiction— personal—order determining—standard of review

The standard of review of an order determining personal jurisdiction is whether the findings are supported by competent evidence.

3. Jurisdiction— personal—motion to dismiss denied—conclusion that claim arose from activities in North Carolina

The trial court did not err by denying a motion to dismiss for lack of personal jurisdiction in an alienation of affections action where defendant lived in Georgia and plaintiff in North Carolina. With one exception, there was evidence to support the court's findings and its conclusion that the action arose from activities in North Carolina. N.C.G.S. § 1-75.4(3).

4. Jurisdiction— minimum contacts—alienation of affections—defendant in Georgia

Sufficient contacts existed that defendant's due process rights were not violated by the exercise of in personam jurisdiction in an alienation of affections case in which defendant lived in Georgia and plaintiff in North Carolina.

Appeal by Defendant from order entered 30 March 2005 by Judge J. Gentry Caudill in Superior Court, Mecklenburg County. Heard in the Court of Appeals 8 February 2006.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, M. Neya Warren, and Sarah M. Brady, for plaintiff-appellee.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for defendant-appellant.

WYNN, Judge.

To establish in personam jurisdiction over a non-resident defendant, the plaintiff must establish statutory authority and sufficient minimum contacts between the defendant and the forum state so as not to offend the defendant's federal due process rights.[1] In this alienation of affections action, Defendant argues that there is neither statutory authority nor sufficient minimum contacts to exercise personal jurisdiction over her in North Carolina. Because N.C. Gen. Stat. § 1-75.4(3) (2005) grants statutory authority for personal jurisdiction

1. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977).

in this case, and Defendant's telephone conversations, e-mails, and sexual relations with Plaintiff's husband while he resided in North Carolina are sufficient minimum contacts, we affirm the trial court's denial of Defendant's motion to dismiss for lack of personal jurisdiction.

This appeal arises from the complaint of Mary Beth Fox against Tracy Gibson for allegedly making "improper advances to [her husband] Skip Fox in violation of [their marital relationship]." Ms. Fox contended that Ms. Gibson, "enticed [her] husband from her and acquired an undue influence over him which was the direct cause of great marital discord between [them] and their subsequent separation." Ms. Fox further asserted that Ms. Gibson's conduct "was unprovoked and unsolicited by [her] husband and was in fact the direct and deliberate attempt on the part of [Ms. Gibson] to cause the alienation of affections between [them]."

Before answering Ms. Fox's complaint, Ms. Gibson moved to dismiss the complaint for lack of personal jurisdiction over her. She contended in an affidavit that she lived in Georgia, not North Carolina, and had "never had sexual relations with the plaintiff's husband in North Carolina" nor "done anything to avail [herself] of the laws and privileges of North Carolina."

Ms. Fox responded by producing the affidavit of her estranged husband who stated that he "engaged in sexual relations with Defendant Tracy Gibson . . . in the state of North Carolina during [his] marriage to Plaintiff." He further stated that he and Ms. Gibson "engaged in numerous telephone conversations while she resided in Georgia and [he] resided in North Carolina" and that Ms. Gibson "sent e-mail messages to [him] in North Carolina from the state of Georgia."

By order entered 30 March 2005, the trial court denied Ms. Gibson's motion to dismiss. From this order Ms. Gibson appeals.

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[1] Preliminarily, we note that this appeal, while interlocutory,[2] is properly before us because motions to dismiss for lack of personal

2. An order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all parties involved in the controversy. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002). Generally, there is no right to immediate appeal from an interlocutory order. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381.

jurisdiction are statutorily deemed to be immediately appealable. N.C. Gen. Stat. § 1-277(b) (2005) ("Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]"); *Retail Investors, Inc. v. Henzlik Inv. Co.*, 113 N.C. App. 549, 552, 439 S.E.2d 196, 198 (1994) (holding that immediate right to appeal lies from denial of motion to dismiss for lack of personal jurisdiction).

[2] We further note that, "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999) (citing *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 462 S.E.2d 832 (1995)).

[3] On appeal, Ms. Gibson argues that the trial court erred in denying her motion to dismiss for lack of personal jurisdiction because (1) there is no statutory authority for personal jurisdiction; and (2) an exercise of personal jurisdiction over her violates due process of the law.

Indeed, Ms. Gibson correctly points out that a two-step analysis applies when determining whether a court may exercise in personam jurisdiction over a non-resident defendant. First, is there statutory authority that confers jurisdiction on the court? *Dillon*, 291 N.C. at 675, 231 S.E.2d at 630. This is determined by looking at North Carolina's "long arm" statute, section 1-75.4 of the North Carolina General Statutes. *Id.* Second, if statutory authority confers in personam jurisdiction over the defendant, does the exercise of in personam jurisdiction violate the defendant's due process rights? *Id.*

Regarding the statutory authority for conferring jurisdiction, Ms. Fox alleges personal jurisdiction over Ms. Gibson under North Carolina's long-arm statute, section 1-75.4 of the North Carolina General Statutes, which states in pertinent part:

> (3) Local Act or Omission.—In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

N.C. Gen. Stat. § 1-75.4(3) (2005).

We recognize that "the statute requires only that the action 'claim' injury to person or property within this state in order to establish personal jurisdiction." *Godwin v. Walls*, 118 N.C. App. 341, 349, 455 S.E.2d 473, 480 (1995). The statute does not require there to be evidence of proof of such injury. *Id.*

The trial court made the following findings of fact, to which Ms. Gibson assigns error, regarding whether the claim arose from an act that occurred within North Carolina:

> 9. During Mr. Fox's marriage to Plaintiff and prior to the day of separation, Defendant sent e-mail messages to Mr. Fox in North Carolina from the state of Georgia.
>
> 10. Defendant and Mr. Fox engaged in sexual intercourse in the State of North Carolina during Mr. Fox's marriage to Plaintiff.
>
> ***
>
> 12. In January 2004, Mr. Fox told Plaintiff that the cell phone he was using belonged to Defendant and that she was letting him use it.
>
> 13. There is a direct link between Defendant's contacts with this state and the injuries alleged in Plaintiff's Complaint.

Mr. Fox's affidavit states that "[d]uring my marriage to Plaintiff, Defendant sent e-mail messages to me in North Carolina from the state of Georgia." This is competent evidence to support finding of fact nine. *Replacements, Ltd.*, 133 N.C. App. at 140-41, 515 S.E.2d at 48.

Moreover, Mr. Fox's affidavit stated that he engaged in "sexual relations" with Ms. Gibson in North Carolina while married to Ms. Fox; that evidence supports finding of fact ten. Nonetheless, Ms. Gibson argues that "[s]exual relations could be any range of acts that would not necessarily be 'intercourse'[.]" However, this Court has held that for a claim of criminal conversation to survive, "plaintiff must have alleged that there were *sexual relations* between defendant and plaintiff's husband." *Cooper v. Shealy*, 140 N.C. App. 729, 733, 537 S.E.2d 854, 857 (2000) (emphasis added). It appears that this Court has previously used "sexual relations" interchangeably with "sexual intercourse." *See, e.g.*, *Nunn v.* Allen, 154 N.C. App. 523, 535-36, 574 S.E.2d 35, 43-44 (2002); *Horner v. Byrnett*, 132 N.C. App. 323, 327, 511 S.E.2d 342, 345 (1999) ("In fact, the appellate cases prove that the *sexual intercourse* that is necessary to establish the

tort also supports an award of punitive damages: as long as there is enough evidence of criminal conversation to go to the jury, the jury may also consider punitive damages. . . . When the plaintiff proves *sexual relations* between the defendant and spouse, then it seems to take little else to establish both the tort and the right to punitive damages." (emphasis added and citation omitted)). Therefore, Mr. Fox's affidavit stating he had "sexual relations" with Ms. Gibson in North Carolina while married to Ms. Fox is competent evidence to support finding of fact ten. *Replacements, Ltd.*, 133 N.C. App. at 140-41, 515 S.E.2d at 48.

Ms. Gibson argues that the only evidence to support finding of fact twelve is inadmissible hearsay evidence. Ms. Fox states in her affidavit that Mr. Fox told her that the cell phone he had belonged to Ms. Gibson and she was letting him use it. While Ms. Fox argues that Ms. Gibson did not raise this argument to the trial court and therefore did not preserve it for review, Ms. Fox did not include a transcript of the hearing in the record on appeal. Therefore, finding of fact twelve is not supported by competent evidence and the trial court erred in making finding of fact twelve.

Finally, Ms. Gibson argues that finding of fact thirteen is incorrect because she had no specific contacts with North Carolina. But the trial court found that Ms. Gibson engaged in numerous telephone conversations with Mr. Fox while he resided in North Carolina; Ms. Gibson sent e-mail messages to Mr. Fox in North Carolina; and, Ms. Gibson engaged in sexual intercourse with Mr. Fox in North Carolina. This is competent evidence to support the trial court's finding that there is a direct link between Ms. Gibson's contacts with North Carolina and the injuries alleged in Ms. Fox's complaint. *Replacements, Ltd.*, 133 N.C. App. at 140-41, 515 S.E.2d at 48.

Since the trial court's findings of fact, ignoring finding of fact twelve, support its conclusion of law that "[t]his action arises directly out of Defendant's activities within and to the state of North Carolina[,]" we hold that section 1-75.4(3) of the North Carolina General Statutes confers personal jurisdiction in North Carolina. *See Dillon*, 291 N.C. at 675, 231 S.E.2d at 630; s*ee also Cooper*, 140 N.C. App. at 733, 537 S.E.2d at 857 (holding that claims of alienation of affections and criminal conversation are claims within the purview of section 1-75.4(3) of the North Carolina General Statutes).

[4] We must next examine whether the exercise of in personam jurisdiction under the statutory authority of section 1-75.4(3) violates Ms.

Gibson's due process rights. *Id.* at 734, 537 S.E.2d at 857. To satisfy the requirements of the due process clause, there must exist "certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citations omitted). In determining minimum contacts, the court looks at several factors, including: 1) the quantity of the contacts; 2) the nature and quality of the contacts; 3) the source and connection of the cause of action with those contacts; 4) the interest of the forum state; and 5) the convenience to the parties. *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 530-31, 265 S.E.2d 476, 479 (1980). These factors are not to be applied mechanically; rather, the court must weigh the factors and determine what is fair and reasonable to both parties. *Id.* at 531, 265 S.E.2d at 479 (citation omitted). No single factor controls; rather, all factors "must be weighed in light of fundamental fairness and the circumstances of the case." *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986).

In examining the quantity of contacts, there is no transcript of the hearing and the complaint does not allege a specific number of contacts. However, Mr. Fox's affidavit states that he had "numerous" telephone conversations with Ms. Gibson while he resided in North Carolina, along with e-mail messages, and sexual relations. While we are unaware of the specific quantity of contacts, the nature of the contacts is sufficient for purposes of section 1-75.4(3) of the North Carolina General Statutes. *See Cooper*, 140 N.C. App. at 735, 537 S.E.2d at 858. Additionally, the trial court found that there is a direct link between Ms. Fox's injuries and Ms. Gibson's contacts with North Carolina. *See id.*

The trial court also found that the state of Georgia has abolished the causes of action for alienation of affections and criminal conversation.[3] In *Cooper*, the plaintiff could not bring the claims for alienation of affections and criminal conversation in the defendant's resident state since that state had abolished those causes of action. *Id.* This Court noted that "North Carolina's interest in providing a

3. "Adultery, alienation of affections, or criminal conversation with a wife or husband shall not give a right of action to the person's spouse. Rights of action for adultery, alienation of affections, or criminal conversation are abolished." Ga. Code Ann. § 51-1-17 (2005); *see also Hyman v. Moldovan*, 166 Ga. App. 891, 305 S.E.2d 648 (1983).

forum for plaintiff's cause of action is especially great in light of the circumstances." *Id.*

Finally, we look to the convenience of the parties. Witnesses and evidence relevant to the Foxes' marriage and cause of separation would more than likely be located in North Carolina. Additionally, Ms. Gibson resides in a nearby state causing a minimal travel burden. *See id.* at 735-36, 537 S.E.2d at 858.

As we find that sufficient minimum contacts exist so that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice[,]' " *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786, the exercise of personal jurisdiction does not violate Ms. Gibson's due process rights. Accordingly, we hold that the trial court did not err in denying Ms. Gibson's motion to dismiss for lack of personal jurisdiction.

Affirmed.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF L.D.B.

No. COA05-519

(Filed 7 March 2006)

Appeal and Error— appealability—permanency planning order

An appeal from an initial permanency planning order was dismissed as interlocutory. *In re B.N.H.*, 170 N.C. App. 157, is directly controlling.

Appeal by respondent from order entered 21 May 2003 by Judge Jimmy L. Love, Jr., in Johnston County District Court. Heard in the Court of Appeals 2 November 2005.

Holland & O'Connor, P.L.L.C., by Jennifer S. O'Connor for petitioner-appellee.

Sofie W. Hosford for respondent-appellant.

CALABRIA, Judge.

Daniel B. ("respondent") appeals the trial court's initial permanency planning order that maintained legal custody of L.D.B. ("L.D.B.") with her mother, Stephanie M. ("Stephanie M."), denied visitation rights to respondent, and repeated previous directives of the trial court that reunification efforts be ceased. We dismiss as interlocutory.

L.D.B. lived with respondent and Stephanie M. Although Stephanie M. had named another man as L.D.B.'s father, paternity testing confirmed that respondent was L.D.B.'s biological father. In September 2002, the Johnston County Department of Social Services ("D.S.S.") filed an initial juvenile petition. D.S.S. alleged that L.D.B. was neglected as a result of domestic violence in her presence causing her to live in an environment injurious to her welfare. An amended petition alleged that the juvenile was dependent and further alleged a history of domestic violence between respondent and Stephanie M:

> [B]oth parents admitt[ed] to domestic fights, which include[d] an incident where the mother attacked [respondent] with a knife, while [respondent] was holding [L.D.B.]. Both [respondent and Stephanie M.] have been instigators in the domestic violence . . . and have a history of substance abuse that contributed to the domestic violence.

D.S.S.'s Intact Families Unit worked with Stephanie M. and respondent on a weekly basis beginning on 4 October 2002. Respondent admitted using marijuana, and Stephanie M. admitted using marijuana and alcohol. As part of a Family Services Case Plan, both respondent and Stephanie M. were required to complete domestic violence prevention programs, substance abuse evaluations, and psychological evaluations. The plan further required that respondent and Stephanie M. follow all recommendations from the programs and evaluations. Respondent and Stephanie M. were also required to maintain safe and stable housing. Additionally, both were to refrain from engaging in acts of coercion, intimidation, or violence against each other, and they were to submit to random drug testing performed by a social worker.

Subsequently, conflict continued within the family. Respondent made accusations against Stephanie M. and her family regarding death threats, and he reported that on a couple of occasions Stephanie M. had assaulted him, although he did not press charges.

Respondent filed four complaints and motions for domestic violence protective orders and *ex parte* domestic violence orders against Stephanie M. All of them were dismissed. Stephanie M., in turn, claimed respondent was controlling.

In September 2002, respondent and Stephanie M. entered a visitation and custody plan. Respondent had primary physical custody, and Stephanie M. had joint legal custody. On 25 October 2002, upon hearing that respondent was fleeing to California, Stephanie M. filed for emergency custody of L.D.B. At the conclusion of an *ex parte* custody hearing on 5 November 2002, the trial court granted D.S.S. custody of L.D.B. Subsequently, Stephanie M. stipulated to neglect, and the trial court adjudicated L.D.B. neglected as to respondent. Stephanie M. presented evidence at the adjudication hearing that she completed a substance abuse program, followed through on recommendations from a psychological evaluation, substantially participated in a domestic violence program, completed parenting classes, and maintained stable housing and employment.

Respondent, on the other hand, had lost his job and was working for his mother. In addition, he had been diagnosed with Acute Adjustment Disorder with Mixed Emotion and Conduct, which would require six months of treatment. He failed to attend two anger management courses, although he had on one occasion attended a class. He additionally failed to attend parenting classes and complete a psychological evaluation. Respondent also had moved to Carteret County, and Carteret County's D.S.S. reported difficulty in both verifying the services that respondent had received and in conducting home studies "due to the number of excuses he gives for not being able to meet with the social worker." In the dispositional phase, the trial court ordered D.S.S. to return L.D.B. to the care, custody, and control of Stephanie M. The trial court also suspended respondent's visitation and granted Stephanie M. a restraining order against respondent. Respondent was ordered not to have any direct or indirect contact with Stephanie M. or the children; however, the trial court asked him to locate an individual who would be willing to supervise visitations.

The trial court subsequently conducted a review hearing in this matter on 12 March 2003 and 30 April 2003. Respondent had made little progress, and the trial court concluded it was in L.D.B.'s best interests that respondent "not have visitation until such time as he provides to the Court a completed psychological evaluation." At the latter review hearing, respondent again failed to complete the psy-

chological evaluation, and the trial court relieved D.S.S. of further efforts toward reunification of L.D.B. with respondent.

An initial permanency planning hearing in this matter was held on 21 May 2003. Although respondent again failed to complete parenting classes, he had completed his psychological evaluation. The evaluation revealed that respondent had a "failure to cope with life's demands and major depression." The report further revealed that "[h]is potential for aggressive behavior is high and his capacity for perceptual distortion based on perceived threats to himself increase the likelihood of his acting out in response to his fears." Finally, the report warned that respondent's "retreating into fantasy when stressed limits the number of reasonable options he might exercise in solving problems."

The trial court found that "based upon the history of this case, including but not limited to domestic violence in the presence of the juvenile, as well as upon [respondent's] continued action to attempt to have contact [with] the mother and the results of [respondent's] psychological evaluation, it would not be in the juvenile's best interest to have unsupervised contact with [respondent]." Because respondent failed on numerous occasions to identify anyone to supervise visitations in Johnston County between himself and the children, the trial court repeated its previous directive that respondent be denied visitation. The trial court also ordered both D.S.S. and the *Guardian ad Litem* relieved of further efforts toward reunification with respondent and terminated further reviews in the matter, in accordance with § 7B-906(d) (2003), since custody was restored to a parent. Respondent appeals.

We initially address whether this case is interlocutory. North Carolina General Statutes § 7B-1001 (2003)[1] states that appeal may be taken from "any final order of the court in a juvenile matter[.]" The statute defines a "final order" to include:

(1) Any order finding absence of jurisdiction;

(2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;

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1. North Carolina General Statutes § 7B-1001 has recently been amended; however, the amended version of the statute applies only to petitions or actions filed on or after 1 October 2005. Because the petition in this case was filed prior to this date, we apply the statute in effect at the time of filing and related case law.

(3) Any order of disposition after an adjudication that a juvenile is abused, neglected, or dependent; or

(4) Any order modifying custodial rights.

N.C. Gen. Stat. § 7B-1001(1-4) (2003).

In *In the Matter of B.N.H*, 170 N.C. App. 157, 611 S.E.2d 888 (2005), this Court recently held

> [i]n our view, the statutory language of G.S. § 7B-1001(3), referring to an "order of disposition after an adjudication that a juvenile is abused, neglected, or dependent," means the dispositional order that is entered after an adjudication under G.S. § 7B-905, and does not mean every permanency planning, review, or other type of order entered at some unspecified point following such a disposition.

B.N.H., 170 N.C. App. at 160, 611 S.E.2d at 890.

The *B.N.H.* panel of this Court narrowly interpreted an earlier opinion, *In re Weiler*, 158 N.C. App. 473, 581 S.E.2d 134 (2003). The *B.N.H.* panel distinguished *Weiler* as follows:

> In *Weiler*, the permanency planning order on appeal changed the plan from reunification to adoption. The order on appeal here is not such an order, not only because it was an initial permanency planning order but also because it repeats the previous directives of the court that reunification be ceased. We therefore limit the holding of *Weiler* to the specific facts of that case, and decline to extend its reasoning further.

B.N.H., 170 N.C. App. at 161, 611 S.E.2d at 891.

B.N.H. is directly controlling on the facts at issue. The order on appeal in this case is an initial permanency planning order that does not change the plan from reunification to adoption. Furthermore, the order "repeats the previous directives of the court that reunification [with respondent] be ceased." *See id.* Moreover, the order on appeal is not a "final order" under any of the other orders listed in § 7B-1001 because it is not: "[an] order finding absence of jurisdiction," "[an] order . . . that prevents a judgment from which appeal might be taken," or an "order modifying custodial rights." *See* N.C. Gen. Stat. § 7B-1001. Accordingly, this appeal is interlocutory, and we dismiss the appeal.

Dismissed.

Judges HUDSON and BRYANT concur.

ISABELLA CEPLECHA AND LANA LEWIS, PLAINTIFFS v. PINE KNOLL TOWNES PHASE II ASSOCIATION AND THE BOARD OF DIRECTORS OF PINE KNOLL TOWNES PHASE II ASSOCIATION, DEFENDANTS

No. COA05-173

(Filed 7 March 2006)

Condominiums and Townhouses— repair after storm— required number of votes—amendment of declaration of ownership

An amendment to a condominium declaration of unit ownership was properly passed by the unit owners, but was barred by N.C.G.S. § 47C-1-102(b) and N.C.G.S. § 47C-3-113(h) because it permitted a simple majority rather than the statutory percentage of unit owners to make the decision not to repair a unit.

Appeal by plaintiffs from order entered 30 July 2004 by Judge Kenneth F. Crow in the Superior Court in Carteret County. Heard in the Court of Appeals 22 September 2005.

Kirkman Whitford & Brady, P.A., by Neil B. Whitford, and Taylor & Taylor, P.A., by Nelson W. Taylor, III, for plaintiff-appellants.

Ward and Smith, P.A., by Eric J. Remington, for defendant-appellees.

HUDSON, Judge.

Pine Knoll Townes Phase II ("Pine Knoll II") is a condominium project on the beach in Carteret County, governed by defendants, the Pine Knoll Townes Phase II Association ("the Association") and the board of directors of the Association ("the Board"). By filing of a complaint 12 November 2002, plaintiff Isabella Ceplecha, the owner of a condominium unit at Pine Knoll II, sought a declaration that an amendment passed by defendants was null and void. The parties filed cross-motions for summary judgment on the issue of the amendment's validity. Following a hearing, on 30 July 2004, the court

granted defendant's motion, denied plaintiff's motion, and dismissed the fourth cause of action in plaintiff's complaint. The parties then reached a settlement and the court entered a consent order dismissing the remaining causes of action on 26 October 2004. On 1 June 2005, plaintiff Ceplecha transferred all of her right, title and interest to plaintiff Lana Lewis. By order filed 1 August 2005, this Court allowed Lewis to be joined with Ceplecha in this appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 25(d). Plaintiffs appeal. As discussed below, we reverse.

In 2000, plaintiff Ceplecha owned an ocean-front unit at Pine Knoll II, a condominium complex composed of two buildings of twenty-three units each. Pine Knoll II was formed under Chapter 47A of the North Carolina General Statutes ("the Unit Ownership Act" or "the UOA") pursuant to a declaration of unit ownership dated 10 May 1972. The Association administers Pine Knoll II. In August 2000, after Hurricane Floyd damaged plaintiff's unit at a cost of more than $77,000, the Association sought to amend section 18 of the declaration, which addressed actions to be taken in response to any damage to Pine Knoll II. The original section 18, in turn, referred to section 19, which tracked statutory language requiring that damage be repaired unless "the building shall be more than two-thirds destroyed by fire or other disaster and the owners of three-fourths of the building duly resolve not to proceed with repair . . . ." *See* N.C. Gen. Stat. § 47A-25 (2001).

The amendment to section 18 effectively alters both the original sections 18 and 19 and reads, in pertinent part:

> (h) Any portion of the Condominium for which insurance is required under this section which is damaged or destroyed shall be repaired or replaced promptly by the Association unless . . . (3) a majority of the Unit Owners in number and common interest vote not to rebuild the damaged portion of the Condominium . . .
>
> If the Unit Owners vote not to rebuild any Unit, (i) the insurance proceeds attributable to that Unit and its undivided interest in the Common Areas and Facilities shall be paid to the Unit Owner in full compensation for his Unit and his interest in the Common Areas and Facilities . . ."

Plaintiffs argue that the court erred in granting summary judgment to defendant and denying summary judgment to plaintiffs on the issue of this amendment's validity. As explained, we reverse.

We begin by noting the well-established standard of review for a trial court's grant of summary judgment:

> Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). On a motion for summary judgment, "[t]he evidence is to be viewed in the light most favorable to the nonmoving party." *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998) (citation omitted). When determining whether the trial court properly ruled on a motion for summary judgment, this court conducts a *de novo* review. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

Brown v. City of Winston-Salem, 171 N.C. App. 266, 270, 614 S.E.2d 599, 602 (2005).

Plaintiffs contend that the amendment conflicts with provisions under the UOA for determining when rebuilding of a damaged building is not required. Plaintiffs assert that N.C. Gen. Stat. § 47A-25 mandates the conditions under which a unit owners association can determine whether to rebuild or repair damage. This statute reads, in pertinent part:

> Except as hereinafter provided, *damage to or destruction of the building shall be promptly repaired and restored by the manager or board of directors, or other managing body*, using the proceeds of insurance on the building for that purpose, and unit owners shall be liable for assessment for any deficiency; *provided, however, if the building shall be more than two-thirds destroyed by fire or other disaster and the owners of three-fourths of the building duly resolve not to proceed with repair* or restoration . . . .

N.C. Gen. Stat. § 47A-25 (2005) (emphasis supplied). The language of the original section 19 of the declaration tracks that in the statute.

In 1985, the General Assembly created the North Carolina Condominium Act ("NCCA"), Chapter 47C, which applies to all condominiums created on or after 1 October 1986. N.C. Gen. Stat. § 47C-1-102(a) (2001). While certain sections of Chapter 47C auto-

matically apply to condominiums created before 1 October 1986, none of the listed provisions touch on the question at issue here. However, N.C. Gen. Stat. § 47C-1-102(b) also provides that an owners association may amend its declaration so as to conform to NCCA provisions, even if the amendments would not have been permitted under the UOA:

> (b) *The provisions of Chapter 47A, the Unit Ownership Act*, do not apply to condominiums created after October 1, 1986 and *do not invalidate any amendment to the declaration, bylaws, and plats and plans of any condominium created on or before October 1, 1986 if the amendment would be permitted by this chapter.* The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by Chapter 47A, the Unit Ownership Act. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

N.C. Gen. Stat. § 47C-1-102(b) (2001) (emphasis supplied). Thus, a pre-1 October 1986 condominium may remain governed under the relevant provisions of the UOA or an association may choose to amend its declaration *so long as the amendment conforms with the NCCA*. The amendment must be valid under either the relevant provision of the UOA or those of the NCCA.

The relevant statute under the NCCA for our consideration is N.C. Gen. Stat. § 47C-3-113(h):

> (h) *Any portion of the condominium* for which insurance is required under this section *which is damaged or destroyed shall be repaired or replaced promptly by the association unless* (1) the condominium is terminated, (2) repair or replacement would be illegal under any State or local health or safety statute or ordinance, or (3) *the unit owners decide not to rebuild by an eighty percent (80%) vote, including one hundred percent (100%) approval of owners of units not to be rebuilt or owners assigned to limited common elements not to be rebuilt.*

N.C. Gen. Stat. § 47C-3-113 (2005).

Because the amendment at issue here allows the decision whether to rebuild or repair to be made by a simple majority rather than the three-fourths of unit owners, and does not require that at

least two-thirds of the building be destroyed before such a decision may be taken, plaintiff argues that the amendment conflicts with the requirements of N.C. Gen. Stat. § 47A-25. We agree.

The amendment here was properly passed by the unit owners, but pursuant to N.C. Gen. Stat. § 47C-1-102(b), declarations may only be amended in conformity with the requirements of the NCCA. Therefore, we must consider whether it would be permitted by the terms of the NCCA. N.C. Gen. Stat. § 47C-3-113(h) expressly sets forth the percentage of owners who must vote not to repair, and does not permit an amendment like the one passed by defendant association, permitting a simple majority of unit owners to make the decision. Because this amendment would not be permitted by N.C. Gen. Stat. § 47C-3-113(h), it is barred by N.C. Gen. Stat. § 47C-1-102(b).

Defendants contend that N.C. Gen. Stat. § 47A-25 applies only to the decision to rebuild or repair entire buildings, as opposed to individual units, which are damaged. Defendants argue that the language of the statute does not address the decision to repair or rebuild an individual unit. Rather, they assert, decisions about individual units are left to the sound discretion of the Association. This interpretation does not square with the General Assembly's clear intention in passing N.C. Gen. Stat. § 47C-1-102(b), which allows amendments to pre-1986 condominium associations only if they conform to N.C. Gen. Stat. § 47C-3-113(h), which in turn made the provisions for deciding not to rebuild or repair even more stringent than those under the UOA. The amendment does not conform to N.C. Gen. Stat. §§ 47C-1-102(b) or 47C-3-113(h) and is void.

Reversed.

Judges McGEE and SMITH concur.

STATE OF NORTH CAROLINA v. GARY NEAVE HOLLARS, DEFENDANT, SURETY: DAVID FRALEY-BRADSHAW'S BONDING CO., AGENT FOR RANGER INSURANCE COMPANY; JUDGMENT CREDITOR: WATAUGA COUNTY BOARD OF EDUCATION

No. COA04-1347

(Filed 7 March 2006)

Bail and Pretrial Release— forfeiture—defendant surrendered to Tennessee jail

There is a clear legislative intent that a nonappearing defendant be surrendered to a North Carolina sheriff before a bond forfeiture is set aside. The trial court here correctly denied a surety's motion to set aside a bond forfeiture which occurred when defendant failed to appear on drug charges in Watauga County and was later surrendered to the Johnson County, Tennessee jail by the surety's agent. N.C.G.S. § 15A-540(b).

Appeal by agent, David Fraley-Bradshaw's Bonding Co., for Surety, Ranger Insurance Company from Order Denying Bond Forfeiture entered 24 June 2004 by Judge Alexander Lyerly in the District Court in Watauga County. Heard in the Court of Appeals 18 August 2005.

Steven M. Carlson, for surety-appellant.

Miller & Johnson, P.L.L.C., by Linda L. Johnson, for judgment creditor-appellee.

HUDSON, Judge.

Gary Neave Hollars ("defendant") was arrested on drug charges in Watauga County, North Carolina in October 2003. A $12,000 secured bond was arranged through the agent of Ranger Insurance Co. ("Surety") and defendant was released from pretrial confinement. Defendant failed to appear at a scheduled court date on 19 November 2003, at which time a warrant was issued for his arrest and a Bond Forfeiture Notice was issued to Surety. The final judgment date of the bond forfeiture was 18 April 2004.

Defendant was arrested in Johnson County, Tennessee on 11 February 2004 on new drug charges in addition to the charge of being a fugitive from justice based upon the outstanding warrant from North Carolina. Defendant waived extradition to North Carolina.

Surety's agent, upon discovery of defendant's whereabouts, appeared in person in Johnson County, Tennessee on 14 April 2004 and surrendered custody of defendant to a custodian of the Johnson County jail. On the same date, Surety's agent filed a motion with the Watauga County Clerk of Superior Court, on behalf of Surety, to set aside the bond forfeiture. Surety's motion was based upon the surrender of defendant to the sheriff of Johnson County, Tennessee pursuant to N.C. Gen. Stat. § 15A-540 (2003). A "Surrender of Defendant by Surety" form, executed by the custodian at the Johnson County jail, was attached to the motion.

The Watauga County School Board (the "School Board") objected to Surety's motion to set aside the bond forfeiture. The motion was denied by Chief District Court Judge Alexander Lyerly on 12 May 2004. The order denying Surety's motion was filed on 24 June 2004. Surety gave notice of appeal on 23 July 2004.

Surety argues that the trial court erred in denying its motion to set aside the bond forfeiture as defendant was surrendered in accordance with N.C. Gen. Stat. § 15A-540(b) prior to the final judgment date of bond forfeiture. We do not agree.

In construing statutes, courts must effectuate the intent of the General Assembly, which is determined by "the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983). Surety argues that the surrender of defendant to the Johnson County, Tennessee sheriff complied with statutory provisions and, therefore, it is entitled to have the forfeiture set aside. The School Board argues that Surety's surrender of defendant to the Tennessee sheriff failed to comply with the statutory requirements for setting aside a bond forfeiture as such a surrender may be accomplished only by a surrender to a North Carolina sheriff. Therefore, the question before this Court is whether our legislature intended that only the surrender of a defendant to a *North Carolina* sheriff would suffice for a bond forfeiture to be set aside or whether a defendant may be surrendered to a sheriff in another state.

After defendant missed a scheduled court appearance on 19 November 2003, bond forfeiture was entered. The Bond Forfeiture Notice was served upon defendant and Surety on 20 November 2003. This notice advised defendant and Surety that the forfeiture will be set aside if satisfactory evidence is presented to the court that:

> the defendant has been surrendered by a surety or bail agent *to a sheriff of this State* as provided by law.

N.C. Gen. Stat. § 15A-544.3(b)(9)(iii) (emphasis added).

N.C. Gen. Stat. § 15A-544.5(b)(3) allows a forfeiture to be set aside if "[t]he 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." N.C. Gen. Stat. § 15A-540(b) discusses the surrender of a defendant by a surety after a breach of his conditions of release. It first states that after arresting a defendant, the surety may surrender him "to the sheriff of the county in which the defendant is bonded to appear or to the sheriff where the defendant was bonded." Clearly these provisions contemplate surrender to a North Carolina sheriff.

> This statute goes on to state:
>
> Alternatively, a surety may surrender a defendant who is already in the custody of any sheriff by appearing in person and informing the sheriff that the surety wishes to surrender the defendant.

This provision must be read in conjunction with the prior provisions of § 15A-540(b) and with § 15A-544.3(b)(9), which contemplate surrender to a North Carolina sheriff. "Statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Board of Adjust. v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313, *reh'ing denied*, 335 N.C. 182, 436 S.E.2d 369 (1993). " '[T]he various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency, so as to render the statute a consistent and harmonious whole.' " *Walker v. American Bakeries Co.*, 234 N.C. 440, 442, 67 S.E.2d 459, 461 (1951) (*quoting* 50 Am. Jur. Statutes § 363). "Portions of the same statute dealing with the same subject matter are 'to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment . . . .' " *Huntington Properties, LLC v. Currituck County*, 153 N.C. App. 218, 224, 569 S.E.2d 695, 700 (2002) (*quoting In re Hickerson*, 235 N.C. 716, 721, 71 S.E.2d 129, 132 (1952).

Surety contends that "any sheriff" means not any sheriff in North Carolina, but any sheriff anywhere in the United States, or possibly in

any foreign country. Clearly, this was not the intent of the legislature. In determining legislative intent, "[w]ords and phrases of a statute 'must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.' " *Underwood v. Howland*, 274 N.C. 473, 479, 164 S.E.2d 2, 7 (1968) (*quoting* 7 Strong's N.C. Index 2d, Statutes, § 5). The clear intent of both statutes was to require surrender to a North Carolina sheriff. Surety's contention ignores the express language of the Bond Forfeiture Notice in N.C. Gen. Stat. § 15A-544.3(b)(9)(iii), which plainly instructs Surety to deliver defendant to a "sheriff of this State." Further, N.C. Gen. Stat. § 15A-540(b) only makes reference to North Carolina sheriffs, both in the county where the defendant is or was bonded, and outside of that county. These provisions should be interpreted as a composite whole to reflect the clear legislative intent that N.C. Gen. Stat. § 15A-540(b) deals solely with surrender within North Carolina.

This statutory interpretation also reinforces the purpose of bail, which is to "secure the appearance of the principal in court as required." *State v. Vikre*, 86 N.C. App. 196, 199, 356 S.E.2d 802, 804, *disc. review denied*, 320 N.C. 637, 360 S.E.2d 103 (1987). This purpose would be frustrated if a principal is allowed to be delivered to the sheriff of another state outside of the jurisdiction of the North Carolina courts where the defendant may never be returned to North Carolina to appear in court.

Affirmed.

Judges STEELMAN and JACKSON concur.

STATE OF NORTH CAROLINA v. DELWOOD EARL SHELLY

No. COA05-713

(Filed 21 March 2006)

1. Evidence— prior crimes or bad acts—stale convictions more than ten years old—actual notice—sufficiency of findings

The trial court did not abuse its discretion in a double first-degree murder and double conspiracy to commit first-degree murder case by allowing the State to impeach defendant on cross-examination with evidence of prior convictions that were more than ten years old, because: (1) although the State failed to give defendant written notice of its intent to introduce evidence of defendant's old convictions as required by N.C.G.S. § 8C-1, Rule 609, there was ample evidence that defendant had actual notice of the State's intent to use his prior convictions since the defense submitted a motion a month before trial to the judge to prohibit the impeachment of defendant by stale convictions; (2) the State provided a copy of defendant's record to the defense as a part of open file discovery with the implication that it would be used at trial; (3) an error must be more than merely technical to warrant a new trial, and it must be material and prejudicial; (4) under the circumstances presented by this case, the spirit and stated purpose of Rule 609(b) regarding notice have been met; and (5) the trial court's findings are at least marginally sufficient under Rule 609(b) to support the admission of the prior convictions, and even if the findings are found to be inadequate, defendant failed to show the outcome of the trial likely would have been different given the overwhelming evidence of defendant's guilt.

2. Conspiracy— first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of conspiracy to commit first-degree murder, because: (1) defendant and his coparticipants had a clear motive for killing the victims; and (2) the events leading to the shooting sufficiently establish that the shooters were in agreement to kill the victims.

3. Conspiracy— first-degree murder—number of conspiracies

The trial court erred by concluding that there was adequate evidence of two conspiracies to commit first-degree murder, and judgment is arrested as to the second conspiracy charge, because: (1) multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies; (2) where the evidence shows only one agreement between the individuals, a defendant may be convicted of only one conspiracy; and (3) in the instant case, the time interval was relatively short since all of the pertinent events occurred within twenty-four hours, the number of participants remained constant throughout the incident, there seemed to be only one objective which was to kill the two victims, and while the number of meetings between defendant and his coparticipants is not entirely clear from the record, the most logical inference points to only one continuous meeting.

4. Constitutional Law— right of confrontation—gunshot residue—expert testimony—tests and report by nontestifying expert—harmless error

The admission of an SBI forensic chemist's expert testimony as to the opinions he formed from his review of gunshot residue tests performed on the friend of two murder victims by a nontestifying SBI forensic chemist, including his review of the report prepared by the other chemist, did not violate defendant's Sixth Amendment right of confrontation pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). Moreover, any error under *Crawford* in the admission of the nontestifying chemist's report and testimony by the SBI chemist stating the opinion of the nontestifying chemist as contained in that report was harmless beyond a reasonable doubt where the gunshot residue testing was performed only because defendant asserted that the victims' friend may have taken a gun belonging to and used by one victim from the scene of the shootings, the opinions of both the testifying and nontestifying chemists were equivocal as to whether the victim's friend could have handled a gun at or about the time of the shootings, and the totality of the evidence in the case overwhelmingly established defendant's guilt of the murders.

Appeal by Defendant from judgments entered 16 September 2004 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 20 February 2006.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant-Appellant.

STEPHENS, Judge.

Defendant appeals from judgments of the trial court convicting him of two counts of first-degree murder and two counts of conspiracy to commit first-degree murder. For the reasons stated herein, we affirm both murder convictions and one conspiracy conviction. We arrest judgment on the second conspiracy conviction.

The State's evidence tended to show that on 1 January 2002, Rodney Wilkerson gave a ride to his friends, Malcom and Andre Jackson. When Wilkerson's car arrived at a destination down a dirt road, a car in which Defendant was a passenger traveled down the same road and stopped near Wilkerson's car. Defendant was in the back seat of the car with the window partially rolled down. Wilkerson saw Defendant with a large shotgun. Wilkerson yelled, "It's a drive by" and immediately ran from his car, leaving Malcom and Andre Jackson in the vicinity of the car. While he was running, Wilkerson heard several shots. Wilkerson ran to his mother's nearby home. His mother called for emergency assistance. Upon the arrival of two sheriff's deputies, Wilkerson explained what had happened and followed the deputies to the location of the shooting. The deputies discovered the bodies of Malcom Jackson and Andre Jackson outside of Wilkerson's car.

The medical examiner found that Andre Jackson had been shot several times and had bullet wounds in his chest, chin, neck, right torso, back, and right shoulder from a shotgun blast. The victim also exhibited a handgun bullet wound to the left side of his face. The medical examiner further discovered that Malcom Jackson had also been shot several times and had shotgun pellet wounds to his right hip, right thigh and left hand. In addition, Malcom Jackson exhibited two handgun wounds to the back of his head.

Wilkerson filed a statement with the police department, and a warrant for the arrest of Defendant was signed by a magistrate on 3 January 2002. On 23 July 2002, Defendant was indicted on two counts of first-degree murder and two counts of conspiracy to commit first-degree murder. Defendant's trial began on 31 August 2004 and, on 13 September 2004, a jury found him guilty on all counts. On 16

September 2004, Judge Ammons sentenced Defendant to two consecutive life terms for the first-degree murder convictions and two consecutive terms of 220 to 273 months for the conspiracy to commit first-degree murder convictions. Defendant appeals.

[1] In his first assignment of error, Defendant argues that the trial court committed reversible error by allowing the State to impeach him on cross-examination with evidence of prior convictions that were more than ten years old. We disagree.

Rule 609 of the N.C. Evidence Code provides, in pertinent part, that:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony . . . shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter . . . .
>
> Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction . . . unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

N.C. Gen. Stat. §8C-1, Rule 609(b) (2003). Thus, pursuant to Rule 609, a prior conviction that is more than ten years old may be admissible if (1) the defendant had written notice of the State's intent to use such evidence sufficiently in advance of trial to object to the evidence, and (2) the trial court makes sufficient findings that the probative value of the evidence substantially outweighs the prejudicial effect of admitting it. The trial court's ultimate determination is reversible only for a manifest abuse of discretion. *State v. Ferguson*, 105 N.C. App. 692, 414 S.E.2d 769 (1992).

In the instant case, there is no dispute that the State failed to give Defendant written notice of its intent to introduce evidence of his old convictions. Nonetheless, there is ample evidence that Defendant had actual notice of the State's intent to use his prior convictions because the defense submitted a motion, which had been authored a month before the trial, to the trial judge to prohibit the impeachment of

Defendant by "stale convictions." Outside the presence of the jury, Defendant argued that the conviction evidence of cocaine possession in 1980, as well as common law robbery, larceny, and credit card fraud in 1988, should not be allowed. The State noted that it did not "specifically write something down and say to [defense attorneys], 'I intend to use these convictions.' " However, the State provided a copy of Defendant's record to the defense as a part of open-file discovery with the "implication" that it would be used at trial. Because the defense had prepared a written motion with Defendant's conviction records attached to it several weeks before the trial, it is obvious that Defendant had actual notice that the State intended to use the prior convictions for impeachment purposes, and that the defense clearly had a fair opportunity to contest the use of such evidence.

Although it does not appear that this State's appellate courts have previously addressed the potential consequences of failing to follow the notice requirements of Rule 609(b) to the letter as those requirements relate to the specific issue raised herein, we agree with the State that to warrant a new trial, an error must be more than merely technical; it must also be material and prejudicial. This is a fundamental legal concept. *See, e.g.*, *State v. Curmon*, 295 N.C. 453, 245 S.E.2d 503 (1978)*; State v. Gilbert*, 85 N.C. App. 594, 355 S.E.2d 261 (1987); *State v. Knoll*, 84 N.C. App. 228, 352 S.E.2d 463 (1987), *rev'd on other grounds*, 322 N.C. 535, 369 S.E.2d 558 (1988); *State v. Mitchell*, 20 N.C. App. 437, 201 S.E.2d 720 (1974).

Moreover, we find persuasive guidance in the decision of this Court in *State v. Blankenship*, 89 N.C. App. 465, 366 S.E.2d 509 (1988). The defendant in *Blankenship* took the stand in his own behalf and, on direct examination, testified about his prior criminal record beginning in 1980, but failed to mention a 1972 conviction for credit card theft. Evidence regarding the 1972 conviction was discovered by the State after the State had responded to the defendant's discovery requests. The evidence had never been disclosed to the defendant, nor had the State given any notice to the defense of an intention to cross-examine the defendant regarding the 1972 conviction. On cross-examination, however, the State asked the defendant about the still undisclosed 1972 conviction and, over defendant's objection, the trial court allowed the evidence.

When the *Blankenship* Court considered the defendant's argument that the use of a prior conviction was prohibited by Rule 609(b) because the State failed to give him advance notice of an intent to use the evidence, the Court noted the absence of any North Carolina

cases determining that specific issue. The Court thus looked to federal law because the federal evidentiary rule is identical to the state rule.

Noting that the State's use of the prior conviction was to directly impeach Blankenship's credibility based on a false assertion made by him during direct examination, the Court found support for allowing the prior conviction evidence under such circumstances, despite the failure of notice, in *United States v. Johnson*, 542 F.2d 230 (5th Cir. 1976), a case in which the federal prosecutor was permitted to cross-examine the defendant about a prior conviction to impeach his credibility based on false testimony he gave on direct examination. The Fifth Circuit ruled that such use of prior conviction evidence was permitted under Rule 609 even though the government had not given the defendant any notice of its intended use of the old conviction.

The holdings in *Blankenship* and *Johnson* were premised primarily on the long-standing evidentiary rule that "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). Left open is the question of whether the State may introduce prior conviction evidence other than to rebut a defendant's false testimony on direct examination, absent advance written notice. On this specific question, we have found no North Carolina or federal cases that have determined the answer.

We are guided by *Blankenship* and *Johnson* because they establish that strict adherence to Rule 609's notice requirement is not the sole test of whether prior conviction evidence is admissible. Furthermore, the purpose of the Rule's notice requirement is plain beyond contradiction, and that is "to provide the adverse party with a fair opportunity to contest the use of such evidence." N.C. Gen. Stat. § 8C-1, Rule 609(b). In a case where, as here, the defense obviously deciphered the State's intent to use the old conviction evidence by preparing a motion objecting to the evidence well in advance of trial, it cannot be reasonably or fairly determined that the failure of the State to follow the Rule to the letter prohibits use of the evidence solely on that basis. While advance written notice is preferred, we decline to reverse Defendant's convictions for what would clearly be a mere technicality. Instead, we hold that, under the circumstances presented by this case, the spirit and stated purpose of Rule 609(b) regarding notice have been met, and the trial court did not commit

reversible error by allowing the use of prior conviction evidence on this basis.

We now consider whether the trial court found sufficient facts to overcome Defendant's additional challenge to use of the prior convictions under Rule 609(b). As noted above, for such evidence to be admissible, Rule 609(b) requires the trial court to make findings of fact which demonstrate that the probative value of the evidence outweighs its prejudicial nature. This requirement of the Rule establishes "a rebuttable presumption that prior convictions more than ten years old [are] more prejudicial to defendant's defense than probative of [his] general character for credibility and, therefore, should not be admitted in evidence." *Blankenship*, 89 N.C. App. at 468, 366 S.E.2d at 511. Indeed, our courts have repeatedly recognized that the instances in which use of the old convictions is not more prejudicial than probative are "rare." *Id.* at 468, 366 S.E.2d at 511; *see also*, *e.g.*, *State v. Farris*, 93 N.C. App. 757, 379 S.E.2d 283 (1989), *rev. improv. all'd*, 326 N.C. 45, 387 S.E.2d 54 (1990); *State v. Hensley*, 77 N.C. App. 192, 334 S.E.2d 783 (1985), *disc. rev. denied*, 315 N.C. 393, 338 S.E.2d 882 (1986). Further, it is settled that the prior conviction evidence is used properly only to impeach the defendant's credibility. *See*, *e.g.*, *State v. Ross*, 329 N.C. 108, 405 S.E.2d 158 (1991). This is the reason that the trial judge must make specific findings as to how the prior convictions are probative on credibility issues when balancing probative value against prejudicial effect.

To enable the reviewing court to determine whether the trial court properly allowed admission of the old conviction evidence, the trial court's findings must set out the "specific facts and circumstances which demonstrate the probative value outweighs the prejudicial effect" of the evidence in question. *Hensley*, 77 N.C. App. at 195, 334 S.E.2d at 785. For the trial court to merely state that the probative value of a prior conviction outweighs its prejudicial effect in the interests of justice is insufficient under Rule 609(b). *State v. Ross*, 329 N.C. 108, 405 S.E.2d 158 (1991); *see also State v. Carter*, 326 N.C. 243, 252, 388 S.E.2d 111, 117 (1990) (trial court's "conclusory remark" that the only purpose for admitting the prior conviction evidence would be to impeach the defendant's credibility "was not a 'fact' or 'circumstance' vouching for an appropriate balance of probative [value] over prejudicial weight"); *State v. Artis*, 325 N.C. 278, 307, 384 S.E.2d 470, 486 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990) (trial court's sole finding that the prior convictions had "a sufficient connection, supported by facts and

circumstances," inadequate to establish that the conviction evidence was more probative of defendant's credibility than prejudicial to his defense); *State v. Smith*, 155 N.C. App. 500, 573 S.E.2d 618 (2002) (error to admit prior conviction evidence without findings of specific facts and circumstances to support the trial court's determination that the evidence was more probative than prejudicial); *State v. Farris*, 93 N.C. App. 757, 379 S.E.2d 283 (1989) (stating that State must lay a foundation for the admission of prior convictions or the trial court will not have a basis for making appropriate Rule 609(b) findings).

In the instant case, the trial judge specifically found as follows:

> for the commission of the crimes of common law robbery, felonious larceny, financial [sic] credit card fraud, misdemeanor credit card fraud, I find that those are probative of truthfulness; and if the defendant chooses to place his credibility at issue by taking the witness stand, he may be cross examined on those convictions, the court having determined that the probative value of such evidence outweighs any prejudicial effect to the defendant. It is probative of his truthfulness.

To analyze the sufficiency of these findings, we compare them to Rule 609(b) findings made by various trial courts, which have been determined to be adequate by previous decisions of this Court and our Supreme Court. In *State v. Holston*, 134 N.C. App. 599, 518 S.E.2d 216 (1999), the trial court made findings of fact stating it believed that the defendant's credibility was central to the case and that evidence of an older conviction was more probative than prejudicial. On appeal, this Court held that "[a]lthough the findings are minimal, we believe they are legally sufficient in this case, as they indicate the trial court exercised meaningful discretion in weighing the probative value of the 1981 conviction against its prejudicial effect." *Id.* at 606, 518 S.E.2d at 222. Elaborating, this Court stated that because the defendant's testimony that he acted in self-defense directly contradicted all the State's evidence of an unprovoked attack on the victim, his credibility was central to the case, and therefore, the evidence of a 1981 conviction for attempted robbery was properly presented to the jury for their consideration of the defendant's credibility.

In reaching its result, the *Holston* Court identified the following considerations as factors to be addressed by the trial court when determining if conviction evidence more than ten years old should be admitted: (a) the impeachment value of the prior crime, (b) the

remoteness of the prior crime, and (c) the centrality of the defendant's credibility. *Id.* (citing 4 Joseph M. McLaughlin, *Weinstein's Federal Evidence* § 609.04[2][a] (2d ed.1999)). It logically follows that findings on each of these factors should be included in the trial court's determination.

Guidance is also available in our Supreme Court's decision in *State v. Lynch*, 337 N.C. 415, 445 S.E.2d 581 (1994), a case in which the trial court's decision to admit evidence of a prior robbery conviction in the defendant's trial for murder of his wife was challenged. Among the findings made by the trial judge to admit the robbery conviction were that (1) the defendant intended to present defenses based on diminished capacity and voluntary intoxication; (2) with respect to such defenses, the defendant's statements to mental health experts and the jury would be difficult to rebut since such statements would originate with the defendant; (3) it was important to the State to be able to impeach the defendant's credibility; (4) robbery is a crime of dishonesty because it involves taking someone's property; and (5) evidence of a conviction for robbery bears on the determination of credibility. *Id.*

In determining whether the trial court's findings regarding the admissibility of 13-year-old convictions were inadequate, this Court, in *State v. Hensley*, 77 N.C. App. 192, 334 S.E.2d 783 (1985), provided further guidance of the kind of findings necessary to establish that the requisite balancing of probative value versus prejudicial effect has been undertaken. *Hensley* involved the defendant's challenge to the trial court's ruling that prior breaking and entering and larceny convictions would be admissible to impeach his credibility based on findings that such convictions "were for 'dishonesty type things,' that they were probative of defendant's credibility, and that they would not prejudice defendant." *Id.* at 194, 334 S.E.2d at 784. This Court agreed with the defendant that these findings were insufficient under Rule 609(b). In its discussion, this Court noted that appropriate findings should address (a) whether the old convictions involved crimes of dishonesty, (b) whether the old convictions demonstrated a "continuous pattern of behavior," and (c) whether the crimes that were the subject of the old convictions were "of a different type from that for which defendant was being tried." *Id.* at 195, 334 S.E.2d at 785.

In the case now before this Court, we are of the opinion that the trial court's findings are at least minimally sufficient to support the admission of the prior convictions under Rule 609(b). We find it sig-

nificant that the trial judge declined to allow cross-examination of Defendant about a prior cocaine possession conviction because "there is [not] a significant link between possession of cocaine and truthfulness," and instead, limited the State to cross-examining Defendant regarding prior convictions for common law robbery, felonious larceny, and credit card fraud, crimes which have long been recognized to implicate dishonesty, deceit, and moral turpitude. *See, e.g.*, *State v. Lynch*, 337 N.C. 415, 445 S.E.2d 581 (1994); *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993); *Jones v. Brinkley*, 174 N.C. 23, 93 S.E. 372 (1917). We thus do not believe that a new trial is warranted on the basis of the trial court's findings of fact on the admissibility of Defendant's prior convictions.

Moreover, even if the trial judge's findings on a challenge to the admissibility of prior conviction evidence are found to be inadequate under Rule 609(b), Defendant would be entitled to a new trial only if the admission of such evidence unfairly prejudiced his defense. "The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (citations omitted). To determine whether unfair prejudice resulted, we consider whether (1) there is substantial evidence of untruthfulness or untrustworthiness apart from the prior offenses, and (2) there is overwhelming evidence of the defendant's guilt. *See State v. Ross*, 329 N.C. 108, 405 S.E.2d 158 (1991); *Hensley*, 77 N.C. App. at 192, 334 S.E.2d at 783.

Here, Defendant admitted other more recent convictions including the trafficking of cocaine. On direct and cross-examination, Defendant's testimony was untrustworthy or untruthful when he (a) described looking at Benjamin and Lamont Shelly's injuries right after their fight with the Jackson brothers and decided to take a ride "just" to look for marijuana; (b) testified that he was asleep or unconscious when the Shelly brothers, his nephews, obtained a shotgun; (c) suddenly came upon the victims at the dirt road and failed to leave or slow down even though he felt threatened; (d) testified that Malcom Jackson was his best friend but then believed it was either "shoot or be shot" when he thought he saw a gun in Malcom Jackson's hand; (e) fired several more shots after he knew Malcom Jackson was unarmed; (f) testified that Andre Jackson ran while being fired upon, but then stated that Andre Jackson did not run; (g) testified that Rodney Wilkerson had a gun, but he did not feel threatened by

Wilkerson; and (h) was unable to explain how an unarmed Andre Jackson, who was running away from him, was more threatening that an allegedly armed Wilkerson.

In addition, there was overwhelming evidence of Defendant's guilt, including (1) Defendant's admissions, (2) the number and type of bullet wounds inflicted on each victim, (3) Defendant's attempt to hide the weapons, and (4) Defendant's leaving the scene without calling an ambulance. Consequently, Defendant has not shown that the outcome of the trial likely would have been different had the jury not heard about his prior convictions which were older than ten years.

We thus hold that, under the circumstances of this case in which (a) there is no contest that Defendant had actual notice of the State's intent to use his old convictions for impeachment purposes at trial and had ample opportunity to contest the use of such evidence, (b) the trial court made at least marginally sufficient findings of fact demonstrating that it had properly weighed the probative value of the impeachment evidence against its potential prejudicial effect, and (c) the evidence as a whole overwhelmingly established that admission of the prior conviction evidence did not prejudice Defendant, the trial court did not commit reversible error by allowing the State to use the prior convictions to impeach Defendant's credibility. Accordingly, we overrule this assignment of error.

[2] By his second assignment of error, Defendant argues that the trial court erred in denying his motion to dismiss the charges of conspiracy to commit first-degree murder.

Upon a motion to dismiss, the trial court must determine whether there is substantial evidence, taken in the light most favorable to the State, of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant being the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (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 is concerned only with the sufficiency of the evidence to go to the jury, and not the weight to be accorded the evidence. *State v. Thaggard*, 168 N.C. App. 263, 608 S.E.2d 774 (2005).

"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. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citations omitted). This evidence may be circumstantial or inferred from the defendant's behavior. *See State v. Choppy*, 141 N.C. App. 32, 39, 539 S.E.2d 44, 49 (2000), *disc. rev. denied*, 353 N.C. 384, 547 S.E.2d 817 (2001). The crime of conspiracy does not require an overt act for its completion; the agreement itself is the crime. *State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975).

In this case, the evidence most favorable to the State showed that on 31 December 2001, Tracie New picked Andre Jackson up and together they went to Defendant's home to pick Defendant up. They then rode around looking for a place to buy marijuana. After stopping the car, Defendant and Andre Jackson left the car. New remained in the vehicle. She was unaware of what, if any, transaction had taken place when the two men returned to her vehicle. New then dropped both men off at Defendant's home. Approximately one hour later, New went to a party with Andre Jackson at the apartment in which Benjamin and Lamont Shelly lived. New testified that at the party, Andre Jackson got into a fistfight with Defendant and other men, including Benjamin Shelly, one of Defendant's nephews. Andre Jackson continued to argue as he was leaving the apartment. Because the partygoers did not want to get in trouble with other tenants or the police over the fighting and noise, the party moved to an outdoor area near an abandoned house. Defendant saw Andre Jackson's truck cruise slowly by Defendant's mother's home. Defendant testified that he believed Andre Jackson was looking for him to retaliate for the fight earlier that evening.

The next day, Andre Jackson returned to the Shellys' apartment with his brother, Malcom Jackson. As soon as he entered the apartment, Andre Jackson "threw [Benjamin Shelly] into the wall." The fighting escalated, involving both Malcom and Andre Jackson against Benjamin and Lamont Shelly. Eventually, the altercation ended, and Malcom and Andre Jackson left the apartment. Crystal Gilfillan, who was at the apartment but could not see into the room where the men were fighting, testified that she noted "a huge knot on the top of [Lamont Shelly's] head" after the fight. Benjamin Shelly had a black eye. Approximately ten minutes after the Jacksons left, Lamont Shelly called Defendant.

Soon thereafter, Defendant, accompanied by Benjamin and Lamont Shelly, went to the Jackson home. Defendant asked Andre Jackson's twelve-year-old son, Bryan Lewis, the whereabouts of Andre Jackson. Lewis replied that he did not know. Defendant and the Shellys then left. Defendant testified that Benjamin Shelly believed that Andre Jackson had stolen his gun from the apartment. Therefore, they placed a loaded shotgun on the back seat of the Shellys' car. Before driving to the dirt road, the Shellys found the handgun that they thought the Jacksons had stolen. Lamont Shelly had a black handgun. There was a total of three guns in the car.

After Rodney Wilkerson had driven the Jacksons down the dirt road and parked the car, Lamont Shelly sped down the dirt lane toward Wilkerson's car. Defendant fired his shotgun at Andre Jackson. Then Lamont Shelly got out of the driver's seat of the car in which Defendant was riding and fired at close range.

Direct evidence shows that Defendant and Andre Jackson fought the night before the shooting. In addition, Lamont Shelly called Defendant after he had been "jumped" by Andre and Malcom Jackson. The evidence also shows that Defendant came looking for Andre Jackson shortly after Lamont Shelly called him and before the Jacksons were killed. Defendant rode in a vehicle with three guns and two other people. Defendant and the Shellys did not shoot or even fire their guns toward either Tracie New or Rodney Wilkerson. This is evidence that the three gunmen had decided to kill only Andre and Malcom Jackson.

Defendant and the Shellys had a clear motive for killing the Jackson brothers. Furthermore, the events leading to the shooting sufficiently establish that the shooters were in agreement to kill Andre and Malcom Jackson. Our Supreme Court has recognized that " '[d]irect proof of the charge [conspiracy] 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. Gibbs*, 335 N.C. 1, 48, 436 S.E.2d 321, 348 (1993) (quoting *State v. Whiteside*, 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933)). The acts of Defendant and his nephews establish beyond reasonable doubt that each had clear animus and each knew about the animus of the others. The totality of Defendant's acts in response to his and his nephews' animus plainly evidences an agreement to kill the Jackson brothers, formed after premeditation and deliberation, and supports the trial court's submission of conspiracy to commit

first-degree murder to the jury. Accordingly, we hold that there was sufficient evidence tending to show a mutual, implied understanding to commit first-degree murder between Defendant and his nephews, Benjamin and Lamont Shelly.

[3] By his third assignment of error, Defendant argues alternatively that even if there was adequate evidence of conspiracy to commit first-degree murder, there was insufficient evidence of *two* such conspiracies. On this issue, we agree with Defendant.

This Court has held that "multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies." *State v. Rozier*, 69 N.C. App. 38, 47, 316 S.E.2d 893, 900, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). "[W]hen the State elects to charge separate conspiracies, it must prove not only the existence of at least two agreements but also that they were separate." *State v. Griffin*, 112 N.C. App. 838, 840, 437 S.E.2d 390, 392 (1993). Where the evidence shows only one agreement between the individuals, a defendant may be convicted of only one conspiracy. *See State v. Brunson*, 165 N.C. App. 667, 599 S.E.2d 576 (2004). In determining the propriety of multiple conspiracy charges, this Court must consider the nature of the agreement(s) in light of the following factors: (1) time intervals, (2) participants, (3) objectives, and (4) number of meetings. *State v. Tabron*, 147 N.C. App. 303, 556 S.E.2d 584 (2001), *rev. improv. all'd*, 356 N.C. 122, 564 S.E.2d 881 (2002).

In the instant case, the State argues that there was evidence of two agreements because Defendant's animus was directed solely at Andre Jackson due to the fight the previous night and the Shellys' animus was directed at Malcom Jackson due to the fight that morning. The State contends that the jury could conclude from the separate motivations that there were separate agreements. In addition, the State argues that the manner of the killings is important because Defendant focused his shots on Andre Jackson and the Shellys focused on Malcom Jackson, evidenced by the varying shotgun and handgun wounds.

However, our careful review of the record, in light of the factors that we must consider, reveals the following pertinent facts: (a) the time interval was relatively short, since all of the pertinent events occurred within twenty-four hours; (b) the number of participants (three) remained constant throughout the incident; (c) there seemed to be only one objective, to kill the Jackson brothers; and (d) while the number of meetings between Defendant and the Shelly brothers

is not entirely clear from the record, the most logical inference points to only one continuous meeting since Defendant and the Shellys were together almost all of the afternoon following Lamont Shelly's call to Defendant, up to the time of the killings. *See State v. Dalton*, 122 N.C. App. 666, 471 S.E.2d 657 (1996).

On this evidence, we hold that the State did not present substantial evidence that Defendant entered into two separate conspiracies to commit first-degree murder. Therefore, it was error for the trial court to deny Defendant's motion to dismiss one of the conspiracy charges, and only one conspiracy conviction can stand. Accordingly, we arrest judgment as to the second conspiracy charge.

[4] By his fourth and final assignment of error, Defendant argues that the trial court erred by admitting the expert testimony of SBI Agent Chuck McClelland regarding gunshot residue testing conducted on Rodney Wilkerson based on a report that was not prepared by Agent McClelland. Defendant relies on the decision of the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), to support his position that admission of McClelland's testimony violated Defendant's Sixth Amendment guarantee to confront the witnesses against him. For the following reasons, we hold that even if the evidence was erroneously admitted, its admission was harmless error beyond a reasonable doubt.

The State's investigation of the shooting deaths of the Jackson brothers included collection of a gunshot residue kit from the Jacksons' friend, Rodney Wilkerson. This part of the investigation was prompted by defense allegations that Wilkerson took a gun belonging to one of the Jacksons away from the scene of the shooting. At the SBI Laboratory, SBI analyst Ken Culbreth performed the analysis of the test data at a time when Agent McClelland was not present. Agent Culbreth, who had retired after thirty years with the SBI and was not called by the State to testify, prepared a report of his findings, which included his opinion of whether gunshot residue was present on Wilkerson's hands.

At trial, Agent McClelland, an eighteen-year veteran of the SBI's Trace Evidence Section, was found by the court to be an expert in forensic chemistry. He testified that he and Agent Culbreth were senior chemists in the SBI Lab for analysis of gunshot residue. He explained the procedures for performing the analysis of a gunshot residue kit, the equipment used in the analysis, and the methods used

for assessing and recording the data thereby obtained. In this case, he said he personally examined the printout from the equipment used by Agent Culbreth to conduct the testing, he compared that data to Agent Culbreth's notes, and he then signed off on the final report. His actions in these respects were mandated by his employer's quality assurance requirements. After reviewing the results of Agent Culbreth's testing, Agent McClelland concluded that there was either no gunshot residue detected on Wilkerson's hands or only very trace, insignificant amounts were present. He further offered his opinion, based on his review and analysis of the test data, that gunshot residue was not present in significant concentrations on Wilkerson's hands. He was then permitted to read into evidence Agent Culbreth's identical opinion from the written report.

Under *Crawford*, "the determinative question with respect to confrontation analysis is whether the challenged hearsay statement is testimonial." *State v. Lewis*, 360 N.C. 1, 14, 619 S.E.2d 830, 839 (2005). The *Lewis* Court, relying on its decisions in *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (2004), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005), and *State v. Morgan*, 359 N.C. 131, 604 S.E.2d 886 (2004), *cert. denied*, —— U.S. ——, 163 L. Ed. 2d 79 (2005), as well as *Crawford*, provided a comprehensive analysis of how to determine whether evidence is testimonial in nature, in an effort to guide our trial courts and litigants. The *Lewis* Court first noted that, under *Crawford*, the term "testimonial," at a minimum, "applies to 'prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*.' " *Lewis*, 360 N.C. at 15, 619 S.E.2d at 839 (citations omitted). In our opinion, Agent McClelland's testimony does not fit into any of these classifications, and therefore, we do not discuss the application of the *Crawford* test to his testimony on any of these grounds.

Rather, with respect to the issue as raised by the case before us, we find instructive the *Lewis* Court's discussion of testimonial statements in the context of an examination of the declarant's state of mind. Based on a "comprehensive survey of other jurisdictions," *Lewis* agreed that testimonial statements "share a common characteristic: The declarant's knowledge, expectation, or intent that his or her statements will be used at a subsequent trial." *Id.* at 21, 619 S.E.2d at 843. The Court then specifically held that an additional test for determining whether evidence is testimonial is "considering the surrounding circumstances, whether 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. This determination is to be measured by an objective, not subjective, standard." *Id.*

In response to Defendant's *Crawford* argument, the State argues that, under the circumstances surrounding Agent McClelland's testimony, the issue has been decided by the decision of this Court in *State v. Delaney*, 171 N.C. App. 141, 613 S.E.2d 699 (2005), and that we are bound by that decision. *Delaney* addressed and resolved the *Crawford* argument on facts substantially similar to the facts at issue in this case, and we agree with the State that, even though *Delaney* was filed more than three months before our Supreme Court's decision in *State v. Lewis*, the *Delaney* holding does not conflict with the *Lewis* decision on the particular issue raised in *Delaney* and in the case now before us.

In *Delaney*, an SBI agent testifying as an expert in the analysis of controlled substances offered his opinion as to the identity of substances taken from the defendant's property based on testing conducted by an SBI colleague who was not called to testify. Recognizing the well-settled law that an expert may base an opinion on tests performed by others in the field, and noting that the defendant was allowed the opportunity to cross-examine the testifying agent regarding his opinions, this Court concluded that allowing the expert to testify did not violate the defendant's confrontation rights under the *Crawford* rationale. "The admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination." Delaney, 171 N.C. App. at 141, 613 S.E.2d at 700 (quotations omitted). This particular issue was not present in *Lewis*. Thus, as to Agent McClelland's testimony regarding the opinions he formed from his review of the test data, including his review of the report prepared by Agent Culbreth, we find nothing in the rationale or holding of *Lewis* that would compel a different result now from the result in *Delaney*.

As for the admission of Agent Culbreth's report and the testimony of Agent McClelland stating Agent Culbreth's opinion as contained in that report on the results of the gunshot residue testing, we likewise are not persuaded that *Crawford* or *Lewis* prevents the admission of such evidence through the testifying expert. *See, e.g.*, *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988). But, even if *Crawford* and its progeny now compel exclusion of this portion of Agent McClelland's testimony, such that it was error for the trial court to admit the writ-

ten report and the testimony of Agent McClelland regarding Agent Culbreth's opinion, such error was manifestly harmless beyond a reasonable doubt.[1]

As noted above, the gunshot residue testing was performed only on Rodney Wilkerson and only because Defendant asserted that Wilkerson may have taken a gun belonging to or being used by one of the victims away from the scene when he fled at the outset of the shootings. Obviously, the absence of gunshot residue on Wilkerson's hands would tend to establish that Defendant's allegations were unfounded. On direct examination of Agent McClelland about Agent Culbreth's opinions, however, the following exchange occurred:

> Q. Okay. Is that the report which shows the conclusion of Mr. Culbreth based upon his examination of the underlying data in this case?
>
> A. Yes, sir.
>
> . . . .
>
> Q. What does his report conclude?
>
> A. "Barium, antimony and lead indicative of gunshot residue were not present in significant concentrations on the handwipings submitted. *It is to be noted, however, that this does not eliminate the possibility that the subject could have fired a gun.*"

(Emphasis added). Agent McClelland then testified that he formed the same opinions independently of Agent Culbreth's opinions. Defense counsel found the emphasized sentence from Agent Culbreth's report so significant that, on cross-examination of Agent McClelland, he asked the agent to read it again "slowly and loudly." He then elicited the following testimony from Agent McClelland:

> It means that I could not . . . or Agent Culbreth could not say that [Wilkerson] did not fire a weapon because we don't know what he did or what activities he did after the weapon was discharged . . . [I]f someone was to wash their hands, they would completely remove the gunshot residue[.]

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1. We distinguish the cases of *State v. Cao*, 175 N.C. App. 434, 626 S.E.2d 301 (2006), and *State v. Melton*, 175 N.C. App. 733, 625 S.E.2d 609 (2006), since the witnesses who testified in those cases and through whom the lab reports in question were admitted were not testifying as experts per Rule 703, unlike the instant case.

This evidence defeats Defendant's argument on appeal that the testimony of Agent McClelland made it less likely that the jury would accept Defendant's theory that Malcom Jackson had a gun or that Wilkerson removed it from the scene. Simply put, the properly admitted independent opinion of Agent McClelland, as well as the opinion of Agent Culbreth as expressed in the written report he prepared, were equivocal on the question of whether Wilkerson could have handled a gun at or about the time of the slayings of Andre and Malcom Jackson.

The totality of the evidence in this case overwhelmingly establishes Defendant's guilt, and therefore, error, if any, in the admission of the SBI report and testimony about the non-testifying agent's opinions was harmless beyond a reasonable doubt. *See*, *e.g.*, *State v. Edwards*, 174 N.C. App. 490, 621 S.E.2d 333 (2005); *State v. Thompson*, 110 N.C. App. 217, 429 S.E.2d 590 (1993). Accordingly, we overrule Defendant's final assignment of error.

In conclusion, we hold that there is no error in Defendant's convictions on two counts of first-degree murder and one count of conspiracy to commit first-degree murder. We arrest judgment and vacate the conviction on the second count of conspiracy to commit first-degree murder.

Affirmed in part, vacated in part.

Chief Judge MARTIN and Judge WYNN concur.

HOLLY RIDGE ASSOCIATES, LLC, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES AND ITS DIVISION OF LAND RESOURCES; WILLIAM P. HOLMAN, IN HIS OFFICIAL CAPACITY; AND CHARLES H. GARDNER, IN HIS OFFICIAL CAPACITY, RESPONDENTS, AND NORTH CAROLINA SHELLFISH GROWERS ASSOCIATION AND NORTH CAROLINA COASTAL FEDERATION, INTERVENOR-RESPONDENTS

No. COA03-1686

(Filed 21 March 2006)

1. Administrative Law— intervention—direct interests of intervenors

An administrative law judge did not err by allowing the Shellfish Growers and the Coastal Federation to intervene in a contested case involving a monetary penalty for erosion and sedimentation violations. The intervenors' interests may be directly affected by the outcome of the case, and are separate from erosion penalties, because conclusive findings indicate that sedimentation affects the waters which their members visit and from which they take fish and shellfish. N.C.G.S. § 150B-23(d).

2. Administrative Law— contentions first raised in superior court—not properly brought forward

Contentions on appeal of an administrative law judge's decision that were first raised in the superior court brief were not properly brought forward.

3. Appeal and Error— no authority cited—argument abandoned

Arguments concerning an administrative law judge's handling of discovery were deemed abandoned where no authority was cited for the arguments.

4. Administrative Law— discovery responses supplemented—no surprise—no abuse of discretion

An administrative law judge did not err by allowing respondents to supplement discovery responses four days prior to trial and then denying a motion for a continuance. The applicable statute and rules gave authority for the action, and there was no abuse of discretion. Respondent was not asserting a new theory that unfairly surprised petitioner.

5. Administrative Law— joint presentation of case—stipulation and participation without objection

Petitioner waived any objection to respondent and intervenors making a joint presentation of their case through a stipulation and by participating in the hearing for three days without complaint.

6. Administrative Law— evidentiary standard—substantial evidence—greater weight of evidence—no conflict

There is no conflict between the application of an evidentiary standard requiring that a decision be based on substantial evidence and a requirement that a party must persuade the fact-finder by the greater weight of the evidence. Although petitioner here argues that the ALJ improperly applied the "substantial evidence" standard, the ALJ considered and carefully weighed the evidence.

7. Administrative Law— burden of proof—agency action outside authority

Unless a statute provides otherwise, the petitioner has the burden of proof in OAH contested cases. Although the petitioner here argues that N.C.G.S. § 113A-64(a)(1) allocates the burden of proof in this case to respondent, petitioner's contention that the Sedimentation Pollution Control Act was inapplicable on its site falls under its burden of showing that an agency acted outside its authority.

8. Environmental Law— sedimentation and erosion—forestry exemption

The forestry exemption in the Sedimentation Pollution Control Act applies, on its face, to activities specifically undertaken for the production and harvesting of timber and timber products, not to drainage activities for other purposes. A superior court conclusion that activities to generally improve drainage do not qualify for the exemption was not error.

9. Administrative Law— agency memoranda—not enforceable as rules—substantial compliance

An administrative law judge did not err by concluding that respondent was not required to follow interagency memoranda on forestry operations where the memoranda described internal agency procedures, were not enforceable as rules, and were substantially complied with.

Judge JACKSON dissenting.

Appeal by petitioner from order entered 5 September 2003 by Judge Benjamin G. Alford in Superior Court in New Hanover County. Heard in the Court of Appeals 21 March 2005.

Attorney General Roy Cooper, by Senior Deputy Attorney General James C. Gulick and Assistant Attorney General Margaret P. Eagles, for respondent-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by George W. House, and Hunton & Williams, by Craig A. Bromby, for petitioner-appellant.

Southern Environmental Law Center, by Donnell Van Noppen, III, and Amy Pickle, for intervenor-respondent-appellees.

HUDSON, Judge.

On 5 March 2000, the Department of Environment and Natural Resources ("DENR") assessed a civil penalty against petitioner Holly Ridge Associates ("HRA") for an alleged violation of the Sedimentation Pollution Control Act ("SPCA"), N.C. Gen. Stat. § 113A-50 *et seq.* (1999). HRA disputed the penalty and filed a contested case petition on 3 April 2000. In October 2000, the North Carolina Shellfish Growers Association ("Shellfish Growers") and the North Carolina Coastal Federation ("Coastal Federation") moved to intervene. In November 2000, the Administrative Law Judge ("ALJ") granted the motion to intervene, over HRA's objection. On 20 December 2001, the ALJ affirmed a reduced penalty and on 29 April 2002, DENR adopted the ALJ's recommended decision as its final agency decision. HRA appealed in Superior Court in New Hanover County. On 5 September 2003, the court affirmed DENR's final agency decision. HRA appeals. For the reasons discussed below, we affirm.

This case involves 1262 acres of land in Onslow County owned by HRA ("the tract"). The tract fronts on and adjoins the Atlantic Intracoastal Waterway ("AIWW") near Stump Sound. The tract drains directly to the AIWW and to Cypress Branch, a stream that forms the southern boundary of much of the tract. Cypress Branch, a perennial stream and tributary of Batts Mill Creek, flows into the AIWW. The tract, which is located on the mainland across the AIWW and Stump Sound from the resort community of Topsail Island, is largely forested and contains substantial wetlands acreage.

During the 1950's, Edgar Yow assembled the tract and owned a 50% interest, with the remaining interest divided equally between two

other individuals. During the 1960's and 70's, the owners constructed a lake on the property and converted some of the agricultural fields to forest. Small stands of timber were cut, some to clear land for the lake, and proceeds from the timber harvesting were used to pay for the lake and dam construction, as well as for property taxes and other expenses associated with owning the land.

In 1983, Westminster Company, a Weyerhauser subsidiary devoted to developing residential subdivisions, purchased the tract. In 1986, Lionel Yow (Edgar Yow's son), Henry E. Miller, Jr., and Weyerhauser entered into a joint venture agreement to acquire the tract and "maintain[], operat[e], and develop[] thereon a resort residential community." The joint venturers formed HRA, a partnership, "to acquire, manage, maintain and develop" the tract. In 1986, HRA had development layouts prepared for the tract, depicting potential residential and recreational development of the entire tract. HRA used the layouts as a sales tool with prospective buyers. Mr. Yow participated in numerous other development projects in nearby coastal communities during the late 1980's and early 1990's. In 1995, he requested that an engineering firm send copies of the 1986 development drawings to a potential buyer. In 1996, Hurricanes Bertha and Fran struck the North Carolina coast in the vicinity of the tract, damaging timber and washing out unpaved roads on the property. At the suggestion of Corbett Lumber Company, HRA engaged Corbett to remove damaged timber from the tract in 1997.

In May 1997, HRA hired regulatory and environmental consultants to plan and execute a ditch excavation project. Neither consultant had any forestry experience and did not provide clients with advice or expertise concerning timber management. By November 1998, the tract had 17 major ditches or systems of ditches, comprising approximately 8 miles over a 34-acre area.

In February 1999, after receiving a report of potential violations from the North Carolina Division of Water Quality, two Division of Land Resources ("DLR") employees inspected the tract. They found numerous violations of the SPCA, including inadequate erosion control devices for the steep ditches. On 3 March 1999, DENR issued a notice of violation of the SPCA. The NOV specified corrective actions necessary to bring the tract into compliance and warned that civil penalties could be assessed if the violations were not corrected within 30 days. On 23 April 1999, DLR returned to the site for a follow-up inspection and observed the same violations as before. DENR issued a notice of continuing violations on 28 April 1999. On 9 July

1999, having still received no submission of the required and previously requested erosion and sedimentation control plan, and having received no notice from HRA that the other violations had been corrected, DENR assessed a penalty of $32,100 for the following violations: failure to submit an erosion and sedimentation control plan for the project, failure to take reasonable measures to protect from damage by land-disturbing activities (not taking measures to control erosion and retain sediment), exposed slopes too steep to maintain ground cover and without other adequate erosion control devices, and failure within fifteen days of grading to have ground cover or other sufficient erosion control devices.

Thereafter, HRA submitted an erosion and sedimentation control plan which was ultimately disapproved due to deficiencies. On 10 November 1999, after another inspection, DENR sent HRA a notice of additional violations, which described new, as well as continuing, violations. After another inspection, DENR sent HRA a notice of continuing violations on 5 January 2000, as the earlier violations had not been corrected. On 5 March 2000, DENR assessed further civil penalties totaling $118,000 for violations of the SPCA. In its contested case petition, HRA claimed that its activities were exempt from the SPCA pursuant to a forestry exception. N.C. Gen. Stat. § 113A-52.01 (1999). Before, during and after the excavation and agency enforcement process, HRA had not claimed that the ditching was being carried out for forestry purposes; it made this assertion for the first time in its petition for contested case hearing.

The North Carolina Administrative Procedure Act ("APA") applies to this case. *See, e.g., Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). Because the petition in this case was filed in April 2000, and the subsequent amendments to the APA apply only to cases commenced on or after 1 January 2001, the "old" APA governs review of this case. 2000 Sess. Law 190, Section 14.

On review of a trial court's order affirming a decision by an administrative agency, our scope of review is the same as it is for other civil cases. *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 899 (1988). We must examine the trial court's order for error of law and determine whether the trial court exercised the appropriate scope of review and whether the trial court properly applied this standard. *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994).

The nature of the error asserted determines the appropriate manner of review; where appellant contends legal error in the agency's decision, the trial court must review *de novo*. *Dillingham v. N.C. Dep't of Human Resources*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999). If the appeal questions whether the agency's decision was supported by the evidence, was arbitrary and capricious or was the result of an abuse of discretion, the reviewing court must apply the "whole record" test. *Id.* "The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "The 'whole record' test does not allow the reviewing court to replace the [agency]'s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

[1] HRA first argues that it was legal error for the ALJ to allow the Shellfish Growers and the Coastal Federation to intervene. We disagree.

As HRA contends legal error, we conclude that the superior court correctly chose to apply a *de novo* standard of review. Thus, we must determine whether the court did so properly. HRA argues that there are three requirements for intervening as a party here: standing, Office of Administrative Hearings ("OAH") Rule 3.0117, and Civil Procedure Rule 24. As our legislature has provided explicit statutory provisions governing intervention in a contested case petition, we conclude that this case must be analyzed pursuant to these provisions, rather than under the more general rules governing civil procedure. "The Rules of Civil Procedure as contained in G.S. 1A-1 . . . shall apply in contested cases in the Office of Administrative Hearings (OAH) *unless another specific statute or rule of the Office of Administrative Hearings provides otherwise*." 26 N.C.A.C. 3.0101 () (emphasis added). N.C. Gen. Stat. § 150B-23(d) (1999) governs intervention in a contested case petition:

> Any person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24. In addi-

> tion, *any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.*

Id. The N.C. Supreme Court has interpreted N.C. Gen. Stat. § 150B- 23(d) as granting "discretionary intervention [] without limitation . . . and . . . provid[ing] intervention broader than the permissive intervention under Rule 24." *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 460, 468, 269 S.E.2d 538, 543 (1980).

HRA propounds a strained interpretation of N.C. Gen. Stat. § 150B-23(d), asserting that the first and second sentences of the statute should be read separately and that the discretion of the second sentence applies only to persons intervening with rights less than those of non-parties, but not to persons who intervene as a "party" under the first sentence. Here, intervenors were granted intervention as parties. HRA contends that those intervening as parties, under the first sentence of the statute, are subject to the all of the requirements of Rule 24. We find nothing in the plain language of the statute to suggest that our legislature intended such a reading. Although the first sentence mentions Rule 24, it states only that parties must file "in the manner" of Rule 24, which plainly refers to procedural, not substantive, requirements. As the Court did in *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, we conclude that the plain language of § 150B-23(d) gives OAH broad discretion to allow intervention.

However, while discretionary intervention under section 150B-23(d) is broader than that under Rule 24, OAH Rule 3.0117 imposes requirements for intervention in contested cases similar to those in Rule 24, including the following provisions:

> (a) Any person not named in the notice of hearing who desires to intervene in a contested case as a party shall file a timely motion to intervene and shall serve the motion upon all existing parties. Timeliness will be determined by the administrative law judge in each case based on circumstances at the time of filing. The motion *shall show how the movant's rights, duties, or privileges may be determined or affected by the contested case; shall show how the movant may be directly affected by the outcome . . .*
>
> (d) The administrative law judge *shall allow intervention upon a proper showing under this Rule, unless the administrative law judge finds that the movant's interest is adequately represented by one or more parties participating in the case . . .*

26 N.C.A.C. 3.0117 (1999) (emphasis added). HRA asserts that intervenors' interests are no more than "an interest common to all persons," and are not separate from the interests of DENR. HRA also argues that intervenors have no interest in a civil penalty assessment against it. But as HRA claimed exemption from the erosion control requirements of the SPCA in its contested case petition, the issue of whether HRA would be exempt from SPCA was also at issue here. Indeed, in their motion to intervene, intervenors stressed that the important issue to them was whether HRA would qualify for the forestry exemption of the SPCA. The superior court found that the following findings made in the recommended decision adequately described the intervening parties:

> 3. The Respondent-Intervenor North Carolina Shellfish Growers Association ("NCSGA") is a private, non-profit association founded in 1995 to represent the interests of the many North Carolinians involved in the shellfish industry. NSCGA has 82 members who include shellfish farmers, hatchery operators, seafood dealers, educators and researchers. *Members of NCSGA own and maintain shellfish production leases in Stump Sound and surrounding coastal waters, including in the vicinity of the Holly Ridge tract. Jim Swartzenberg, President of NCSGA, along with his wife, Bonnie, leases 37 acres of waters in Stump Sound for oyster production and assists in management and production of oysters from over 100 additional acres in Stump Sound.* (Affidavit of Jim Swartzenberg, submitted with Motion to Intervene). NCSGA is a plaintiff in a federal lawsuit against HRA arising out of the same facts and circumstances as this matter.
>
> 4. Respondent-Intervenor North Carolina Coastal Federation is a non-profit tax-exempt organization dedicated to the promotion of better stewardship of coastal resources. The Coastal Federation was founded in 1982 and *has approximately 5,000 members who live near, shellfish or fish in, or regularly visit, Stump Sound and nearby coastal waters.* The Coastal Federation has worked to protect water quality in Stump Sound and in the vicinity of the Holly Ridge tract and has investigated, documented, publicized, and sought government enforcement of violations of state and federal sedimentation, stormwater, water quality, and wetlands laws in connection with ditch excavation which occurred in southeastern North Carolina during 1998 and 1999, including at the Morris Landing tract. (Affidavit of Todd Miller).

(emphasis added). These findings, and the superior court's decision to adopt them, were not challenged on appeal and thus are conclusive. *Walker v. N.C. Dep't of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *cert. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). Furthermore, in his affidavit which was submitted with the motion to intervene, Jim Swartzenberg, president of Shellfish Growers, stated the following:

> 10. Ditching and draining of tracts of land located in close proximity to shellfish waters can, if sediment controls are not fully implemented, result in excessive turbidity and sediment being transported by surface water and stormwater to shellfish waters, jeopardizing those waters and causing the waters to be closed to the taking of shellfish for human consumption. Additionally, the silting-in of the oyster beds can lead to mortality of planted oysters prior to their reaching market size. Waters that contain excessive silt can also affect the propagation of oysters and interfere with the natural spatfall causing a reduction of naturally set oysters. (Spatfall is the process by which the young oyster attaches itself to stable substances on the bottom). Reduction of spatfall can have a devastating effect on the production of lease-raised oysters because leaseholders regularly plant cultch (oyster shells and marl) to recruit wild spat into their leases. Similarly, inadequately controlled stormwater runoff from ditched and drained coastal properties can transmit excessive levels of fecal coliform bacteria to shellfishing waters, resulting in closure of those waters.
>
> 11. Stump Sound select oysters raised in shellfish leases in the vicinity of the Holly Ridge tract traditionally command a premium price because of their superior fullness and flavor.

Accordingly, we conclude that intervenors' interests may be directly affected by the outcome of the contested case here. We further conclude that intervenors' interests in having the SPCA erosion requirements apply to HRA are separate from the penalties assessed against HRA by DENR.

In *Empire Power Co. v. N.C. Dep't of Env't & Natural Resources*, the North Carolina Supreme Court held that the types of economic and environmental interests asserted by intervenors are legally protectable. 337 N.C. 569, 447 S.E.2d 768 (1994). In *Empire Power*, the Court addressed whether an adjacent property owner was a "person

aggrieved," and thus entitled to a hearing, after the State awarded an air pollution control permit to the respondent utility company. *Id.* The state agency argued that only the permit applicant or permittee was entitled to a contested hearing. *Id.* The Court held that the APA conferred upon any "person aggrieved" the right to commence an administrative hearing involving the person's rights, duties, or privileges. *Id.* at 584, 447 S.E.2d at 777. The Court held that an adjacent property owner was an aggrieved person because he and his family would suffer injury to their health, their property, and their quality of life if the permit were granted. *Id.* at 589, 447 S.E.2d at 780. Here, intervenors need not meet the standard of a "person aggrieved" in order to intervene, but *Empire Power* is instructive regarding the types of economic and environmental interests parties may seek to protect in a contested case. If HRA were exempted from SPCA, the intervenors would suffer injury to their property, livelihoods, and quality of life similar to that asserted by the petitioner in *Empire Power*.

HRA mistakenly relies on *Neuse River Found., Inc., v. Smithfield Foods, Inc.* to support its contention that intervenors' interests are generalized and legally unprotected. 155 N.C. App. 110, 574 S.E.2d 48 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). The plaintiffs in *Neuse River* alleged public nuisance violations and sought damages to be paid into a court-ordered trust for the restoration of public waters. *Id.* This Court held that the plaintiff river associations lacked standing because none of them alleged injury to "particular" and "important personal rights" that cannot be considered merged in the general public right." *Id.* at 116, 574 S.E.2d at 53. However, because *Neuse River* did not involve the APA or intervention in a contested case, but rather addressed standing in a common law public nuisance action seeking damages, we conclude that *Neuse River* is inapposite. Moreover, under the facts here, we conclude that intervenors' interests in the waters affected by HRA's discharge activities are discrete and particular to certain members of the intervenor organizations, who live near, or who visit, fish or shellfish in the affected waters, and are not merely a generalized public interest.

[2] In its brief, HRA also argues that the intervenors did not show that their interests would be inadequately represented by DENR. However, HRA first raised this argument in its superior court brief and has thus failed to properly bring forward this objection. *Nantz v. Employment Sec. Com.*, 28 N.C. App. 626, 630, 222 S.E.2d 474, 477,

aff'd, 290 N.C. 473, 226 S.E.2d 340 (1976). Accordingly, we do not address this argument.

[3] HRA makes several arguments regarding the ALJ's grant of discovery rights to the intervenors. They assert that the ALJ erred by reopening discovery, by allowing respondents to serve supplemental discovery responses, and by allowing respondents and intervenors to present evidence jointly, and that the superior court erred in affirming these decisions. We disagree.

Although HRA devotes several pages in its brief to arguing that the ALJ's decision to reopen discovery was error, it fails to cite any authority for this argument. Thus, this argument is deemed abandoned. N.C. R. App. P. 28(b)(5) (2005).

[4] HRA argues next in its brief that the ALJ's decision to allow respondents to supplement their discovery responses four days prior to trial, and his subsequent denial of its motion for continuance, were arbitrary and capricious and legal error. The Superior Court thus reviewed these issues *de novo* and under the whole record test. "[O]rders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 595, 551 S.E.2d 873, 877 (2001). *See also Rose v. Isenhour Brick & Tile Co.*, 120 N.C. App. 235, 241, 461 S.E.2d 782, 786 (1995) (holding that trial court did not abuse its discretion in failing to impose sanctions, even though sanctions for discovery abuse would be supported). Similarly, "a motion to continue is addressed to the sound discretion of the trial judge." *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976).

DENR initially served its responses to HRA's discovery on 18 August 2000. Then, on 25 July 2001, four business days before the scheduled hearing, DENR delivered supplemental discovery responses, including designation of two witnesses and 102 pages of documents. The new witnesses were both employees of DENR's Division of Forest Resources ("DFR") and the documents were related to their involvement in evaluating the tract. HRA asserts that the ALJ should not have allowed respondents to submit this supplemental discovery because it was untimely. N.C. Gen. Stat. § 150B-33 gives an ALJ power to rule on all objections to discovery and to "regulate the course of the hearing, including discovery." N.C. Gen. Stat. § 150B-33(b)(3)&(4) (1999). The OAH rule governing discovery provides that:

> (e) All discovery shall be completed *no later than the first day of the contested case hearing*. An administrative law judge *may shorten or lengthen the period for discovery* and adjust hearing dates accordingly and, when necessary, *allow discovery during the pendency of the contested case hearing*.

26 N.C.A.C. 3.0112 (emphasis added). Thus, under the applicable statute and rules, we conclude that the ALJ had express authority to allow respondents to supplement discovery four days prior to the hearing and did not abuse his discretion.

In support of its argument that the ALJ erred in allowing supplementation, HRA cites *Bumgarner v. Reneau*, 332 N.C. 624, 422 S.E.2d 686 (1992). However, *Bumgarner* involved very different facts and, to the extent that it is relevant here, we conclude that it actually supports the ALJ's actions. In *Bumgarner*, a party attempted to present evidence at trial that it had failed to provide in its response to the opposing party's discovery request. *Id.* at 627, 422 S.E.2d at 688. The Court in *Bumgarner* held that the trial court did not abuse its discretion when it refused to admit this evidence as a sanction for the discovery violation, pursuant to N.C. R. Civ. P. 37. *Id.* at 633, 422 S.E.2d at 691. Although HRA has not argued in its brief that the ALJ abused his discretion in failing to sanction respondents, it did move for exclusion pursuant to Rule 37 in its motion *in limine*. However, *Bumgarner* supports the well-established law that matters of discovery, including how to treat violations, are within the sound discretion of the trial court.

HRA also asserts that DENR's late supplementation changed the case and left it unprepared, thus entitling it to a continuance "as a matter of right." In a contested case hearing,

> [r]equests for a continuance of a hearing shall be granted upon a showing of good cause. . . . In determining whether good cause exists, due regard shall be given to the ability of the party requesting a continuance to proceed effectively without a continuance.

26 N.C.A.C. 3.0118 (2005). This rule, like the civil procedure rule on continuances (N.C. R. Civ. P. 40(b)), "wisely makes no attempt to enumerate them but leaves it to the judge to determine, in each case, whether 'good cause' for a continuance has been shown." *Shankle*, 289 N.C. at 483, 223 S.E.2d at 386. "In passing on the motion the trial court must pass on the grounds urged in support of it, and . . . should consider all the facts in evidence, and not act on its own mental impression or facts outside the record." *Id.*

Here, in his order, the ALJ stated that he was ruling, "[i]n the interests of justice, after considering arguments of counsel in this matter regarding Petitioner's Motion *in Limine*." The ALJ then limited the testimony of DENR's new witnesses to rebuttal only. Furthermore, one of the two "new" witnesses had already been identified by DENR in its May 2000 prehearing statement. Petitioner, through counsel and a consultant, had met with the other new witness over a year prior to trial, and petitioner's counsel met with both of the witnesses 9 months prior to trial during a site visit made by DFR. As mentioned, DENR submitted its supplemental response four days prior to the trial. But there were ten days between the supplementation and the presentation of HRA's case. Then, as the hearing was continued, there were 52 days between the supplementation and the testimony of the DFR witnesses. We conclude that there was no abuse of discretion here.

HRA cites *Green v. Maness* in support of its argument that it was entitled to a continuance "as a matter of right." 69 N.C. App. 292, 294, 316 S.E.2d 917, 919, *disc. rev. denied*, 312 N.C. 622, 323 S.E.2d 922 (1984). In *Green*, a complex medical malpractice case, shortly before trial the defendant met with a new medical expert who agreed to testify. *Id.* at 295-96, 316 S.E.2d at 919-20. The new expert presented a new defense theory, that plaintiff child's defect was caused by a preexisting condition or congenital abnormalities rather than trauma during birth, which would negate any negligence by defendant obstetrician. *Id.* Then, at trial, the new expert presented yet another new defense theory. *Id.* at 297, 316 S.E.2d at 920. Under these particular circumstances, the Court held that the trial court erred in not granting a continuance because the new defense theory resulted in unfair surprise to plaintiff. *Id.* at 299, 316 S.E.2d at 921. We conclude that as HRA asserted that it was exempt from the SPCA because of forestry practices, and there was a history of DFR's involvement in investigating HRA's claims, of which HRA was aware, DENR did not present a new theory which unfairly surprised HRA.

[5] HRA also contends that the ALJ improperly permitted intervenors to present evidence jointly with DENR because the ALJ thus improperly considered evidence admitted through the testimony of witnesses called by the intervenors in determining whether respondents met their burden of proof. HRA asserts that this was both an error of law, and arbitrary and capricious. Accordingly, the superior court reviewed the issue regarding the burden of proof *de novo* and the question of the arbitrariness and capriciousness of the ALJ's reg-

ulation of the course of the hearing under the whole record test. Our review of the law and the record indicates that the superior court correctly affirmed.

Here, the parties attended a pretrial conference pursuant to OAH Rule 3.0108, and stipulated that "Respondent and Respondent-Intervenors shall present evidence first." Another paragraph in the pretrial order, regarding witnesses, states that, "Respondent and Respondent-Intervenors will call witnesses jointly." On appeal, HRA contends that they only stipulated that both parties would be permitted to introduce evidence. However, the pretrial order was signed by all parties after the first day of trial, when respondents and intervenors had already begun to present evidence jointly. Moreover, respondents' and intervenors' counsel stated at the outset of the hearing that they intended to put on a joint case. The transcript further reflects that the joint presentation of evidence proceeded for three days before HRA objected. Thus, we conclude that by stipulating to this procedure, and by participating in it for three days without complaint, HRA waived this objection.

[6] HRA also asserts that the ALJ and superior court improperly based their decisions on a "substantial evidence" standard and that the ALJ failed to weigh the evidence. We disagree.

We first conclude that the superior court here properly chose to review this matter *de novo*, as the standard of review or proof is a matter of law. We must now determine whether the superior court exercised this review correctly. The ALJ concluded that "[t]he applicable version of the Administrative Procedure Act directs that the decision in this contested case must be supported by substantial evidence," and that "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In the applicable version of the APA, a final agency decision "shall be supported by substantial evidence." N.C. Gen. Stat. § 150B-36(b) (1999). Thus, when the ALJ stated this as the law, it was a correct statement. HRA contends, though, that the ALJ improperly applied this substantial evidence standard of review rather than applying an appropriate standard of proof. It argues that the "substantial evidence" standard governs review of the *agency* decision, not the ALJ's, and that the ALJ was required to apply a weighing standard of proof. "Our Supreme Court has stated that the standard of proof in administrative matters is by the greater weight of the evidence." *Dillingham*, 132 N.C. App. at 712, 513 S.E.2d at 828. Nonetheless, we conclude that there is no conflict between the application of an evidentiary stand-

ard requiring that a decision be based on substantial evidence and a requirement that a party must persuade the fact-finder by the greater weight of the evidence. Furthermore, our careful review of the record reveals that the ALJ considered and carefully weighed the evidence, making unusually detailed findings of fact, specific credibility determinations, and addressing petitioner's contentions. Thus, we overrule this assignment of error.

[7] HRA next argues that the superior court erred in affirming the ALJ and Agency decisions because the burden of proof was improperly placed upon HRA, the statutory exemption for forestry activities was misread, and DENR was not required to adhere to its own interagency policies. We disagree.

The SPCA does not apply to "[a]ctivities undertaken on forestland for the production and harvesting of timber and timber products," as long as they are conducted in compliance with DENR best management practices. N.C. Gen. Stat. § 113A-52.01 (2) (1999). The ALJ required HRA to prove that this exception applied and HRA contends that this was legal error. The superior court thus properly reviewed this argument *de novo*. We conclude that it did so correctly.

HRA contends that N.C. Gen. Stat. § 113A-64(a)(1) (1999) allocates the burden of proof to DENR to prove both that the SPCA applies and that there was a violation. N.C. Gen. Stat. § 113A-64(a)(1) provides that:

> Any person who violates any of the provisions of this Article or any ordinance, rule, or order adopted or issued pursuant to this Article by the Commission or by a local government, or who initiates or continues a land-disturbing activity for which an erosion and sedimentation control plan is required except in accordance with the terms, conditions, and provisions of an approved plan, is subject to a civil penalty. The maximum civil penalty for a violation is five thousand dollars ($ 5,000). A civil penalty may be assessed from the date of the violation. Each day of a continuing violation shall constitute a separate violation.

Id. We find nothing here to support HRA's reading of this statute. To the contrary, our caselaw holds that unless a statute provides otherwise, petitioner has the burden of proof in OAH contested cases. *See, e.g., Peace v. Employment Sec. Comm'n*, 349 N.C. 315; 328, 507 S.E.2d 272, 281 (1998). Indeed, N.C. Gen. Stat. § 150B-23(a) (1999) requires that the petitioner

> 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.

Id. HRA's contention that the SPCA was inapplicable on its site falls under a petitioner's burden of showing that an agency acted outside its authority, pursuant to N.C. Gen. Stat. § 150B-23(a). Accordingly, we overrule this assignment of error.

[8] HRA argues next that the ALJ and superior court misinterpreted the SPCA forestry exemption. Because this involved a question of law, the Superior Court correctly reviewed it *de novo*. HRA challenges conclusion of law 15 of the recommended decision:

> In assessing whether land-disturbing activities undertaken on forestland were undertaken 'for the production and harvesting of timber and timber products,' the purposes for which the activities were conducted and the objective nature of those activities must be evaluated. The fact that a landowner may have a history of management activities and uses of the land involving timber production is not by itself determinative, nor is the fact that timber may have been cut in connection with the land-disturbing activities. Land-disturbing activities undertaken on forestland to prepare the property for development, to improve the marketability of the property for development, or *to generally improve drainage of the property are not activities which qualify for the SPCA's forestry exemption.*

(emphasis added). HRA contends that the italicized language above added a limitation to the exemption which is not supported by the statute, as the assertion that activities undertaken to "generally improve drainage," could refer to those undertaken to improve timber production and operations. We disagree. The SPCA forestry exemption, on its face, applies to activities specifically undertaken "for the production and harvesting of timber and timber products,"

not to drainage activities for other purposes, such as general improvement of drainage. N.C. Gen. Stat. § 113A-52.01(2) (1999). We overrule this assignment of error.

[9] Finally, HRA argues that the ALJ erred in concluding that DENR was not required to follow its written memoranda on forestry operations. HRA asserts that this was legal error. Accordingly, the Superior Court reviewed the matter *de novo*, and we conclude that it did so correctly.

DLR and DFR, both subdivisions of DENR, entered into Memoranda of Agreement in 1989 and 1992, in which they agreed to a joint approach in implementing the forestry exemption of the SPCA. DLR agreed to refer potential violations of forestry activity to DFR and DFR stated that it would attempt to mitigate and correct the problems with the responsible party and to take no further action if the violation was cured. HRA contends that these policies are rules, and that DENR was thus required to follow them. We disagree. N.C. Gen. Stat. § 150B-2 (1999) states that the following are *not* rules:

> a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department . . . including policies and procedures manuals if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
>
> * * *
>
> g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing . . . investigations, or inspections . . . or in the defense, prosecution, or settlement of cases.

Id. In addition, no agency pronouncement of any kind is valid and enforceable as a rule unless adopted in substantial compliance with the notice, comment, public hearing, and other requirements for adopting a rule under the APA. *See* N.C. Gen. Stat. § 150B-18 (1999); *American Guarantee & Liability Ins. Co. v. Ingram*, 32 N.C. App. 552, 555-56, 233 S.E.2d 398, 400, *disc. rev. denied* (1977).

Our review of the record reveals that the 1989 and 1992 interagency memoranda and the DFR policies are statements about how the two agencies intended to evaluate and investigate cases possibly involving the forestry exemption to the SPCA. They do not attempt to define statutory language, to impose additional obligations upon

landowners, or to alter the terms of the exemption in any way. Rather, they describe internal agency procedures for applying the forestry exemption, and, as such, are not rules. *See*, *e.g.*, *Ford v. State*, *Dep't of Crime Control & Pub. Safety*, 115 N.C. App. 556, 559, 445 S.E.2d 425, 427 (1994) (memorandum detailing guidelines for investigating and prosecuting violations of state law fell squarely within the meaning of N.C. Gen. Stat. § 150B-2 `(8a)(c) and (g), and was not a rule). Furthermore, it is undisputed that these documents were not promulgated as rules. Accordingly, they are not enforceable by HRA, or by the agencies, as rules. We overrule this assignment of error.

HRA also contends that even if the memoranda do not constitute rules, DENR's failure to follow them was arbitrary and capricious. The Superior Court correctly reviewed this argument under the whole record test and concluded that the ALJ and agency correctly decided that even though the memoranda did not constitute rules, the agencies substantially complied with the memoranda. Our review also indicates that the agency's conclusions regarding this matter are supported by substantial evidence of record.

For the reasons discussed above, we affirm.

Affirmed.

Chief Judge MARTIN concurs.

JACKSON, Judge, dissenting.

For the reasons stated below, I respectfully dissent from the majority opinion.

Initially, Petitioner argues that it was legal error for the Administrative Law Judge ("ALJ") to allow the North Carolina Shellfish Growers Association ("Shellfish Growers") and the North Carolina Coastal Federation ("Coastal Federation") to intervene in this matter. The majority has determined that this case must be analyzed pursuant to the legislature's explicit statutory provisions governing intervention in a contested case petition. *See supra*. Although I agree with the majority that it is appropriate to analyze this matter within the framework of a contested case petition, I believe that we must frame the issue even more narrowly, *i.e.*, whether it is appropriate to allow intervention in a contested case petition involving the imposition of a civil penalty.

Within the body of case law regarding contested case petitions, there is a wide array of actions by the State which might give right to such a petition. *Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs.*, 360 N.C. 156, 622 S.E.2d 621 (2005) (issuance of certificate of need); *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 620 S.E.2d 14 (2005) (state employment dispute); *Godfrey Lumber Co. v. Howard*, 151 N.C. App. 738, 566 S.E.2d 825 (2002) (revocation of stormwater permit); *Beaufort County Schools v. Roach*, 114 N.C. App. 330, 443 S.E.2d 339 (1994) (special education). In some instances, intervention by a third party may be appropriate and properly within the discretion of the ALJ. *See Empire Power Co. v. N.C. Dep't of E.H.N.R.*, 337 N.C. 569, 447 S.E.2d 768 (1994) (allowing air quality permit holder to intervene in contested case challenging state agency's issuance of permit); *Albemarle Mental Health Ctr. v. N.C. Dep't of Health & Human Servs.*, 159 N.C. App. 66, 582 S.E.2d 651 (2003) (Medicaid reimbursement appeal); *Mt. Olive Home Health Care Agency, Inc. v. N.C. Dep't of Human Resources*, 78 N.C. App. 224, 336 S.E.2d 625 (1985) (unsuccessful applicant for Certificate of Need permitted to intervene in contested case hearing). In the case of a state agency's imposition of a civil penalty, I believe that it is not. Further, my research has disclosed no case law in this State nor in any other state jurisdiction allowing intervention by a private individual or entity in a matter involving imposition of a civil penalty by a state. *But see Sanders et al. v. Pacific Gas and Electric Co.*, 53 Cal App. 3d 661 (1975) (allowing the *State* to intervene to pursue civil penalties in a superior court suit filed by private property owners). Moreover, in federal cases allowing for intervention by private entities, in most instances, the intervenors either have been precluded or voluntarily have chosen not to involve themselves in the claims involving the assessment of civil penalties. *U.S. v. Metropolitan St. Louis Sewer Dist.*, 883 F.2d 54, 55 (8th Cir. 1989) (intervenors complaint incorporated "all of the allegations set forth in the complaint filed by the United States, except those relating to the payment of civil penalties"); *U.S. v. City of Toledo*, 867 F. Supp. 595, 597 (N.D. Ohio 1994) ("a citizen-intervenor . . . can only seek remedies for ongoing violations of federal law and not civil penalties for past violations"); *but see U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 649 (M.D.N.C. 2003) (allowing intervenors to participate in action for civil penalty without challenge by defendant).

The legislature has delegated to the several executive branch agencies the authority to impose civil penalties for a variety of purposes. *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 509 S.E.2d 165

(1998) (violation of various pesticide regulations by aerial pesticide applicator); *O.S. Steel Erectors v. Brooks, Com'r of Labor*, 84 N.C. App. 630, 353 S.E.2d 869 (1987) (violation of Occupational Safety and Health regulations); *N.C. Private Protective Services Bd. v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E.2d 135 (1987) (failure to register unarmed guards and armed guards in accordance with Private Protective Services statutes and regulations). That delegation properly rests with an agency of the State, not with a private citizen or association. By allowing the Shellfish Growers and the Coastal Federation to intervene in this matter, the ALJ effectively deputized both entities with the authority of the State and enabled both of them to act as private prosecutors. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379, 379 S.E.2d 30, 34 (1989) ("Article IV, section 3 of the Constitution contemplates that discretionary judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purpose."); *State of North Carolina ex rel. Cobey v. Cook*, 118 N.C. App. 70, 74, 453 S.E.2d 553, 556 (1995) (State agency's "authority to issue a penalty is . . . reasonably necessary to the enforcement of" its statutes). I cannot believe that this was the legislature's intention in creating the various schemes for assessment of civil money penalties that flow throughout State government, more particularly, the Sedimentation Pollution Control Act, under which Petitioner was assessed. N.C. Gen. Stat. § 113A-50 *et seq.* Therefore, I would reverse the trial court. As I believe that Intervenors should not have been permitted to intervene in the first place, I do not address the remaining issues raised by Petitioner on appeal.

IN THE MATTER OF: J.L.B.M., JUVENILE

No. COA05-500

(Filed 21 March 2006)

1. Search and Seizure— stop of juvenile—generalized suspicion

A stop leading to the detention of a juvenile was not justified, and the juvenile's motion to suppress evidence seized as a result of the stop should have been granted, where the officer relied on a report that there was a suspicious person at a gas station, that the juvenile matched the "Hispanic male" description of the suspicious person, that the juvenile was wearing baggy clothes, and

that the juvenile chose to walk away from the patrol car. The officer had only a generalized suspicion of criminal behavior.

2. Firearms and Other Weapons— concealed box cutter— fruit of illegal seizure

A juvenile's motion to dismiss a charge of carrying a concealed weapon should have been dismissed where the only evidence of a concealed weapon was a box cutter obtained as the fruit of an illegal stop and the officer's testimony about the seizure of the box cutter.

3. Confessions and Incriminating Statements— custodial nature of confession not clear—remanded

The question of the sufficiency of the State's evidence of injury to real property was remanded where the evidence consisted of a can of spray paint that should have been suppressed as the fruit of an unreasonable stop, and the juvenile's confession in ambiguous circumstances. There is no question that the juvenile was thirteen years old and that there was no parent, guardian, custodian, or attorney at the questioning as required by N.C.G.S. § 7B-2101(b), and the issue is whether the admission was obtained during a custodial interrogation. There was no testimony and the trial court made no findings or conclusions on the issue.

4. Obstructing Justice— giving false name—sufficiency

There was sufficient evidence that a juvenile resisted, delayed, and obstructed an officer where the juvenile initially gave a false name. Although the stop was unreasonable and invalid, the facts are distinguishable from the cases concerned with resisting illegal arrests.

5. Arson— burning public building—setting off fireworks in police interview room

There was sufficient evidence to support a charge of burning a public building where a juvenile set off fireworks in an interview room at a police station. The willful and wanton element of the offense is supported by the juvenile's laughter while an officer tried to put out the fireworks, and the "setting fire" element is supported by the fireworks causing a flame two to three feet high which caused black markings on the floor and wall. Given the proximity of the fireworks to the wall and the resulting flame and damage, an intent to "set fire" can be inferred. N.C.G.S. § 14-59.

6. Juveniles— commitment order—maximum term omitted from written order

A juvenile commitment order was remanded for correction of a clerical error where the court orally found that the commitment could not exceed the juvenile's eighteenth birthday, but omitted the finding from the written order. N.C.G.S. § 7B-2513(a).

7. Juveniles— release pending appeal denied—compelling reason not stated—remanded

An order denying the release of a juvenile pending appeal which did not state compelling reasons was remanded for appropriate findings. N.C.G.S. § 7B-2605.

Appeal by juvenile from orders entered 2 September 2004 and 20 September 2004 by Judge Bradley R. Allen, Sr. in District Court, Alamance County. Heard in the Court of Appeals 23 January 2006.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for the State.

Anne Bleyman for juvenile-appellant.

McGEE, Judge.

J.L.B.M., a juvenile, appeals from orders adjudicating him delinquent, committing him to the Department of Juvenile Justice and Delinquency Prevention for an indefinite period of time, and denying his release from custody pending appeal. For the reasons set forth below, we (1) affirm the adjudication order in part, reverse in part, and remand in part for further findings; and (2) we vacate and remand the commitment order and the order denying release of the juvenile.

Juvenile petitions were filed on 14 July 2004 alleging that J.L.B.M. (the juvenile) was delinquent in that he committed the following acts: (1) set fire to, burned, or caused to be burned a government building in violation of N.C. Gen. Stat. § 14-59; (2) damaged real property in violation of N.C. Gen. Stat. § 14-127; (3) resisted, delayed, and obstructed an officer in violation of N.C. Gen. Stat. § 14-223; and (4) carried a concealed weapon in violation of N.C. Gen. Stat. § 14-269(a1).

Evidence at the hearing tended to show the following: While on patrol at approximately 6:00 p.m. on 6 July 2004, Officer D.H.

Henderson (Officer Henderson) responded to a police dispatch of a "suspicious person" at an Exxon gas station in Burlington, North Carolina. The only description given of the person was "Hispanic male." Officer Henderson saw a person in the gas station parking lot, later identified as the juvenile, who fit the description of the person. When the juvenile saw Officer Henderson, he walked over to a vehicle in the parking lot, spoke to someone, and then began walking away from Officer Henderson's patrol car. Officer Henderson pulled up beside the juvenile in an adjoining restaurant parking lot and stopped the juvenile. Upon getting out of the patrol car and speaking with the juvenile, Officer Henderson noticed a bulge in the juvenile's pocket. Officer Henderson patted down the juvenile for weapons. Officer Henderson found and seized a dark blue, half-empty spray can of paint and a box cutter with an open blade. In response to being asked his name, the juvenile replied, "Oscar Lopez."

Officer Henderson transported the juvenile to a nearby shopping center where graffiti had recently been sprayed. Officer Henderson testified that the graffiti, which was blue, read: "Sir 13, Mr. Puppet 213." Officer Henderson testified that the juvenile initially said that "Mr. Puppet" had done the graffiti, and that the juvenile later identified himself as "Mr. Puppet."

Officer Henderson drove the juvenile to the police station, again patted him down, and found fireworks in the juvenile's pocket. Officer Henderson let the juvenile keep the fireworks. The juvenile was placed in an interview room, where several officers questioned him about his name. The juvenile continued to give the name "Oscar Lopez." Officer Wendy P. Jordan (Officer Jordan) recognized the juvenile's face and called him by his real name, "J——." The juvenile replied, "[M]y name is J—— L— mother f—— M——. You found me out."

The juvenile was eventually left alone in the interview room with the door ajar. Officer R.V. Marsh (Officer Marsh) testified that he noticed the room "got real quiet," and he looked into the room. Officer Marsh saw the juvenile trying to light something with a lighter, then saw a two to three-foot flame come out of the floor and up the wall. Officer Jordan testified that she saw sparks flying. The fireworks left black soot on the floor and wall.

The juvenile presented no evidence. At the close of the hearing, the juvenile made a motion to dismiss, which was denied by the trial court. The trial court adjudicated the juvenile delinquent and entered

a disposition committing the juvenile to a period of indefinite commitment. The juvenile appeals.

The juvenile argues more than a dozen assignments of error on appeal, which we will discuss as four issues: whether the trial court erred by (I) denying the juvenile's motion to suppress evidence obtained during a search of the juvenile; (II) denying the juvenile's motion to dismiss each allegation; (III) failing to include a maximum term of commitment in the written order of commitment; and (IV) failing to state in writing the compelling reasons for denying the juvenile's release pending appeal.

We note that at the same time as the trial court entered its disposition order on the four offenses discussed herein, it revoked the juvenile's probation for three prior offenses. Arguably, the juvenile assigned error to this order, but failed to argue it in his brief. As such, it is deemed abandoned. N.C.R. App. P. 28(b)(6).

I.

[1] The juvenile first argues the trial court erred in denying his motion to suppress evidence obtained after the juvenile was stopped and searched by Officer Henderson. The juvenile contends there were insufficient grounds for stopping the juvenile, and therefore any evidence obtained as a result of the stop was inadmissible and should have been suppressed.

A trial court's findings of fact made after a suppression hearing are binding on the appellate courts if supported by competent evidence. *State v. Brooks*, 337 N.C. 132, 140, 446 S.E.2d 579, 585 (1994). A trial court's conclusions of law are reviewed *de novo* on appeal. *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001).

In the present case, the trial court made the following relevant findings of fact:

> that on or about July 6, 2004 . . . Officer Henderson, a 27 year veteran of the Burlington Police Dept. had received a call of a suspicious activity at Coy's Exxon on the corner of Graham-Hopedale Rd. and N. Church St. That location has had numerous calls for shoplifting[,] fights[,] and other activity. Also there is numerous gang and graffiti activity at that end of town. The call was for a suspicious person being a Hispanic male. The officer went specifically to that location and the juvenile matches the description of

being a Hispanic male[,] and[,] according to the officer's testimony, he was wearing gang attire, large baggy clothes.

We uphold the trial court's findings, with the exception of the finding that the dispatch call was about "suspicious activity," because Officer Henderson testified that the dispatch was about a "suspicious person" at the Exxon gas station. Officer Henderson testified as follows:

A [T]he [dispatch] call was a suspicious person at the [Exxon] station at the corner of Graham-Hopedale and Church Street.

. . . .

Q What time of the day or night was that?

A It was right before 6 o'clock p.m.

. . . .

A . . . I saw a person fitting [the] description in the parking lot at Coy's. When he saw me, he walked over to a vehicle in the parking lot, spoke to somebody and immediately began walking away. As I approached, [I] stopped him in the parking lot next door of Kentucky Fried Chicken.

Q Do you recall the description that you were given of that suspicious person?

A No, I do not, other than Hispanic male.

Officer Henderson continued his testimony during a *voir dire:*

Q Officer, at the time you got the call about suspicious activity [sic], was any criminal activity alleged?

A Not from what our dispatcher gave us, no.

Q Okay. And did you, up to the point where you stopped [the juvenile], did you ever see him committing any illegal act?

A No, sir.

Q Okay. And you, he was walking away from you, and you asked him to stop and patted him down?

A He looked in my direction and then turned and walked away. Yes, sir.

. . . .

Q And nothing [criminal] in particular with [regard to] [the juvenile] that you know of?

A Other than he was wearing gang attire.

Q What kind of attire was that?

A Large baggy clothes.

Q Is that it?

A I guess that's it.

The trial court further found there was a "reasonable, [articulable] suspicion that some criminal activity may have taken place" and distinguished the present case from *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992). Although labeled as findings, these determinations are actually conclusions of law, in that they require the exercise of judgment and application of legal principles. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). As such, they are reviewable *de novo* on appeal. *See Kincaid*, 147 N.C. App. at 97, 555 S.E.2d at 297.

The Fourth Amendment protects the right of individuals to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. This protection is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961). The right to be free from unreasonable searches and seizures applies to seizures of the person, including brief investigatory stops. *Terry v. Ohio*, 392 U.S. 1, 16-19, 20 L. Ed. 2d 889, 903-05 (1968). "An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). Whether an officer had a reasonable suspicion to make an investigatory stop is evaluated under the totality of the circumstances. *Id.* (citing *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

> The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by [the officer's] experience and training. The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch."

Id., 337 N.C. at 441-42, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)) (other citations omitted).

The juvenile argues that the facts of this case are analogous to those in *Fleming*. In *Fleming*, our Court held that a stop and frisk was unjustified where an officer relied solely on the fact that a defendant was standing in an open area between two apartment buildings shortly after midnight and chose to walk away from a group of officers. *Fleming*, 106 N.C. App. at 171, 415 S.E.2d at 785. From those facts, our Court held that the officer in *Fleming* had only a "generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer's knowledge that defendant was unfamiliar in the area." *Id.* The defendant's actions "were not sufficient to create a reasonable suspicion that [the] defendant was involved in criminal conduct, it being neither unusual nor suspicious that [the defendant] chose to walk in a direction which led away from [a] group of officers." *Fleming*, 106 N.C. App. at 170-71, 415 S.E.2d at 785.

In the present case, the dispatch did not allege that the "suspicious person" was engaged in any criminal activity. *Cf. In re Whitley*, 122 N.C. App. 290, 292, 468 S.E.2d 610, 612, *disc. review denied*, 344 N.C. 437, 476 S.E.2d 132 (1996) (holding that articulable facts sufficient to support a stop included a telephone call that two black males were selling drugs at a particular location, discovery of the juvenile at that location with another black male, and the juvenile's nervous body reflexes); *State v. Wilson*, 112 N.C. App. 777, 779, 437 S.E.2d 387, 388 (1993) (holding that an officer responding to a call that individuals were dealing drugs had more than a generalized suspicion); *State v. Cornelius*, 104 N.C. App. 583, 585-88, 410 S.E.2d 504, 506-08 (1991), *disc. review denied*, 331 N.C. 119, 414 S.E.2d 762 (1992) (holding that an officer had reasonable suspicion to justify an investigatory stop of an automobile where the officer received a dispatch that a black male in a black BMW with a temporary license tag was selling controlled substances, and the officer observed a person in an automobile fitting that description less than one minute later). Rather, the dispatch specified only that there was a suspicious person described as a Hispanic male. There was no approximate age, height, weight or other physical characteristics given as part of the description, nor was there a description of any specific clothing worn by the suspicious person. *Cf. State v. Lovin*, 339 N.C. 695, 703-04, 454 S.E.2d 229, 234 (1995) (holding circumstances supporting reasonable suspicion included a description of a suspicious person with "a 'lot of hair,' a

gold watch and large frame glasses"); *State v. Jordan*, 120 N.C. App. 364, 367-68, 462 S.E.2d 234, 237, *disc. rev*iew *denied*, 342 N.C. 416, 465 S.E.2d 546 (1995) (holding specific articulable facts sufficient to justify a stop included a description of the defendants' clothing).

Moreover, Officer Henderson did not observe the juvenile committing any criminal acts, nor had there been other reports of any criminal activity in the area that day. *Cf. State v. Thompson*, 296 N.C. 703, 707, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979) (holding circumstances supporting reasonable suspicion for an investigatory stop of occupants of a van included that the van was located near the vicinity where officers had reports earlier that evening of break-ins involving a van). Although the trial court found that police had received calls for shoplifting, fights, "and other activity" from the gas station, and that "that end of town" had gang and graffiti activity, the State offered no evidence of whether any past calls of shoplifting, fights, or other activity had led to any actual arrests. *Cf. State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (holding circumstances supporting reasonable suspicion to make a stop included that the defendant was on a corner on which recent, multiple drug-related arrests had been made). Moreover, the juvenile was stopped at approximately 6:00 p.m. on a summer evening in front of an open business. *Cf. State v. Rinck*, 303 N.C. 551, 555-60, 280 S.E.2d 912, 916-20 (1981) (holding circumstances supporting a reasonable basis for a stop included that the defendants were walking along a road at an "unusual hour" of approximately 1:35 a.m.); *State v. Blackstock*, 165 N.C. App. 50, 59, 598 S.E.2d 412, 418 (2004), *disc. review denied*, 359 N.C. 283, 610 S.E.2d 208 (2005) (holding reasonable and articulable suspicion existed to support an investigatory stop of a vehicle where the defendant and driver were observed loitering at a closed shopping center shortly before midnight, no other vehicles were in the parking lot, and the two men abruptly and hurriedly returned to their vehicle, which was parked out of general public view).

The State argues "[i]t is clear from the record that Officer Henderson had a reasonable suspicion that the juvenile was involved in suspicious activity." However, the rule is clear under both federal and state law that an officer must have a reasonable and articulable suspicion of "criminal activity," not merely suspicious activity. *See Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979); *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70. Even viewed through the eyes of a reasonable, cautious officer, *see id.*, the facts relied on by

Officer Henderson are inadequate to show more than an unparticularized suspicion or hunch that the juvenile was involved in criminal activity.

We hold that in the present case, like in *Fleming*, the stop was unjustified. Officer Henderson relied solely on the dispatch that there was a suspicious person at the Exxon gas station, that the juvenile matched the "Hispanic male" description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car. Officer Henderson was not aware of any graffiti or property damage before he stopped the juvenile, and he testified that he noticed the bulge in the juvenile's pocket after he stopped the juvenile.

From those facts, we find that Officer Henderson had only a "generalized suspicion that the [juvenile] was engaged in criminal activity[.]" *Fleming*, 106 N.C. App. at 171, 415 S.E.2d at 785. Even viewed as a whole picture, the facts and circumstances were inadequate to create a reasonable suspicion that the juvenile was involved in criminal activity. The stop was therefore an unreasonable intrusion upon the juvenile's Fourth Amendment right to privacy. The trial court erred in denying the juvenile's motion to suppress evidence obtained thereby. *See Mapp*, 367 U.S. 655, 6 L. Ed. 2d 1090.

II.

[2] The juvenile's second assignment of error is that the trial court erred in denying the juvenile's motion to dismiss the underlying allegations. At trial, the juvenile argued there was insufficient evidence of each allegation.

In reviewing a motion to dismiss a juvenile petition, the evidence must be considered in the light most favorable to the State, which is entitled to every reasonable inference that may be drawn from the evidence. *In re Brown*, 150 N.C. App. 127, 129, 562 S.E.2d 583, 585 (2002). "[I]n order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged." *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). If the evidence raises merely " 'suspicion or conjecture as to either the commission of the offense or the identity of the [juvenile] as the perpetrator of it, the motion should [have been] allowed.' " *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

The juvenile argues the State presented insufficient evidence of the allegation of carrying a concealed weapon because the State's sole evidence was the fruit of an illegal stop. We agree. We have held that the stop of the juvenile was unreasonable and that evidence obtained as a result of the illegal stop should have been suppressed by the trial court. Such evidence includes the box cutter found by Officer Henderson in the juvenile's pants pocket. Other than the illegally obtained box cutter, and Officer Henderson's testimony about its seizure, the State presented no evidence to support the allegation of carrying a concealed weapon. Accordingly, the trial court erred in denying the juvenile's motion to dismiss this allegation, as there was insufficient admissible evidence that the juvenile was carrying a concealed weapon.

[3] The juvenile also challenges the sufficiency of the State's evidence of the allegation of injury to real property. This argument has some merit. At trial, the State presented evidence of a spray can of paint obtained by Officer Henderson during his stop of the juvenile. We have held that Officer Henderson's stop of the juvenile was unreasonable. Therefore, the spray can of paint should have been suppressed by the trial court, and cannot be used to support this allegation.

Along with the spray can of paint, the State introduced evidence of the juvenile's statement that "Mr. Puppet" had sprayed the graffiti, and evidence of the juvenile's confession that he was in fact "Mr. Puppet." Officer Henderson testified that at the scene of the graffiti, he "had a conversation with" the juvenile, and the juvenile stated that "Mr. Puppet" had sprayed the graffiti. Officer Henderson also testified that after being transported to the police department, the juvenile admitted to being "Mr. Puppet." The juvenile argues this testimony was introduced in violation of his *Miranda* rights.

"In *Miranda v. Arizona*, the United States Supreme Court held that a suspect must be informed of his rights upon being arrested: that is, to remain silent, to an attorney and that any statement made may be used as evidence against him." *State v. Miller*, 344 N.C. 658, 666, 477 S.E.2d 915, 920 (1996) (citing *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966)) (internal citation omitted). In addition to these constitutional rights, our General Assembly has granted to juveniles certain statutory protections, including the right to have a parent, guardian or custodian present during questioning. N.C. Gen. Stat. § 7B-2101 (2005) provides in relevant part:

(a) Any juvenile in custody must be advised prior to questioning:

(1) That the juvenile has a right to remain silent;

(2) That any statement the juvenile does make can be and may be used against the juvenile;

(3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and

(4) That the juvenile has a right to consult with an attorney. . . .

(b) When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. . . .

It is undisputed that the juvenile was thirteen years old at the time of the questioning, and that no parent, guardian, custodian or attorney was present during the time the juvenile made any statements. Therefore, if the juvenile's admissions were obtained during a custodial interrogation, they would be inadmissible. *See In Re Butts*, 157 N.C. App. 609, 612, 582 S.E.2d 279, 282 (2003).

The determination of whether a juvenile is in custody is whether, "based upon the trial court's findings of fact, a reasonable person in [the juvenile's] position would have believed that he was under arrest or was restrained in his movement to that significant degree." *State v. Garcia*, 358 N.C. 382, 396, 597 S.E.2d 724, 737 (2004), *cert. denied*, —— U.S. ——, 161 L. Ed. 2d 122 (2005) (citing *State v. Buchanan*, 353 N.C. 332, 339-40, 543 S.E.2d 823, 828 (2001)). However, the trial court made no findings or conclusions as to whether the juvenile's statements about "Mr. Puppet" were made during a custodial interrogation. The order stated only that "[t]he juvenile was questioned about [the graffiti] and he stated that somebody else did it[,] a Mr. Puppet" and that "[l]ater at the police dept. [the juvenile] admitted that he was Mr. Puppet." Moreover, there is insufficient evidence in the record on this issue, with no testimony as to whether the juvenile was in custody or being interrogated when he allegedly stated that "Mr. Puppet" had painted the graffiti. There is no testimony as to when exactly the juvenile admitted to being "Mr. Puppet," or under what circumstances he made such an admission. The only evidence of the juvenile's admission is the testimony of Officer Henderson that during a "conversa-

tion" about the graffiti, the juvenile told him "Mr. Puppet" had done it, and "[l]ater at the police department, [the juvenile] identified himself as Mr. Puppet." Accordingly, we cannot discern whether the juvenile's admissions were made in response to custodial interrogation in violation of the juvenile's constitutional and statutory rights. We therefore remand for findings on whether the juvenile was in custody at the time of his questioning, and whether his statements were the result of interrogation. *See Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (remanding for a determination of whether the defendant was in custody for purposes of *Miranda*); *State v. Johnson*, 310 N.C. 581, 313 S.E.2d 580 (1984) (remanding for findings where "*voir dire* evidence and the trial judge's findings [were] insufficient to permit adequate review by the appellate courts" of legality of search); *In re Young*, 78 N.C. App. 440, 337 S.E.2d 185 (1985) (remanding for findings on compliance with prior version of N.C. Gen. Stat. § 7B-2101).

If the trial court determines the juvenile's statements were inadmissible, then the trial court's denial of the motion to dismiss this allegation will have been error. Without the spray can of paint, or the juvenile's confession, the State's evidence was insufficient to support an adjudication of delinquency on the underlying allegation of injury to real property.

[4] The juvenile also argues the trial court erred in denying his motion to dismiss the allegation of resisting an officer in violation of N.C. Gen. Stat. § 14-223. The elements of resisting an officer are that a person (1) willfully and unlawfully; (2) resists, delays or obstructs; (3) a public officer; (4) who is discharging or attempting to discharge a duty of office. N.C. Gen. Stat. § 14-223 (2005). In the present case, the petition alleged that the juvenile resisted, delayed, and obstructed Officer Henderson by giving a false name at the time Officer Henderson was conducting an investigation. The trial court found that by insisting his name was "Oscar Lopez," the juvenile delayed Officer Henderson's investigation of the offenses of injury to real property and carrying a concealed weapon.

The juvenile argues that since Officer Henderson's stop was invalid, the juvenile was within his right to give a false name. We disagree and hold that the invalid stop did not give the juvenile license to subsequently lie about his identity to Officer Henderson. *See, e.g.*, *State v. Miller*, 282 N.C. 633, 641, 194 S.E.2d 353, 358 (1973) (holding that a defendant was not excused for his subsequent criminal behavior even though police entered the premises on an invalid search war-

rant). The juvenile argues the well-established rule that a person has the right to resist an illegal arrest. *See*, *e.g.*, *State v. McGowan*, 243 N.C. 431, 90 S.E.2d 703 (1956); *State v. Hewson*, 88 N.C. App. 128, 362 S.E.2d 574 (1987). However, the facts of the present case are distinguishable from the line of cases dealing with illegal arrest. In *Hewson*, for example, this Court held that a motion to dismiss a charge of resisting arrest should have been granted where the underlying arrest was illegal, because a lawful arrest was a necessary element of the charge. *Hewson*, 88 N.C. App. at 132, 362 S.E.2d at 576-77. In this case, the State presented substantial evidence of each element of the allegation of resisting, delaying, or obstructing an investigation. In giving Officer Henderson a false name, the juvenile delayed the officer's investigation, including any attempt to contact the juvenile's parent or guardian. Accordingly, we affirm the trial court's denial of the juvenile's motion to dismiss this allegation.

[5] By his next assignment of error, the juvenile argues the trial court erred in denying his motion to dismiss the allegation of burning a public building. Under the facts of this case, in order to survive the juvenile's motion to dismiss, the State must have presented substantial evidence of each of the following elements: (1) the juvenile wantonly and willfully; (2) set fire to the police station; and (3) the building was owned or occupied by an incorporated city or town. N.C. Gen. Stat. § 14-59 (2005).

The juvenile first challenges the sufficiency of the State's evidence on the "wanton and willful" element of the offense. To be wanton and willful, "it must be shown that [an] act was done intentionally, without legal excuse or justification, and with knowledge of or reasonable grounds to believe that the act would endanger the rights or safety of others." *State v. Payne*, 149 N.C. App. 421, 424, 561 S.E.2d 507, 509 (2002). In the present case, the State did not introduce any direct evidence that the juvenile set off fireworks with knowledge of or reasonable grounds to believe that the act would endanger the rights or safety of others. However, it is well-established that "[i]ntent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974). Officer Marsh testified that the juvenile laughed when Officer Marsh attempted to put out the fireworks. Viewed in the light most favorable to the State, this evidence is sufficient to give rise to an inference that the juvenile's act was wanton and willful. Accordingly, this element of N.C.G.S. § 14-59 is supported by the evidence.

The juvenile also challenges the sufficiency of the State's evidence on the "setting fire" element of the offense. N.C.G.S. § 14-59 refers to four acts which constitute the operative element of the offense: (1) set fire to; (2) burn; (3) cause to be burned; or (4) aid, counsel or procure the burning of the building. The trial court found that the juvenile's act of setting off fireworks ignited a flame approximately two to three feet high, which caused "black markings on the floor and white markings on the wall" of the interview room. The trial court found that "this is not burning" but noted that "burning is not required to meet the elements [of N.C.G.S. § 14-59] but setting fire does meet the elements." Therefore, in order to find the juvenile in violation of N.C.G.S. § 14-59, we must uphold the trial court's conclusion that the juvenile's act of igniting fireworks constituted "setting fire" to the police department building.

We note that N.C.G.S. § 14-59 does not define the act of setting fire. *See* N.C.G.S. § 14-59. Nor has North Carolina case law interpreted what act is necessary to constitute setting fire to a government building under this statute. However, in *State v.* Hall, 93 N.C. 571 (1885), our Supreme Court held that "set fire to" is distinct and different from "burn." The Court reasoned that "it is certainly possible to set fire to some articles which, by reason of the sudden extinction of the fire, may fail to change by charring even the material to which it has been applied, so that the defendant may have done the act imputed and yet not *burned* it within the meaning of the act [of 1875.]" *Hall*, 93 N.C. at 574.

Moreover, in *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985), our Supreme Court held that where a defendant ignited a fire bomb in a building, which caused blackening of the tile floor, a steel cabinet, and an office partition, the act of igniting the fire bomb was sufficient to support a conviction for the lesser included offense of attempting to set fire to or burn a building under N.C. Gen. Stat. § 14-67.1. The State was not required to prove a "burning" in order to prove an attempt to burn or set fire. *Avery*, 315 N.C. at 25, 337 S.E.2d at 799. We note that, unlike the facts of *Avery*, the juvenile in the present case did not set off a fire bomb, but rather set off fireworks. While this factual distinction may be significant under different facts, the facts here are that the juvenile set off fireworks "near the wall" of the interview room. Given the proximity of the fireworks to the wall and the resulting flame and damage, we infer an intent to set fire with the fireworks. *See State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (holding that an individual is presumed

to intend the natural consequences of the individual's actions). Accordingly, the trial court did not err in denying the juvenile's motion to dismiss this allegation.

III.

[6] The juvenile next argues the trial court erred in omitting from the commitment order the maximum term of commitment, in violation of N.C. Gen. Stat. § 7B-2513(a), which requires a trial court to determine the maximum period of time for which a juvenile may remain committed and to notify the juvenile of that determination. The State concedes the error. While the trial court made the proper finding orally that commitment would not exceed the juvenile's eighteenth birthday, this term was omitted from the written order. Once the record on appeal has been filed with an appellate court, the trial court is divested of jurisdiction to correct a clerical error. *See State v. Dixon*, 139 N.C. App. 332, 337, 533 S.E.2d 297, 301 (2000). Accordingly, we remand to the trial court with instructions to correct the clerical error on the commitment order.

IV.

[7] The juvenile's final argument is that the trial court erred in not stating its compelling reasons for denying the release of the juvenile pending appeal, in violation of N.C. Gen. Stat. § 7B-2605. N.C. Gen. Stat. § 7B-2605 (2005) provides:

> Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

The State concedes the error. Accordingly, we vacate the order denying the juvenile's release pending appeal and remand the matter to the trial court for findings as to the compelling reasons for denying release. As we noted in *In re Lineberry*, "we are aware of the likelihood that the passage of time may have rendered the issue of [the] juvenile's custody pending appeal moot." 154 N.C. App. 246, 256, 572 S.E.2d 229, 236 (2002), *cert. denied*, 356 N.C. 672, 577 S.E.2d 624 (2003). Moreover, we note that this error by the trial court has no effect on the juvenile's adjudication or disposition. *See id.* (citing *In re Bullabough*, 89 N.C. App. 171, 184, 365 S.E.2d 642, 649 (1988)).

The 20 September 2004 order adjudicating the juvenile delinquent is hereby

Affirmed in part, reversed in part, and remanded in part.

The 2 September 2004 order committing the juvenile for an indefinite period of time is hereby

Vacated and remanded.

The 20 September 2004 order denying release of the juvenile pending appeal is hereby

Vacated and remanded.

Chief Judge MARTIN and Judge STEELMAN concur.

PAUL BRYAN WILSON, PLAINTIFF v. BURCH FARMS, INC., DEFENDANT

No. COA05-207

(Filed 21 March 2006)

1. Appeal and Error— preservation of charge objection— objection not repeated

Defendant's objection at the charge conference preserved for appeal the question of whether proper instructions were given even though he did not object again after the instructions were given.

2. Bailments— instructions—perishable agricultural commodities

The trial court did not err by instructing on the Perishable Agricultural Commodities Act (PACA) in plaintiff's bailment and contract action arising from storage of his sweet potatoes. The trial court instructed the jury fully and completely on defendant's obligations to plaintiff under both federal law and the oral contract between the parties. In the context of the entire charge, the court's instruction on the requirements of PACA did not mislead the jury.

3. Contracts— storage of sweet potatoes—oral agreement—directed verdict

The trial court did not err by denying defendant's motion for a directed verdict on a breach of contract claim arising from the defendant's storage and disposal of plaintiff's sweet potatoes where the evidence created an issue of fact concerning the terms of the contract and the marketability of plaintiff's crop.

4. Appeal and Error— lack of supporting authority—argument abandoned

Defendant's argument concerning a set-off in an agricultural contract case was deemed abandoned for failure to cite supporting statutory or case law.

5. Damages— sweet potato storage and disposal—USDA payments and verdict for negligence—collateral source rule—applicability

The trial court erred in an action arising from defendant's storage and disposal of plaintiff's sweet potatoes by granting a set-off for amounts plaintiff received from the USDA Quality Assurance Program. The USDA payments and the jury's verdict were for different losses, and the collateral source rule does not apply.

6. Bailment— storage and disposal of sweet potatoes—consignment and bailment

The trial court erred by dismissing plaintiff's bailment claim arising from the storage of his sweet potatoes where plaintiff had left the crop with defendant for sorting and selling under an oral agreement, and defendant disposed of the crop as not marketable. While a consignment relationship may have existed, the relationship was also that of a bailment.

Appeal by defendant from judgment entered 14 July 2004 by Judge Christopher M. Collier in Richmond County Superior Court. Heard in the Court of Appeals 18 October 2005.

Henry T. Drake, for plaintiff-appellee.

White & Allen, P.A., by David J. Fillippeli, Jr. and Gregory E. Floyd, for defendant-appellant.

JACKSON, Judge.

Paul Bryan Wilson ("plaintiff") is a sweet potato farmer in Richmond County, North Carolina. Beginning in 1996 or 1997, plaintiff entered into an agreement with Burch Farms, Inc. ("defendant"), under the terms of which plaintiff would harvest his crop of sweet potatoes, and bring the crop to defendant. Thereafter, defendant would store the sweet potatoes for plaintiff, and many other farmers, and then run them through a process known as grading and packing. This process separates the potatoes based on type and quality, after which defendant would then sell the potatoes to various grocery store chains or other customers. After defendant sold what it could of plaintiff's crop, it would account to plaintiff with the proceeds from the sale, minus the administrative costs of storing and processing the produce.

In the fall of 2000, plaintiff farmed fifty acres of sweet potatoes, and entered into an agreement with defendant as he had in prior years. In November 2000, plaintiff delivered ten thousand two hundred (10,200) bushels of sweet potatoes, which defendant stored at a leased facility in Smithfield. Plaintiff stated at trial that all of these potatoes were of good quality and were freshly harvested at the time of shipment to defendant. Defendant's primary packing and storing facility is located in Faison, North Carolina, and at the time of plaintiff's shipment to defendant, the Faison facility was full. In May 2001, plaintiff shipped an additional three thousand three hundred (3,300) bushels of sweet potatoes to defendant's Faison facility. Both parties agreed upon inspection of the May 2001 shipment, that this shipment was not of marketable quality and was of no use to either party. This shipment was then "dumped" by defendant with plaintiff's consent.

As defendant ran plaintiff's and other farmer's sweet potatoes through the grading and packing process, unmarketable and rotten potatoes were removed from the bushels and discarded, or "dumped." Defendant regularly dumped plaintiff's and other farmer's produce if it began to rot or sprout roots while in storage, and before it could be graded and packed. Both plaintiff and Ted Burch ("Burch"), supervisor of defendant's packing house, testified that it was common practice in the industry for the broker, or defendant in this case, to notify the farmer if something was wrong with his crop, so that the farmer could come and look at the crop and retrieve it if he wanted to do so, prior to the broker's dumping the crop. During plaintiff's and defendant's previous dealings, defendant regularly dumped unmarketable and rotten bushels of plaintiff's sweet potato

crops, with plaintiff's consent and without prior notification to plaintiff. At no time during the parties' dealings together had defendant ever had to dump plaintiff's entire sweet potato crop.

During the summer of 2001, defendant transported plaintiff's sweet potatoes being stored in Smithfield, to the Faison facility. Upon arrival of the potatoes, Burch testified that he immediately saw problems with the crop. Plaintiff testified that defendant informed him that the sweet potatoes would be processed shortly after their arrival at the Faison facility. In September 2001, plaintiff contacted defendant for an accounting of the ten thousand two hundred bushels of potatoes that originally had been stored in Smithfield. At this time, plaintiff was informed that defendant had dumped all of plaintiff's sweet potatoes approximately one month prior, due to the potatoes' being unmarketable and of poor quality. At no time prior to defendant's dumping plaintiff's potatoes was plaintiff notified that there was a problem with his crop.

Defendant provided a letter to plaintiff stating that plaintiff's crop of sweet potatoes for the year 2000 was of poor quality as a result of weather conditions, and therefore plaintiff's potatoes were unmarketable and were dumped by defendant. With this letter, plaintiff submitted an application to the U.S. Department of Agriculture ("USDA"), for compensation through the Quality Loss Program, which was designed to compensate farmers for cases in which their crop yield was low or unmarketable. Plaintiff received twenty-three thousand four hundred and eighty-four dollars ($23,484.00) in compensation from the USDA, representing compensation for only a portion of plaintiff's entire 2000 sweet potato crop, at only a fraction of the usual market price.

On 30 August 2002, plaintiff filed a complaint in Richmond County Superior Court alleging various claims against defendant. Plaintiff's complaint alleged claims for breach of contract and negligence on the part of a bailee. At trial, both parties testified along with several other farmers and employees of defendant. At the close of plaintiff's evidence, defendant made a motion for directed verdict on both of plaintiff's claims. The trial court denied defendant's motion as to the breach of contract claim, and granted the motion on the bailment claim, thereby dismissing plaintiff's bailment claim. The jury returned a verdict finding that defendant had breached its oral contract with plaintiff, and awarded plaintiff damages in the amount of fifty thousand dollars ($50,000.00). The trial court then made findings of fact regarding the compensation plaintiff received from the federal

government, and proceeded to grant defendant a set-off against plaintiff's damages award in the total amount of twenty-one thousand six hundred fifteen dollars and thirty cents ($21,615.30). From the jury verdict and award of damages to the plaintiff, defendant appeals. Plaintiff cross appeals on the trial court's dismissal of the bailment claim and the reduction of the damages awarded.

[1] Defendant's first assignment of error concerns the trial court's instructions to the jury regarding the requirements of the Perishable Agricultural Commodities Act ("PACA") for dumping perishable agricultural commodities. Defendant contends the instruction on PACA's requirements constituted reversible error in that PACA was not applicable in the present case, as plaintiff's case was one in state court for a breach of contract claim.

The record demonstrates that before the trial court instructed the jury, a charge conference was held with the attorneys representing both parties. At the charge conference, the court advised the attorneys as to how and what it was going to instruct the jury on the issue of PACA and dumping. Defendant objected to the proposed instruction on PACA's requirements, and his objection was denied. After the jury was instructed, the trial court asked both parties, outside the presence of the jury, if either of them had any objections or requests for additional instructions. Neither party objected to the instructions as they were given.

" 'Rule 10(b)(2) of our Rules of Appellate Procedure requiring objection to the charge before the jury retires is mandatory and not merely directory.' " *Wachovia Bank v. Guthrie*, 67 N.C. App. 622, 626, 313 S.E.2d 603, 606 (1984) (quoting *State v. Fennell*, 307 N.C. 258, 263, 297 S.E.2d 393, 396 (1982)). "[W]here a party fails to object to jury instructions, 'it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error.' " *Madden v. Carolina Door Controls*, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994) (quoting *Dailey v. Integon General Ins. Corp.*, 75 N.C. App. 387, 399, 331 S.E.2d 148, 156, *disc. review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985)). On appeal, plaintiff now contends that defendant failed to preserve his right to appeal on the instructions to the jury, as defendant failed to object to the instructions before the jury retired to deliberate. Our Supreme Court has held, and we reiterate, that when a party has objected to proposed jury instructions during a charge conference, and the trial court has considered and denied the request, that the party need not repeat its objections after the jury charge is given. *Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E.2d 571, 574

(1984). Therefore, by objecting to the proposed instruction on PACA at the charge conference and receiving a ruling on his objection, defendant has properly preserved this issue for appeal.

[2] As defendant has properly preserved its right to appeal on the jury instruction regarding PACA, we review the trial court's instruction to determine whether it was proper. On appeal, this Court reviews a jury charge "contextually and in its entirety," and the charge will be considered "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 . . . .' " *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (quoting *Jones v. Development Co.*, 16 N.C. App. 80, 86-87, 191 S.E.2d 435, 439-40, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972)). As defendant now asserts there was error in the instruction, defendant "bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction." *Id.* (citing *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.' " *Id.* (quoting *Robinson*, 87 N.C. App. at 524, 361 S.E.2d at 917).

The jury instruction to which defendant assigns error consisted of the following:

> COURT: Members of the jury, it is unlawful for any broker to discard, dump, or destroy, without reasonable cause, any perishable agricultural commodity received by such broker in interstate commerce. Reasonable cause for destroying any produce exists when it has no commercial value.
>
> A clear and complete record shall be maintained showing justification for dumping of produce received on consignment if any portion of such produce cannot be sold due to poor condition.
>
> In addition to the foregoing, if five percent or more of a shipment is dumped, an official certificate or other adequate evidence shall be obtained to prove the produce is actually without commercial value, unless there is a specific agreement to the contrary between the parties.

The language used in the trial court's instruction was taken directly from PACA regulations found at 7 U.S.C. § 499b(3) (2005), 7 C.F.R. 46.22 (2005), and 7 C.F.R. 46.23 (2005). At trial, defendant testified that he was required to abide by the regulations and requirements of PACA, and that he was a licensed and bonded broker. During the charge conference, the trial court stated that it recognized that the requirements of PACA essentially were accounting procedures, however, the trial court confirmed that defendant still had obligations to plaintiff through PACA in that 7 U.S.C. § 499e of PACA states that "[i]f any broker violates any provision of section 2 [of 7 U.S.C. § 499b regarding unfair conduct and unreasonable rejection of the perishable agricultural commodity], he shall be liable to the person thereby injured for the full amount of damages." *See* 7 U.S.C. § 499b(a) (2005). Based on this section of PACA, the trial court determined that the jury was entitled to be instructed on defendant's obligations under the federal law.

In reviewing the jury instruction in its entirety, we can see that the trial court instructed the jury fully and completely on defendant's obligations to plaintiff under both the federal law and the oral contract between the parties. The trial court instructed the jury not only on the requirements of PACA, but also on the issues of course of performance and course of dealings between the parties. The court instructed the jury that the parties had stipulated to the fact that an oral contract existed between the parties, and the court also fully instructed the jury regarding what constitutes a breach of a contract. It was therefore properly left to the jury to determine whether defendant satisfied its contractual duties with plaintiff.

Therefore, we hold the trial court's instruction on the requirements of PACA, when considered in the context of the entire jury charge, did not serve to mislead the jury, and was a proper explanation of the applicable law. There was sufficient evidence presented to support the jury's finding that defendant breached its contract with plaintiff, and thus the trial court's instruction did not adversely affect the jury's verdict or mislead the jury.

[3] Defendant next contends the trial court erred in denying defendant's motion for directed verdict on plaintiff's breach of contract claim.

On appeal, the standard of review on a motion for directed verdict "is whether, 'upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the

benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.' " *Stamm v. Salomon*, 144 N.C. App. 672, 679, 551 S.E.2d 152, 157 (2001) (quoting *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000)). "The party moving for a directed verdict bears a heavy burden in North Carolina." *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923 (1998). A motion for directed verdict should be denied where " 'there is more than a scintilla of evidence supporting each element of the plaintiff's case.' " *Stamm*, 144 N.C. App. at 679, 551 S.E.2d at 157 (quoting *Little v. Matthewson*, 114 N.C. App. 562, 565, 442 S.E.2d 567, 569 (1994), *aff'd*, 340 N.C. 102, 455 S.E.2d 160 (1995)). In addition, when the decision to grant a motion for directed verdict "is a close one, the better practice is for the trial judge to reserve his decision on the motion and submit the case to the jury." *Edwards*, 128 N.C. App. at 573, 495 S.E.2d at 923.

In the instant case, plaintiff does not contend defendant breached the contract by failing to pack and sell all of plaintiff's sweet potatoes. Instead, plaintiff's breach of contract claim is based upon defendant's failure to notify and account to plaintiff prior to dumping plaintiff's entire sweet potato crop, and denying plaintiff the opportunity to retrieve his crop and mitigate his damages.

Viewing the evidence in a light most favorable to the plaintiff, we hold there was sufficient evidence to take plaintiff's breach of contract claim to the jury. The testimony and evidence presented at trial showed that plaintiff delivered three thousand three hundred (3,300) bushels of sweet potatoes to defendant, which both parties agreed were unmarketable. Plaintiff also delivered an additional ten thousand two hundred (10,200) bushels which plaintiff testified were marketable at the time of delivery to defendant. These ten thousand two hundred bushels were dumped by defendant, without notice or an accounting to plaintiff prior to the dumping. Both plaintiff and Ted Burch, supervisor of defendant's warehouse and packing process, testified concerning the oral agreement between the parties. Both testified that the oral agreement was that defendant would provide storage for plaintiff's sweet potato crop, and would pack and sell the potatoes that were of marketable quality. Both parties also testified that the standard procedure in the industry was that a pack house, such as defendant, would notify the farmer if there was something wrong with their produce, giving the farmer the opportunity to come and retrieve his produce before it was dumped. Both parties also testified that in their past course of dealing, defendant would dump

plaintiff's unmarketable produce without first notifying plaintiff and with plaintiff's consent. However, never before had defendant had to dump plaintiff's entire sweet potato crop. There was conflicting testimony from plaintiff's and defendant's witnesses regarding the quality of plaintiff's sweet potatoes at the time they were delivered to defendant's storage facilities.

The evidence presented by both parties creates an issue of fact concerning the terms of the parties' contract and the marketability of plaintiff's crop, which are questions properly left for the jury to determine. *See Goeckel v. Stokely*, 236 N.C. 604, 607, 73 S.E.2d 618, 620 (1952) (issues of fact concerning terms of a contract are for the jury to consider). Any conflicts in the evidence should be "resolved in plaintiff's favor, and he 'must be given the benefit of every inference reasonably to be drawn in his favor.' " *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 523, 613 S.E.2d 274, 278 (2005) (citation omitted). As there is more than a scintilla of evidence that under the parties' agreement defendant had a duty to notify plaintiff prior to dumping his crop and that a breach of contract occurred, this issue was properly submitted to the jury for resolution of the conflicts. Thus, the trial court acted properly in denying defendant's motion for directed verdict on plaintiff's breach of contract claim, and this assignment of error is overruled.

[4] In his final assignment of error, defendant contends the trial court erred in failing to credit defendant with the entire amount of the quality loss/disaster proceeds recovered by plaintiff. We do not reach the merits of defendant's arguments, as defendant has failed to comply with the North Carolina Rules of Appellate Procedure. Therefore we dismiss defendant's final assignment of error.

The Rules of Appellate Procedure are mandatory, and "must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). " '[F]ailure to follow these rules will subject an appeal to dismissal.' " *Consol. Elec. Distribs., Inc. v. Dorsey*, 170 N.C. App. 684, 686, 613 S.E.2d 518, 520 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)).

Rule 28(b)(6) of our Rules of Appellate Procedure, as written at the time defendant submitted its brief to this Court, required an appellant's brief to contain an argument section that included:

> 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.*
>
> *The body of the argument shall contain citations of the authorities upon which the appellant relies.*

N.C. R. App. P. 28(b)(6), 2005 Ann. R. (N.C.) 175, 303 (emphasis added). In the argument section of defendant's brief are set forth three questions for our review. However, the body of defendant's final argument fails to "contain citations of the authorities upon which the appellant relies." *Id.* Defendant fails to cite to any statutory or case law authority in support of its argument that the trial court should have credited it with the full amount of plaintiff's quality/loss disaster proceeds. Therefore, as defendant has failed to cite any legal authority to support its argument, this assignment of error is deemed abandoned.

[5] In plaintiff's cross-appeal, he first argues the trial court erred in allowing defendant a set-off against the jury verdict for a portion of the proceeds which plaintiff received under the USDA 2000 Quality Loss Program. Plaintiff contends the collateral source rule should have prohibited evidence of this payment, and that this rule should have prevented the set-off. Defendant contends the trial court acted properly, in that had defendant not been granted a set-off, plaintiff would have double recovered for his lost crop.

The trial court granted defendant a set-off against plaintiff's judgment in the amount of eighteen thousand, one hundred eighty one dollars and eight cents ($18,181.08), plus interest, for a total set-off of twenty one thousand, six hundred fifteen dollars and thirty cents ($21,615.30).

The purpose of the collateral source rule is to " 'exclude[] evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff.' " *Kaminsky v. Sebile*, 140 N.C. App. 71, 77, 535 S.E.2d 109, 113 (2000) (quoting *Badgett v. Davis*, 104 N.C. App. 760, 764, 411 S.E.2d 200, 203 (1991)). "The policy behind the rule is to prevent a tortfeasor from

'reduc[ing] his own liability for damages by the amount of compensation the injured party receives from an independent source.' " *Id.* (quoting *Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981)). This rule is punitive in nature, and is intended to prevent the tortfeasor from a windfall when a portion of the plaintiff's damages have been paid by a collateral source. In this State, and many others, the collateral source rule typically is applied only in actions arising under tort law.

Plaintiff's compensation through the Quality Loss Program was for the damage done to his crop and his lost yield, as a result of the drought, while his claim against defendant was for the destruction of his potatoes. The USDA Quality Loss Program was enacted with the purpose of compensating farmers who suffered yield or quality loss due to weather-related disasters. Since the USDA payments and the jury's verdict were compensation for different losses suffered by plaintiff, we hold the collateral source rule is inapplicable in the instant case, and the trial court should not have allowed a set-off from the damages plaintiff was awarded. The payment plaintiff received from the Quality Loss Program compensated plaintiff for an entirely different loss.

Plaintiff alleged defendant dumped plaintiff's sweet potatoes without notifying him, in breach of their contract. After hearing evidence, over plaintiff's objection, of the Quality Loss payment to plaintiff, the jury agreed that defendant breached the contract and awarded plaintiff fifty thousand dollars ($50,000.00). As the compensation provided to plaintiff under the Quality Loss Program was compensation for a different loss than that found by the jury, we hold the trial court erred when it granted defendant a set-off for the compensation plaintiff received from the USDA Quality Loss Program. Our holding in the instant case is limited to the unique facts presented by this case, and therefore we decline to address the issue of whether the collateral source rule should apply generally to a breach of contract situation.

[6] Finally, plaintiff contends the trial court erred in granting defendant's motion for directed verdict and dismissing plaintiff's bailment claim.

Our Supreme Court has held that

> [t]he 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. 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. [An appellate court] reviews a trial court's grant of a motion for directed verdict *de novo*.

Herring v. Food Lion, Inc., 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005) (internal citations omitted). When a defendant has moved for a directed verdict on one of the plaintiff's claims,

> plaintiff's evidence must be taken as true and viewed in the light most favorable to the plaintiff. . . . This question should not be resolved against the plaintiff unless it appears, as a matter of law, that the plaintiff cannot recover upon any view of the facts that the evidence reasonably tends to establish.

U.S. Helicopters, Inc. v. Black, 318 N.C. 268, 270, 347 S.E.2d 431, 432 (1986) (internal citations omitted).

" 'A bailment is created when a third person accepts the sole custody of some property given from another.' " *Barnes v. Erie Ins. Exch.*, 156 N.C. App. 270, 273, 576 S.E.2d 681, 683 (2003) (quoting *Bramlett v. Overnite Transport*, 102 N.C. App. 77, 82, 401 S.E.2d 410, 413 (1991)). The possession of the property by the bailee must be such that it is to the exclusion of the owner and all other persons, and that the bailee has complete control of the property. *Electric Co. v. Dennis*, 255 N.C. 64, 72, 120 S.E.2d 533, 539 (1961). The burden of establishing that a bailor-bailee relationship in fact exists rests with the bailor. *Barnes*, 156 N.C. App. at 273, 576 S.E.2d at 683. "When a bailment is created for the benefit of both the bailor and bailee, the bailee is required to exercise ordinary care to protect the subject of the bailment from negligent loss, damage, or destruction." *Id.* at 273-74, 576 S.E.2d at 683-84 (citing *Strang v. Hollowell*, 97 N.C. App. 316, 387 S.E.2d 664 (1990)). " 'A *prima facie* case of actionable negligence . . . is made when the bailor offers evidence tending to show or it is admitted that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition.' " *Id.* at 274, 576 S.E.2d at 684 (quoting *McKissick v. Jewelers, Inc.*, 41 N.C. App. 152, 155, 254 S.E.2d 211, 213 (1979)).

Plaintiff contends that a bailment relationship existed between the parties by virtue of their oral agreement. Plaintiff argues that he delivered his crop of sweet potatoes to defendant, who then took

exclusive possession and control over the crop, and defendant was then obligated to provide plaintiff with an accounting for the potatoes. Plaintiff argues that defendant was negligent in failing to notify plaintiff prior to dumping the sweet potatoes, and in failing to allow plaintiff an opportunity to mitigate his damages. We agree. We hold the trial court erred in granting defendant's motion for directed verdict on the bailment claim, at the close of plaintiff's evidence.

The evidence presented during plaintiff's case in chief indicated that plaintiff was free to come and look at the potatoes and to remove them from defendant's storage facilities. At no point was plaintiff notified prior to defendant's total disposal of his bailed property, and plaintiff was not provided with an opportunity to retrieve his potatoes before they were dumped. Further, defendant failed to provide plaintiff with any accounting for the potatoes it held for plaintiff.

Defendant does not dispute the fact that it disposed of plaintiff's potatoes without providing plaintiff prior notice, and it does not dispute the fact that it failed to provide plaintiff with an accounting. However, defendant contends that the arrangement between the parties could not have been a bailment, as plaintiff did not expect to have the specific property of the bailment, the sweet potatoes, returned to him. Defendant contends that plaintiff expected an accounting of the sweet potatoes, or the proceeds from their sale, and thus the specific property was not to be returned to plaintiff. Defendant argues that for a bailment to exist, the specific property that is the subject of the bailment must be returned to the bailor. *See*, *Perry v. R.R.*, 171 N.C. 158, 164, 88 S.E. 156, 160 (1916) ("the obligation to redeliver or deliver over the property at the termination of the bailment on demand is an essential part of every bailment contract."). Defendant's argument that the relationship between the parties could not have been that of a bailment is misguided.

A consignment exists where an consignor leaves his property with a consignee who is "substantially engaged in selling the goods of others," and will work to sell the goods on behalf of the consignor. After selling the goods, the consignee must account to the consignor with the proceeds from the sale. *See*, *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 154, 229 S.E.2d 278, 285 (1976). While the consignee may or may not receive the specific property of the consignment back, depending on if it is sold, this Court has recognized that a consignment creates a bailment between the parties. *See*, *Strang v. Hollowell*, 97 N.C. App. 316, 387 S.E.2d 664 (1990); *see also*, 8 C.J.S. *Bailments*

§ 11, at 384 (2005) ("The rule that where a person receiving property is not bound to return the identical thing received, but may account therefor in money or other property, or thing of value, the transaction is a sale, is not applicable to bailments or consignments for sale. . . . A consignment is a type of bailment where the goods are entrusted for sale . . . ."); *Black's Law Dictionary* 152 (8th ed. 2004) (definition of bailment for sale is "[a] bailment in which the bailee agrees to sell the goods on behalf of the bailor; a consignment."). Thus, where a consignment relationship may have existed between plaintiff and defendant, the relationship was also that of a bailment.

We hold plaintiff has "shown sufficient evidence, taken in the light most favorable to it, to establish the existence of a bailment with defendant as bailee." *U.S. Helicopters, Inc.*, 318 N.C. at 275, 347 S.E.2d at 435. The total loss of plaintiff's crop was due to defendant's dumping of the potatoes without prior notice to plaintiff, after no objections as to marketability were raised at the time of delivery, and defendant assured plaintiff that the potatoes would be processed and graded by defendant.

We therefore hold the trial court erred in dismissing plaintiff's bailment claim, and thus plaintiff is entitled to a new trial on this issue alone.

Reversed and remanded.

Judges TYSON and JOHN concur.

STATE OF NORTH CAROLINA v. TONY LEE WEAKLEY

No. COA05-863

(Filed 21 March 2006)

1. Search and Seizure— motion to suppress evidence—probable cause—plain view exception

The trial court did not err in a possession of stolen property, possession of a stolen firearm, possession of Valium, possession of marijuana, possession of drug paraphernalia, and possession of methamphetamine case by denying defendant's

motion to suppress items found pursuant to the search of his residence, because: (1) a detective was lawfully inside defendant's premises to monitor the movements of a suspect who needed to return inside the house to get fully dressed when she observed a shower curtain belonging to a larceny victim; (2) the discovery of the shower curtain was inadvertent when it just caught the detective's eye in one of the bedroom windows, and there was no evidence the officer was looking for the shower curtain; (3) it was immediately apparent to the detective that the shower curtain constituted evidence of a crime when the curtain matched pictures she had seen provided by the victims of items taken from their bathroom with a border in the bathroom matching the curtain; and (4) based on the detective's observation of the shower curtain, she had probable cause to believe defendant's residence contained stolen items entitling her to get a search warrant.

2. Constitutional Law— right against self-incrimination—no standing to assert rights of third party

Although defendant contends the trial court committed plain error in a prosecution for possession of stolen property and other crimes by allowing the State to cross-examine defendant's girlfriend regarding her failure to give a statement to a detective, this assignment of error is dismissed because defendant does not have standing to assert the constitutional right against self-incrimination of a third party.

3. Possession of Stolen Property— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of stolen property under N.C.G.S. § 14-71.1, because: (1) the evidence tended to show that stolen goods were found throughout defendant's residence; and (2) the circumstantial evidence tended to show defendant knew or should have known the goods his girlfriend brought into his residence were stolen.

4. Firearms and Other Weapons— possession of stolen firearm—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of possession of a stolen firearm under N.C.G.S. § 14-71.1, and this conviction is reversed, because: (1) the State presented no evidence that the firearms were stolen pursuant to

a breaking or entering or that defendant knew or should have known the firearms were stolen; (2) the trial court dismissed defendant's charges of breaking and entering and larceny after breaking and entering; and (3) the State presented no evidence of when the firearms were stolen or how long they had been in defendant's possession.

5. Drugs— possession of Valium—possession of marijuana—possession of drug paraphernalia—possession of methamphetamine—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of possession of Valium, possession of marijuana, possession of drug paraphernalia, and possession of methamphetamine, because: (1) an accused has possession of contraband when he has both the power and the intent to control its disposition or use; (2) defendant leased and resided in the house where the controlled substances and drug paraphernalia were found, and our Supreme Court has found constructive possession to exist where possession is not exclusive but defendant exercises sole or joint physical custody of the premises; and (3) the State presented sufficient evidence placing defendant within such close juxtaposition to the narcotic drugs to justify the jury in concluding that they were in his possession.

Appeal by defendant from judgments entered 6 January 2005 by Judge J. Marlene Hyatt in Watauga County Superior Court. Heard in the Court of Appeals 23 February 2006.

Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley, Jr., for the State.

William D. Auman, for defendant-appellant.

TYSON, Judge.

Tony Lee Weakley ("defendant") appeals from judgment entered after a jury found him to be guilty of possession of stolen property, possession of a stolen firearm, possession of Valium, possession of marijuana, possession of drug paraphernalia, and possession of methamphetamine. We reverse defendant's conviction for possession of a stolen firearm. We find no error in the judgment entered on all other charges, and remand for re-sentencing.

I. Background

A. State's Evidence

Sandra Kay Byrum ("Byrum") and her two sisters owned a house on Broadstone Road in Watauga County. In May 2003, Byrum arrived at the house and discovered it had been broken into and that many items were missing. The telephones had been stolen, so Byrum went to use the neighbor's telephone at the mobile home next door. Byrum knocked on the door of the mobile home and looked inside to see if anyone was home. When Byrum looked inside she saw some of the items missing from her house located on the floor.

Byrum spoke with the Sheriff's Department and prepared a list of the items missing from her house. The Sheriff's Department obtained a search warrant for the mobile home. Sheriff's deputies executed the search warrant and found several items reported stolen from Byrum's house located on the floor of the mobile home and documents identifying Denise Brannigan ("Brannigan") as the resident of the mobile home.

The next day Detective Dee Dee Rominger ("Detective Rominger") obtained a warrant for Brannigan's arrest. Detective Rominger, along with Detective Darren Tolbert ("Detective Tolbert") and Detective Shane Robbins ("Detective Robbins"), went to Brannigan's mobile home to execute the warrant. Brannigan was not home. Detective Rominger remained at the mobile home while Detectives Tolbert and Robbins went to a nearby construction site and spoke with someone who advised them Brannigan might be at defendant's residence on Swamp Box Road.

Detectives Rominger, Tolbert, and Robbins traveled to Swamp Box Road and spoke with defendant's landlord and employer, Mike Perry ("Perry"). Perry testified he knew Brannigan and stated she had worked with a friend and would "help us some." Perry further testified that Brannigan was dating defendant and had been staying at defendant's home "off and on." Perry accompanied the detectives to defendant's residence and knocked on the door. Brannigan opened the door and Detective Rominger advised her of the warrants for her arrest. Brannigan was not fully clothed, and Detective Rominger accompanied her into the residence while Brannigan dressed. Detective Rominger noticed a green and brown leaf-print shower curtain across a window in one of the bedrooms. Detective Rominger recognized the shower curtain from pictures Byrum had provided

of items stolen from her bathroom. Detective Rominger obtained a search warrant for defendant's residence. Upon executing the search warrant, the detectives found numerous other items taken from Byrum's home, three stolen firearms, illegal narcotics, and drug paraphernalia.

The next day Detective Rominger obtained an arrest warrant for defendant. Defendant provided Detective Rominger a statement in which he claimed he was unaware any items were stolen, and his belief that the items, other than the firearms, were placed in his home by Brannigan. Defendant stated Brannigan had told him that "a lady was moving out of a house and was giving her all this stuff."

B. Defendant's Evidence

Defendant testified at trial that at the time he was arrested he lived on Swamp Box Road with "another guy named Derrick, I don't recall what his last name was . . . ." Derrick had lived with defendant for approximately a month. Defendant had been dating Brannigan for about two weeks at the time of his arrest. Brannigan spent the night at defendant's residence "a couple of nights a week." Defendant testified Brannigan brought some items to his residence and told defendant she had been cleaning houses and people had given her the items.

Defendant testified that the firearms were brought to his residence by a man named Robert Deluka ("Deluka") as collateral for a loan, and that he was unaware the firearms were stolen. Defendant further testified that the drug items found in his residence did not belong to him and that he did not allow illegal drug use in his home.

Brannigan testified that she brought the stolen items to defendant's residence and defendant "never had any idea that any of it was stolen." Brannigan further testified she told defendant she was cleaning someone's house because they were moving and that person had given her the items. She also testified that she never saw defendant use drugs and that defendant did not like to be around anyone using drugs.

On 6 January 2006, the jury found defendant to be guilty of: possession of stolen property; possession of a stolen firearm; possession of a schedule IV controlled substance (Valium); possession of marijuana; possession of drug paraphernalia; and possession of methamphetamine. Defendant was sentenced as a Prior Record Level II. Defendant received a suspended sentence of a minimum of six

months and a maximum of eight months incarceration for the possession of stolen property and possession of a stolen firearm convictions. He received a suspended sentence of a minimum of six months and a maximum of eight months incarceration for the drug convictions to run consecutively with the possession of stolen property offenses. Defendant appeals.

II. Issues

Defendant argues the trial court erred in: (1) denying defendant's motion to suppress items found pursuant to the search of his residence; (2) allowing the State to cross-examine Brannigan regarding her failure to give a statement to Detective Rominger; and (3) failing to dismiss all charges due to insufficient evidence.

III. Motion to Suppress

[1] Defendant argues the items seized from his residence should have been suppressed from evidence because (1) Detective Rominger's initial entry into his residence does not satisfy any exception to the search warrant requirement, and (2) no probable cause justified issuance of the search warrant.

In *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967), the United States Supreme Court stated, ". . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (Citations omitted).

> [I]n *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, *reh'g denied*, 404 U.S. 874, 30 L. Ed. 2d 120 (1971), the U.S. Supreme Court held that the police may seize without a warrant the instrumentalities, fruits, or evidence of crime which is in "plain view" if three requirements are met. First, the initial intrusion which brings the evidence into plain view must be lawful. *Id.* at 465, 29 L. Ed. 2d at 582. Second, the discovery of the incriminating evidence must be inadvertent. *Id.* at 469, 29 L. Ed. 2d at 585. Third, it must be immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are otherwise subject to seizure. *Id.* at 466, 29 L. Ed. 2d at 583.

State v. Williams, 315 N.C. 310, 317, 338 S.E.2d 75, 80 (1986).

Here, all three elements of the plain view exception to the search warrant requirement are present.

A. Lawful Presence

First, Detective Rominger was lawfully inside defendant's premises when she observed the shower curtain. *Id.* Detective Rominger and other members of the Watauga County Sheriff's Department, along with Perry, went to defendant's residence to find Brannigan and execute the warrant for her arrest. "[O]fficers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances." *State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 600 (1979) (citing *Ellison v. United States*, 206 F. 2d 476 (D.C. Cir. 1953)). Perry, defendant's employer and owner of the premises, knocked on the door of defendant's residence. Brannigan opened the door, at which time she was advised of the warrants for her arrest.

Brannigan was not fully clothed when law enforcement arrived. Detective Rominger accompanied her into the residence to get dressed before she was transported. Detective Rominger was lawfully entitled to monitor Brannigan's movements while she got dressed. The United States Supreme Court's decision in *Washington v. Chrisman*, 455 U.S. 1, 70 L. Ed. 2d 778 (1982) is instructive on this issue:

> Every arrest must be presumed to present a risk of danger to the arresting officer. There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious.
>
> . . . .
>
> We hold, therefore, that it is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety—as well as the integrity of the arrest—is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested.

Id. at 7, 70 L. Ed. 2d at 785 (internal citations omitted); *see also United States v. Wilson*, 306 F.3d 231, 241 (5th Cir. 2002) ("Even without considering any issue of 'common decency' in transporting a person in underwear to a jailhouse or police station, we hold that in a situation such as this, the potential of a personal safety hazard to the

arrestee places a duty on law enforcement officers to obtain appropriate clothing."), *cert. denied*, 537 U.S. 1240, 123 155 L. Ed. 2d 211.

Similarly, in *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978), the police entered the residence where defendant had been living with her accomplice and placed defendant under arrest. *Id.* at 484-85, 242 S.E.2d at 851-52. An officer accompanied defendant into her bedroom to obtain clothing and personal effects. *Id.* at 485, 242 S.E.2d at 852. When the officer followed defendant into her bedroom, he observed a gun in the open top drawer of a dresser. *Id.* Our Supreme Court upheld the seizure of the gun, holding, "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Id.* at 488, 242 S.E.2d at 853 (quoting *Harris v. United States*, 390 U.S. 234, 236, 19 L. Ed. 2d 1067, 1069 (1968)).

B. Inadvertent Discovery

Second, Detective Rominger discovered the shower curtain inadvertently. *Williams*, 315 N.C. at 317, 338 S.E.2d at 80. Detective Rominger testified, "what caught my eye was in one of the bedrooms there was a window and there was a rod across the window with a green and brown leaf print shower curtain." No evidence was presented that Detective Rominger was specifically looking for the shower curtain. She simply observed it in plain view in one of the bedrooms while accompanying Brannigan to get dressed.

C. Immediately Apparent

Third, it was immediately apparent to Detective Rominger that the shower curtain constituted evidence of a crime. *Id.* Detective Rominger testified "that curtain matched pictures that I had seen, victims has provided me of items that were taken from their bathroom, they had a border in their bathroom that matched this curtain."

Detective Rominger was lawfully in defendant's residence when she observed the shower curtain in plain view. " 'The substance of all the definitions [of probable cause] is a reasonable ground for belief in guilt.' " *State v. Hicks*, 60 N.C. App. 116, 119, 298 S.E.2d 180, 182 (1982) (quoting *Carroll v. United States*, 267 U.S. 132, 161, 69 L. Ed. 543, 555 (1925)). Based on her observation of the shower curtain, which matched pictures of a shower curtain stolen from Byrum's house, Detective Rominger had probable cause to believe defendant's

residence contained stolen items. The search warrant was properly issued and the items seized thereunder were properly admitted. The trial court's denial of defendant's motion to suppress items found pursuant to the search of his residence was proper. This assignment of error is overruled.

IV. Cross-Examination of Brannigan

[2] Defendant argues the trial court committed plain error in allowing the State to cross-examine Brannigan regarding her failure to give a statement to Detective Rominger in violation of her constitutional rights. We disagree. Under these facts, defendant cannot assert a third party's rights.

In *State v. Lipford*, 81 N.C. App. 464, 467-68, 344 S.E.2d 307, 310 (1986), this Court held, "Defendant has no standing to argue the inadmissibility of the statement on the ground that [the co-defendant's] constitutional rights were violated. As with Fourth Amendment rights, Fifth Amendment rights are personal and may not be vicariously asserted." (citing N.C. Gen. Stat. 15A-972 ("*a defendant who is aggrieved* may move to suppress evidence . . ."); *State v. Ford*, 71 N.C. App. 748, 751, 323 S.E.2d 358, 361 (1984), *disc. rev. denied*, 313 N.C. 511, 329 S.E.2d 397 (1985) (" 'Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.' . . . Only an 'aggrieved' party may move to suppress evidence under G.S. 15A-972 by demonstrating that his personal rights and not those of some third party have been violated."); *United States v. Handley*, 763 F. 2d 1401, 1404 (11th Cir.), *cert. denied*, 474 U.S. 951, 88 L. Ed. 2d 301, (1985) ("A defendant has standing to object on the ground of the fifth amendment self-incrimination privilege to the admission only of his own statements."); *United States v. Shaffner*, 524 F. 2d 1021, 1022 (7th Cir. 1975), *cert. denied*, 424 U.S. 920, 47 L. Ed. 2d 327, (1976) (defendant had no standing to object to introduction of co-defendant's confession on the grounds that it was not voluntarily given)). Clear and long-standing precedents show defendant has no standing to assert Brannigan's constitutional right against self-incrimination. This assignment of error is dismissed.

V. Motion to Dismiss

Defendant argues the trial court erred in denying his motion to dismiss all charges where insufficient evidence supports each of the essential elements of the charges.

A. Standard of Review

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (citations and quotation marks omitted).

B. Possession of Stolen Property Conviction

[3] Defendant was convicted of possessing stolen goods under N.C. Gen. Stat. § 14-71.1 (2003) ("If any person shall possess any . . . property . . . , the stealing or taking whereof amounts to larceny or a felony, . . . such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a Class H felony . . . .").

> The essential elements of felonious possession of stolen property are: (1) possession of personal property, (2) which was stolen pursuant to a breaking or entering, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen pursuant to a breaking or entering, and (4) the possessor acting with a dishonest purpose.

State v. McQueen, 165 N.C. App. 454, 459, 598 S.E.2d 672, 676 (2004), *disc. rev. denied*, 359 N.C. 285, 610 S.E.2d 385-86 (2005).

Defendant challenges evidence to sustain the first and third elements of the felony possession of stolen goods conviction. Regarding the possession element, "[o]ne has possession of stolen property when one has both the power and intent to control its disposition or use." *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985) (citation omitted). "One who has the requisite power to control and intent to control access to and use of a vehicle or a house has also the possession of the known contents thereof." *State v. Eppley*, 282 N.C.

249, 254, 192 S.E.2d 441, 445 (1972). The evidence tends to show stolen goods were found throughout defendant's residence. Detective Rominger testified the stolen items "were out on the shelves, the house had been decorated with the items, the rugs were on the floor, the items were sitting on the shelves, the towels were hanging on the towel racks, the utensils were in the drawers, food in the freezer." Sufficient evidence was presented to meet the requisite possession element of the offense.

Defendant argues the State presented insufficient evidence that defendant knew or had reasonable grounds to know the goods brought into his residence by Brannigan were stolen to satisfy the third element of the offense. We disagree.

"Whether the defendant knew or had reasonable grounds to believe that the [property was] stolen must necessarily be proved through inferences drawn from the evidence." *State v. Brown*, 85 N.C. App. 583, 589, 355 S.E.2d 225, 229 (1987). Our Supreme Court has held the legislature intended for the "reasonable man" standard to apply to the offense of possession of stolen goods. *State v. Parker*, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986).

Here, the State presented no direct evidence that defendant had actual knowledge the goods Brannigan brought into his home were stolen and relies wholly on circumstantial evidence of possession.

Perry assisted Brannigan in unloading some of the stolen goods in defendant's home. When Perry was asked whether he had any reason to believe the items had been stolen, he replied, "Well, it began to look suspicious. She was suppose [sic] to be cleaning people's houses, she had a ladder, and stuff like that, why would people be giving away something that could be used in cleaning with, nice stuff, you know." Further, defendant referred to the stolen goods as "nice stuff" and told Brannigan "there better not be no stolen stuff in my house." Viewed in the light most favorable to the State, the circumstantial evidence tends to show defendant knew or should have known the goods Brannigan brought into his residence were stolen and is sufficient to withstand a motion to dismiss. *McQueen*, 165 N.C. App. at 459, 598 S.E.2d at 676; *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. Despite defendant's and Brannigan's testimony to the contrary, this issue became a factual dispute for the jury to decide. This assignment of error is overruled.

C. Possession of Stolen Firearm Conviction

[4] Defendant was also convicted of felony possession of a stolen firearm pursuant to N.C. Gen. Stat. § 14-71.1. The only evidence presented regarding defendant's knowledge the firearms were stolen came from defendant's testimony. Defendant testified he loaned Deluka money to pay rent and took the firearms as collateral without knowing the firearms were stolen. Deluka did not testify at trial. Perry was asked whether he was aware that defendant had loaned Deluka money, to which he responded, "I'm sure it went both ways all the time."

The State argues defendant's constructive possession of the stolen firearms in his residence is sufficient to withstand defendant's motion to dismiss. The second and third elements of felony possession of stolen goods require that the goods were stolen pursuant to a breaking or entering, and defendant knew or had reasonable grounds to believe the property to have been stolen pursuant to a breaking or entering. *McQueen*, 165 N.C. App. at 459, 598 S.E.2d at 676.

The State presented no evidence the firearms were stolen pursuant to a breaking or entering or that defendant knew or should have known the firearms were stolen. The trial court dismissed defendant's charges of breaking and entering and larceny after breaking and entering. The State presented no evidence of when the firearms were stolen or how long they had been in defendant's possession. Insufficient evidence on this charge was presented to withstand defendant's motion to dismiss. The trial court should have dismissed the felonious possession of stolen firearms charge and erred in submitting defendant's possession of a stolen firearm charge to the jury.

D. Drug Related Convictions

[5] Defendant was also convicted of (1) simple possession of Valium, a schedule IV controlled substance; (2) possession of methamphetamine, a schedule II controlled substance; (3) possession of marijuana up to 1/2 ounce; and (4) possession of drug paraphernalia.

Detective Tolbert testified controlled substances and drug paraphernalia were found when he and the other detectives executed the search warrant at defendant's residence. Detective Tolbert testified that a black box was found under the love-seat in defendant's residence containing a blue pill, the barrel part of a pen, and a small plastic bag containing a white residue. Detective Tolbert testified that a pen barrel is often used to inhale methamphetamine into the body.

Two boxes found under the bathroom sink contained marijuana pipes, a glass vile containing white residue, several other glass vials, a yellow capsule, a blue Valium pill, rolling papers, a plastic bag, a pen barrel, half of a marijuana cigarette, six pieces of aluminum foil with black residue, and a small pocket knife. Detective Tolbert testified that aluminum foil is used to heat methamphetamine and inhale it into the body. Defendant's residence contained only one bathroom. A pocket knife with black residue on the tip was found on a night-stand in a bedroom "to the left as you walk in the door." Detective Tolbert testified it is common for the tip of a knife to be used to clean pipes used to smoke marijuana or other controlled substances. Rolling papers and a "roach clip" was found "in the bedroom to the right." North Carolina State Bureau of Investigations Agent Joe Revis ("Agent Revis") analyzed the items seized from defendant's residence. Agent Revis found methamphetamine residue on two plastic bags.

Defendant argues the State failed to establish the possession element of the drug offenses and asserts the State failed to establish defendant had custody and control of the contraband to the exclusion of others or that defendant knew of the contraband. We disagree.

"An accused has possession of [contraband] . . . when he has both the power and the intent to control its disposition or use. Where direct evidence of power and intent to control are absent, however, these manifestations of actual possession must be inferred from the circumstances." *State v. Thorpe*, 326 N.C. 451, 454, 390 S.E.2d 311, 313 (1990) (citation omitted).

> Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. *[T]he State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.*'

Id. (quoting *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984)) (emphasis supplied).

> [C]onstructive possession can be reasonably inferred from the fact of ownership of premises where contraband is found. Such

> ownership is strong evidence of control and "gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession."

Id. at 455, 390 S.E.2d at 314 (quoting *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714).

Here, undisputed evidence was presented that defendant leased and resided in the house where the controlled substances and drug paraphernalia were found. When the search warrant was executed, another man also lived in the residence and Brannigan had stayed there a couple of nights a week. Our Supreme Court has found constructive possession to exist "where possession is not exclusive but defendant exercises sole or joint physical custody" of the premises. *Id.* at 455, 390 S.E.2d at 313 (citing *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (defendant had key and was seen repeatedly at apartment where contraband was found)). The State presented sufficient evidence "within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession" to overcome defendant's motion to dismiss. *Id.* at 454, 390 S.E.2d at 313. This assignment of error is overruled.

VI. Conclusion

The trial court did not err in denying defendant's motion to suppress items found pursuant to the search of defendant's residence. Defendant has no standing to object to the State's cross-examination of Brannigan on the grounds that it violated her constitutional rights. The trial court properly denied defendant's motion to dismiss the possession of stolen goods and drug related charges.

The trial court erred in denying defendant's motion to dismiss the possession of a stolen firearm charge. Defendant's conviction for possession of a stolen firearm is reversed. In all other respects defendant received a fair trial free from prejudicial errors he assigned and argued.

No error in part, Reversed in part, Remanded for re-sentencing.

Judges McCULLOUGH and LEVINSON concur.

STRICKLAND v. LAWRENCE

[176 N.C. App. 656 (2006)]

POLLY GROOME STRICKLAND, CARROLL P. GROOME, MARY ELIZABETH GROOME McHENRY, AND JOHN R. GROOME, JR., PLAINTIFFS v. BILL LAWRENCE, LAWRENCE SAND AND GRAVEL, INC., D/B/A VIEWMONT SANDROCK, INC., DAVID H. GRIFFIN, SR., JIMMY CLARK, BISHOP ROAD PROPERTIES, LLC AND VIEWMONT ROAD PROPERTIES, LLC, DEFENDANTS

No. COA05-823

(Filed 21 March 2006)

1. Fiduciary Relationship— breach of fiduciary duty—failure to establish existence of fiduciary relationship

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' breach of fiduciary duty claim, because: (1) a fiduciary relationship will not exist between parties in equal bargaining positions dealing at arm's length, even though they are mutually interdependent businesses; (2) plaintiffs took an active role in the day-to-day management of the pertinent mine; and (3) under the facts of this case, plaintiffs cannot establish that the Lawrence defendants exerted the necessary dominion and influence over plaintiffs to establish the existence of a fiduciary relationship.

2. Fraud— constructive—failure to show relationship of trust and confidence

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' constructive fraud claim, because plaintiffs cannot establish defendant Lawrence owed them a fiduciary duty, and therefore, they cannot establish the element of a relationship of trust and confidence required to maintain a claim for constructive fraud.

3. Fraud— actual—missing sales tickets—failure to show damages

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' actual fraud claim, because: (1) although plaintiffs' forecast of evidence regarding the allegation that defendant Lawrence misrepresented the amount of money he took in from sales of the sandrock and dump truck loads includes evidence that tickets used to record the sales were missing, plaintiffs failed to show that any of the missing tickets actually represented a load of sandrock or a dump truck load for which plaintiffs were not paid; (2) there was no requirement that the tickets be used in numerical order and there is evidence on the record that it was common for ticket books to be lost, for

multiple books to be in use at one time, and that there were errors in printing the books in numerical order; (3) while a review of the books disclosed a net underpayment of rent due plaintiffs, defendant Lawrence paid plaintiffs the amount due them as disclosed by the review, and thus, plaintiffs have not suffered any damages from the underpayment disclosed; and (4) plaintiffs have forecast no other evidence tending to show there were other discrepancies between the books kept by the Lawrence defendants and those kept by plaintiffs.

4. Unfair Trade Practices— bare allegations—failure to forecast evidence of fraud

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' unfair and deceptive trade practices claim, because: (1) plaintiffs have not forecast any evidence other than the bare allegations in their complaint regarding their claim for actual fraud and cannot establish the required relationship of trust and confidence for their claim for constructive fraud; and (2) the claim for unfair and deceptive trade practices rests on the same forecast of evidence for their claims of fraud which have not been adequately supported.

5. Unjust Enrichment— mining permit—failure to make any reservation of rent or of any other interest in property in conveyance

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim for unjust enrichment even though plaintiffs contend the sale of the Groome property did not include the sale of plaintiffs' mining permit and that the Griffin defendants have used the permit reaping a substantial benefit for which plaintiffs have not been compensated, because: (1) while the sale of the property did not include the sale of the mining permit, plaintiffs did not make any reservation of rent or of any other interest in the property in their conveyance but instead expressly assigned their rights under the mining lease to defendant Viewmont Road Properties (Viewmont); (2) under the mining lease, only defendant Lawrence Sand and Gravel (LSG) had the right to conduct mining activities on the property to the exclusion of all others; and (3) following the sale of the property and plaintiffs' assignment of the mining lease, Viewmont enjoyed the exclusive right to receive compensation for mining activities conducted on the property by LSG even though plaintiffs retained ownership of the mining permit.

6. Pleadings— denial of motion for leave to file amended complaint—failure to provide evidence to support motion

The trial court did not abuse its discretion in a breach of fiduciary duty, constructive fraud, actual fraud, unfair and deceptive trade practices, negligent misrepresentation, and conversion/quantum meruit case by partially denying plaintiffs' motion for leave to file an amended complaint to add a claim for civil conspiracy, because: (1) plaintiffs' motion was filed seven months after the institution of their action and nine depositions had already been taken including those of the named individual defendants; and (2) plaintiffs sought to add the claim for civil conspiracy based on information that had been obtained in discovery, yet at the hearing on plaintiffs' motion to amend they presented no deposition transcripts or other documentary evidence other than the pleadings to support their motion.

Appeal by plaintiffs from orders entered 30 September 2004 by Judge Russell G. Walker, Jr., and 22 December 2004 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 25 January 2006.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Teresa DeLoatch Bryant, for plaintiff-appellants.

Hunter, Higgins, Miles, Elam & Benjamin, PLLC, by James W. Miles, Jr. and William A. Eagles, for defendant-appellees Bill Lawrence and Lawrence Sand and Gravel, Inc.

Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine, for defendant-appellees David H. Griffin, Sr., Jimmy Clark, and Viewmont Road Properties, LLC.

BRYANT, Judge.

Polly Groome Strickland, Carroll P. Groome, Mary Elizabeth Groome McHenry, and John R. Groome, Jr. (plaintiffs) appeal from orders entered in Guilford County Superior Court on 30 September 2004 by Judge Russell G. Walker, Jr., partially denying plaintiffs' motion to amend; and 22 December 2004 by Judge Lindsay R. Davis, Jr., granting summary judgment in favor of Bill Lawrence, Lawrence Sand and Gravel, Inc., (collectively, the Lawrence defendants), and David H. Griffin, Sr., Jimmy Clark, and Viewmont Road Properties, LLC (collectively, the Griffin defendants). We affirm the orders of the trial court.

Facts

Prior to 26 April 2002, plaintiffs owned property in Greensboro, North Carolina (the Groome property) on which they conducted mining and landfill operations. The mining operations were run under authorization from the North Carolina Department of Environment and Natural Resources (NCDENR) pursuant to Mining Permit Number 41-09 owned by plaintiffs. On 11 October 2001, plaintiffs submitted a request to NCDENR for the modification of their Mining Permit No. 41-09 to increase the area in which they were permitted to mine and fill. Plaintiffs were granted the modifications to their Mining Permit No. 41-09 on 17 May 2002, expanding the area for potential mining activity on the Groome property to eight acres.

In late 1993, pursuant to an oral agreement with Fred M. Groome, Jr. (Mack Groome), an owner of the Groome property, Bill Lawrence began managing the day-to-day operations on the property. Lawrence sold sandrock mined from the property and ran the landfill business. Lawrence collected the proceeds from the mining and landfill operation which were shared between Lawrence and plaintiffs with Lawrence receiving seventy-five percent and plaintiffs receiving twenty-five percent. Lawrence remitted the plaintiffs' twenty-five percent of the proceeds on a monthly basis. On 1 September 1995, plaintiffs entered into a Mining Lease executed by Bill Lawrence as President of Lawrence Sand and Gravel d/b/a Viewmont Sandrock, granting Lawrence the exclusive rights, *inter alia*, to conduct mine and landfill operations on the Groome property.

In early 2001 a creek at the mine washed out a portion of its bank and flooded the mine. Lawrence testified he entered into an oral agreement with Mack Groome whereby Lawrence Sand and Gravel would provide labor, material and equipment to correct the problems with the creek and subsequent flooding. In payment for these services, $25,000.00 would be withheld from the rental payments under the Mining Lease at the rate of $2,000.00 per month.

In April of 2001, Mack Groome died of cancer. Plaintiffs began actively dealing directly with Lawrence Sand and Gravel and made various complaints concerning the amount of payments made under the Mining Lease. As a result, a review was conducted relating to sales and payments under the Mining Lease. The review disclosed underpayment of rent of $14,332.25 in 2001, during the period of withholding monies pursuant to the oral agreement with Mack Groome. However, the review also disclosed an overpayment of $5,190.00 in

2000. Lawrence did not attempt to enforce the terms of his oral agreement with Mack Groome and paid plaintiffs $9,141.25.

On 12 October and 30 November 2000, defendants Griffin and Clark made written offers to purchase the Groome property, both of which were rejected by plaintiffs. On 31 January 2001, the parties entered into an agreement concerning the purchase of the Groome property, however the agreement called for the settlement of further details at a later date. Shortly after the death of Mack Groome, Griffin and Clark sent another offer to purchase the Groome property to plaintiffs which included numerous detailed and specific conditions precedent not previously discussed. Ultimately, no agreement was reached on the January/May 2001 offers to purchase the Groome property.

On 26 April 2002, plaintiffs sold their interests in the Groome property to Viewmont Road Properties, LLC, created by defendants Griffin and Clark for the purpose of, *inter alia*, purchasing plaintiffs' properties. The total sales price of the property was approximately $1,500,000.00. Plaintiffs contend that, although they estimated the value of the land and the mining business to be $4,450,000.00, they accepted $1,500,000.00 in light of damage the property had incurred and the fact that Griffin and Clark did not purchase the Mining Permit.

During this time, Griffin and Clark were also in negotiations with Lawrence to purchase all of his equipment used at the mine on the Groome property. On 26 April 2002, Griffin entered into an agreement with Lawrence for the sale of the assets of Lawrence Sand and Gravel associated with the mining and landfill operations on the Groome property. As part of the agreement Lawrence was also hired to oversee the continuing mining and landfill operations on the Groome property.

Procedural History

Plaintiffs instituted this action on 15 January 2004, filing a complaint alleging claims for breach of fiduciary duty, constructive fraud, actual fraud, unfair and deceptive trade practices, negligent misrepresentation and conversion/quantum meruit. On 20 August 2004, plaintiffs filed a Motion for Leave to File Amended Complaint. By Order entered on 30 September 2004 the trial court denied plaintiffs' proposed amendments to add a claim for conspiracy and supporting allegations, but granted the motion as to other amendments. On 15

and 17 November 2004, defendants filed motions for summary judgment. Plaintiffs voluntarily dismissed their claims against defendant Bishop Road Properties, LLC without prejudice on 19 November 2004. Defendants' motions for summary judgment were heard on 10 December 2004 and by Order entered on 22 December 2004 the trial court granted defendants' motions as to all claims. Plaintiffs appeal.

Plaintiffs raise the issues of whether the trial court erred in: (I) granting defendants' motions for summary judgment; and (II) denying, in part, plaintiffs' Motion For Leave To File Amended Complaint. For the reasons below, we affirm the orders of the trial court.

I

Plaintiffs first argue the trial court erred in granting defendants' motions for summary judgment as to all of plaintiffs' claims. Under Rule 56(c) of the Rules of Civil Procedure, summary judgment shall be granted if "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). In ruling on a motion for summary judgment, "the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials." *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975). "All such evidence must be considered in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). "Where there are genuine, conflicting issues of material fact, the motion for summary judgment must be denied so that such disputes may be properly resolved by the jury as the trier of fact." *Id.* at 468, 597 S.E.2d at 692.

The purpose of summary judgment is to determine whether any issues of material fact exist and, if not, eliminate the necessity of a full trial where only questions of law are involved. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 641-42, 281 S.E.2d 36, 40 (1981). The movant has the burden of establishing the absence of any triable issues of fact. *Id.* This burden may be met in one of two ways: (1) "by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense"; or (2) "by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). If the moving party satisfies its burden of proof, the non-moving party cannot rest upon her pleadings, and must "set

forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005); *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). "The opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists." *Bradford*, 305 N.C. at 370, 289 S.E.2d at 366. We review an order allowing summary judgment *de novo*. *Shroyer v. County of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002).

Claims Against Defendants Bill Lawrence and Lawrence Sand and Gravel, Inc.

Plaintiffs assert claims for breach of fiduciary duty, constructive fraud, actual fraud, unfair and deceptive trade practices and unjust enrichment against the Lawrence defendants. At the hearing on defendants' motions for summary judgment the Lawrence defendants argued that the discovery to date has shown that plaintiffs cannot produce evidence to support an essential element of their claims and that an essential element of the plaintiffs claims does not exist.

Breach of Fiduciary Duty

[1] "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). A fiduciary relationship

> has been broadly defined . . . as one in which "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . , [and] it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other*."

Id. at 651, 548 S.E.2d at 707-08 (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). Generally, the existence of a fiduciary relationship "is determined by specific facts and circumstances, and is thus a question of fact for the jury." *Stamm v. Salomon*, 144 N.C. App. 672, 680, 551 S.E.2d 152, 158 (2001) (citing *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 665, 391 S.E.2d 831, 832 (1990)). Nevertheless, this Court has held that a fiduciary relationship will not exist between parties in equal bargaining positions dealing at arm's length, even though they are mutually interdependent businesses. *Tin Originals*, 98 N.C. App. at 665-66, 391 S.E.2d at 832-33.

In the case at hand, the dealings between plaintiffs and the Lawrence defendants were conducted under the Mining Lease entered on 1 September 1995. While Bill Lawrence was the day-to-day manager of the mine, evidence was presented that plaintiffs took an active role in overseeing the mine's operations and, under the Mining Lease, plaintiffs reserved the rights to inspect and audit the operation's books. Initially Lawrence dealt primarily with Mack Groome, who would come to the mine often and discuss the mining operation. After Mack Groome's death and during the year preceding the sale of the Groome property to Viewmont Road Properties, plaintiffs Polly Groome Strickland and Carroll P. Groome took an active role in the day-to-day management of the mine. Further, evidence of record establishes that the Groome family had been involved in the mining business for several years with mines other than the one on the Groome property. Under these facts, plaintiffs cannot establish that the Lawrence defendants exerted the necessary "domination and influence" over plaintiffs to establish the existence of a fiduciary relationship. Thus the trial court properly granted defendants' motion for summary judgment on this claim.

Constructive Fraud

[2] In order to survive a motion for summary judgment on their claim for constructive fraud, plaintiffs were required to forecast evidence showing: (1) a relationship of trust and confidence; (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that the plaintiff was as a result injured. *Sterner v. Penn*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003) (citations omitted). Plaintiffs contend Lawrence owed them a fiduciary duty which he breached resulting in damage to them. As discussed above, plaintiffs cannot establish Lawrence owed them a fiduciary duty and therefore they cannot establish the element of a relationship of trust and confidence required to maintain a claim for constructive fraud. Thus the trial court properly granted defendants' motion for summary judgment on this claim.

Actual Fraud

[3] To establish a claim for fraud, plaintiffs must show: "(1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with the intent to deceive; (4) which the injured person reasonably relies upon; [and] (5) resulting in damage to the injured party." *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 30, 437 S.E.2d 674, 681 (1993) (citations omitted). Under their claim

against the Lawrence defendants for actual fraud, plaintiffs contend Bill Lawrence "misrepresented the amount of money that he took in from sales of the sandrock and dump truck loads." Plaintiffs' forecast of evidence regarding this allegation includes evidence that tickets used to record sales of sandrock and receipt of dumping loads were missing, "suggesting that [p]laintiffs did not receive rents for those sales." Plaintiffs argue that Bill Lawrence lowered the tally of amounts of rent received in order to induce them to sell the Groome property to the Griffin defendants. However, plaintiffs forecast no evidence that any of the missing tickets actually represented a load of sandrock or a dump truck load for which plaintiffs were not paid.

On a motion for summary judgment plaintiffs cannot rest on their mere allegations that the missing tickets represented actual sales from which plaintiffs were not paid their rent as required under the Mining Lease, but must set forth specific facts showing there is a genuine issue for trial. *Bradford*, 305 N.C. at 369-70, 289 S.E.2d at 366. By not setting forth any facts supporting their allegations that Lawrence intentionally withheld tickets showing valid sales and thus did not pay plaintiffs the rents due them under the Mining Lease, plaintiffs have failed to forecast evidence of the elements of actual fraud. Further, there was no requirement that the tickets be used in numerical order and there is evidence on the record before this Court that it was common for ticket books to be lost, for multiple books to be in use at one time, and that there were errors in printing the books in numerical order.

Plaintiffs also argue their claim for actual fraud is supported by the past discrepancies revealed in the review of the books kept by the Lawrence defendants and plaintiffs regarding the amount of payments made under the Mining Lease. While this review disclosed a net underpayment of rent due plaintiffs, Lawrence paid plaintiffs the amount due them as disclosed by the review. Therefore, plaintiffs have not suffered any damages from the underpayment disclosed by the review and this activity cannot support a claim of fraud. While the review was not a complete audit of the books kept by plaintiffs and the Lawrence defendants, plaintiffs cannot rest on an allegation that such an audit would reveal acts to support their claim for actual fraud. *Id.* Plaintiffs have forecast no other evidence tending to show there were other discrepancies between the books kept by the Lawrence defendants and those kept by plaintiffs. In light of these facts, the trial court properly granted defendants' motion for summary judgment on this claim.

Unfair and Deceptive Trade Practices

[4] "To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998) (citations omitted). To support this claim, plaintiffs contend they have forecast evidence that the sale of significant amounts of sandrock and landfill services to customers who are heavily involved in the transport of products affects commerce. Plaintiffs further contend their forecast of evidence as to their claims for fraud also form the basis for the unfair or deceptive acts or practice committed by the Lawrence defendants. As discussed above, plaintiffs have not forecast any evidence other than the bare allegations in their complaint regarding their claim for actual fraud and cannot establish the required relationship of trust and confidence for their claim for constructive fraud. As their claim for unfair and deceptive trade practices rests on the same forecast of evidence for their claims of fraud, which have not been adequately supported, the trial court properly granted defendants' motion for summary judgment on this claim.

Claims Against All Defendants[1]

[5] Plaintiffs contend the trial court erred in granting summary judgment on their claim for unjust enrichment as to all defendants because the sale of the Groome property did not include the sale of their Mining Permit and the Griffin defendants have used the permit, "reaping a substantial benefit," for which plaintiffs have not been compensated. Plaintiffs entered into a lease on 1 September 1995 granting Lawrence Sand & Gravel the "*exclusive right and privilege* to mine, dig, mill, process and remove all minerals, ores, clays, earths, and stone" referred to in the Mining Permit. (Emphasis added.) The Lease additionally obligated Lawrence Sand and Gravel to reclaim the mine in accordance with the reclamation plan established in the Mining Permit.

"A conveyance of land, which is subject to a valid and continuing lease, passes to the purchaser the right to collect the rents thereafter accruing. . . . When title passes, lessee ceases to hold under the

1. Plaintiffs asserted an additional claim of negligent misrepresentation against the Griffin defendants. However, at the hearing on defendants' motions for summary judgment, plaintiffs admitted they had not met each and every element of negligent misrepresentation and conceded that summary judgment on that claim was proper.

grantor. He then becomes a tenant of grantee, and his possession is grantee's possession." *Pearce v. Gay*, 263 N.C. 449, 451, 139 S.E.2d 567, 569 (1965) (citations omitted). While the sale of the Groome property did not include the sale of the Mining Permit, plaintiffs did not make any reservation of rent or of any other interest in the Groome property in their conveyance to Viewmont Road Properties. Instead, plaintiffs expressly assigned their rights under the Mining Lease to Viewmont Road Properties. Therefore, under the Mining Lease, only Lawrence Sand and Gravel had the right to conduct mining activities on the Groome property, to the exclusion of all others, even plaintiffs.

Following the sale of the Groome property and plaintiffs' assignment of the Mining Lease, Viewmont Road Properties enjoyed the exclusive right to receive compensation for mining activities conducted on the Groome property by Lawrence Sand and Gravel, even though plaintiffs retained ownership of the Mining Permit. Plaintiffs are therefore not entitled to compensation under a theory of unjust enrichment and defendants' motion for summary judgment on this claim was properly granted by the trial court.

These assignments of error are overruled.

II

[6] Plaintiffs next argue the court erred in denying, in part, plaintiffs' Motion For Leave To File Amended Complaint. Under Rule 15(a) of the North Carolina Rules of Civil Procedure, where a party has no right to amend because a responsive pleading has been filed, the "party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2005). However, in order to protect parties who may be prejudiced by liberal amendment, our Supreme Court has held that "[a] motion to amend is addressed to the [sound] discretion of the trial court. Its decision will not be disturbed on appeal absent a showing of abuse of discretion." *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). "Where it is unclear as to why the trial court denied leave to amend, this Court may consider any apparent reasons for the denial." *Draughon v. Harnett County Bd. of Educ.*, 166 N.C. App. 464, 467, 602 S.E.2d 721, 724 (2004) (citing *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 727, 266 S.E.2d 14, 16 (1980)).

A motion to amend may be denied for "(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e)

repeated failure to cure defects by previous amendments." *Carter v. Rockingham County Bd. of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003) (citations and quotations omitted). "In deciding if there was undue delay, the trial court may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit." *Draughon*, 166 N.C. App. at 467, 602 S.E.2d at 724 (citing *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 31, 598 S.E.2d 570, 590 (2004)).

In the instant case the trial court denied plaintiffs' motion to amend their complaint to add a claim for civil conspiracy between all defendants; but allowed plaintiffs to add new allegations regarding the corporate structure of Lawrence Sand and Gravel, update their allegations related to damages, and change a claim for conversion to one for unjust enrichment. The trial court did not state any reason for its order. Plaintiffs' motion was filed seven months after the institution of their action and nine depositions had been taken, including those of the named individual defendants. Plaintiffs sought to add the claim for civil conspiracy "based upon information that has been obtained in discovery", however, at the hearing on plaintiffs' motion to amend, plaintiffs presented no deposition transcripts or other documentary evidence, other than the pleadings, to support their motion. Based on these circumstances alone, plaintiffs cannot show that the trial court abused its discretion in denying the motion based on undue delay. This assignment of error is overruled.

Affirmed.

Judges CALABRIA and JOHN concur.

RAY WALKER AND BETTY STATEN, PLAINTIFFS v. FLEETWOOD HOMES OF NORTH CAROLINA, INC., A NORTH CAROLINA CORPORATION, DEFENDANT

No. COA04-1466

(Filed 21 March 2006)

1. Unfair Trade Practices— manufactured housing—failure to perform repairs and other work—failure to respond to complaints

The trial court properly decided that defendant's violations of the regulations of the N.C. Manufactured Housing Board were sufficient to support a claim under N.C.G.S. § 75-1.1. The jury found that defendant failed to perform repairs, alterations, and/or additions completely and in a workmanlike manner, and repeatedly failed to respond promptly to consumer complaints and inquiries.

2. Unfair Trade Practices— purchase of mobile home by parent for child—claim by child

The trial court did not err by ruling that plaintiff Staten may maintain a claim for recovery pursuant to N.C.G.S. § 75-16 arising from her father's purchase of a mobile home for her. The conclusion that "any person" in the statute does not include Staten would leave her with no remedy, as she would not be able to recover as a buyer under Chapter 75 or under the bond required by N.C.G.S. § 143-143.12(c).

3. Damages and Remedies— unfair trade practices—loss of privacy—emotional distress—not pled

A new trial was awarded on damages in an action for unfair and deceptive trade practices arising from a parent's purchase of a mobile home for his daughter where the court allowed the jury to consider loss of privacy and mental and emotional distress even though neither the claims nor the supporting facts were pled, there was no attempt to amend the complaint to include these claims, and defendant objected to the trial court's jury instruction on emotional distress.

4. Appeal and Error— preservation of issues—issue not brought forward in motion appealed

The issue of whether damages should have been reduced by the amount of a settlement was not preserved for appeal where it was not brought forward in defendant's motion for judgment

notwithstanding the verdict or a new trial, the only motion from which defendant appealed.

Judge JACKSON concurring in part and dissenting in part.

Appeal by defendant from order entered 15 March 2004 by Judge Charles H. Henry in the Superior Court in Craven County. Heard in the Court of Appeals 16 June 2005.

William F. Ward, III, for plaintiffs.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Philip J. Mohr and Alison R. Bost, for defendant.

HUDSON, Judge.

Plaintiffs Ray Walker and Betty Staten brought suit against defendant Fleetwood Homes, Inc., ("Fleetwood") and other defendants asserting various claims arising out of Walker's purchase of a mobile home for his daughter Staten. After plaintiffs settled with the other defendants, they proceeded to trial against Fleetwood on 7 July 2003. On 8 September 2003, Judge W. Allen Cobb granted plaintiff's motion for a mistrial. The case came on for retrial on 29 September 2003 on Walker's claims for breach of contract, breach of express warranty and unfair and deceptive trade practices ("UDTP"), and Staten's claims for breach of contract and UDTP. Both of plaintiffs' breach of contract claims were dismissed, but the jury returned a verdict in favor of Walker on his breach of warranty and UDTP claims, and in favor of Staten on her UDTP claim. The court heard arguments from the parties on whether judgment should be entered on the verdict. On 25 November 2003, the court entered judgment for plaintiffs in accordance with the jury's verdict, trebling the damages awarded for UDTP. By separate order, the court awarded attorney's fees to plaintiffs. Defendant then moved for judgment not withstanding the verdict ("JNOV") and a new trial, which motions the court denied on 12 March 2004. Defendants appeal. As discussed below, we affirm in part, and dismiss in part, and remand for a new trial on damages.

In September 2001, Walker made a down payment on a mobile home from New Way Housing of New Bern, which had to specially order the home from Fleetwood. Walker entered into a retail installment contract with Greenpoint Credit, LLC, in order to finance the rest of the purchase price. Although Walker bought the home for his daughter Staten in a so-called "buy-for" arrangement, Walker's name

alone appeared on all related paperwork. Tony Lund, the general manager of New Way, testified that both he and Greenpoint were aware of the buy-for arrangement and knew that Staten intended to live in the home. Lund defined a buy-for arrangement as "when a person buys a home for someone else, and with that information disclosed to the lender, if there is retail financing." This arrangement is common and well-understood in the mobile home industry, as evidenced by plaintiff's exhibit 15, a "Notice to cosigner/borrower in 'buy/for' transactions" from Greenpoint Credit and signed by Walker. The home came with a two-year warranty, which stated:

> Your new home, including the steel structure beneath the floor of the home, plumbing, heating, electrical systems, appliances, and all equipment installed by the Fleetwood Manufacturing Center, is warranted, under normal use, to be free from defects of materials and/or workmanship for two years.

(Emphasis in original). Independent contractors hired by New Way delivered and set up the home on Staten's lot. Plaintiffs found numerous defects in the home, and contacted New Way about them. New Way's general manager inspected the home, then contacted Fleetwood and asked them to make the repairs. On 1 October 2001, Fleetwood sent out a repair crew to inspect the home, but Staten asked them to return the following week to give her time to consult an attorney. No one from Fleetwood ever returned or contacted either plaintiff. On 9 October 2001, Walker attempted to rescind the purchase contract, which New Way refused to accept because it was past the three-day right of rescission provided for in the contract. Plaintiffs then filed this suit.

[1] Defendant first argues that the court erred in denying its motion for directed verdict, for JNOV and for a new trial on plaintiffs' UDTP claims. We disagree.

A motion for JNOV is essentially a renewal of an earlier motion for directed verdict and the standards of review are the same. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985). In considering such a motion,

> the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradic-

> tions, conflicts, and inconsistencies being resolved in the nonmovant's favor.

Id. at 369, 329 S.E.2d at 337-38. "[A] motion for judgment notwithstanding the verdict is cautiously and sparingly granted." *Id.* at 369, 329 S.E.2d at 338.

"[U]nfair or deceptive acts or practices in or affecting commerce" are unlawful. N.C. Gen. Stat. § 75-1.1, *et seq.* (2001). To prevail on such a claim, a plaintiff must show "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Mitchell v. Linville*, 148 N.C. App. 71, 73-4, 557 S.E.2d 620, 623 (2001). These requirements have been further defined by this Court:

> If a practice has the capacity or tendency to deceive, it is deceptive for the purposes of the statute. 'Unfairness' is a broader concept than and includes the concept of 'deception.' A practice is unfair when it offends established public policy, as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

Id. at 74, 400 S.E.2d at 623 (internal quotation marks and citations omitted). "[A] mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1 [; instead]'[s]ubstantial aggravating circumstances' must attend the breach in order to recover under the Act." *Id.* at 75, 400 S.E.2d at 623-24 (internal quotation marks and citations omitted).

Defendant contends that any wrong done to plaintiff was no more than a breach of warranty. However, the jury found that defendant engaged in acts which are direct violations of N.C. Gen. Stat. § 143-143.13, which specifies grounds for denying, suspending, or revoking licenses of or imposing civil penalties on members of the manufactured housing industry:

> (a) A license may be denied, suspended or revoked by the Board on any one or more of the following grounds:
>
> ***
>
> (7) Using unfair methods of competition or committing unfair or deceptive acts or practices.

N.C. Gen. Stat. § 143-143.13 (2001). The N.C. Manufactured Housing Board ("the Board") has further specified in the North Carolina Administrative Code that certain specific actions *shall be* considered unfair and deceptive trade practices, including:

> 1. Failure to perform repairs, alterations and/or additions completely or in a workmanlike and competent manner.
>
> ***
>
> 4. Repeated failure to respond promptly to consumer complaints and inquiries.

11 N.C.A.C. 8.0907 (2003). We have held that N.C. Gen. Stat. § 75-1.1 should not be narrowly construed. *Drouillard v. Keister Williams Newspaper Services, Inc.*, 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992), *disc. review denied and cert. denied*, 333 N.C. 344, 427 S.E.2d 617 (1993). "This Court has repeatedly held that the violation of regulatory statutes which govern business activities may also be a violation of N.C. Gen. Stat. § 75-1.1 whether or not such activities are listed specifically in the regulatory act as a violation of N.C. Gen. Stat. § 75-1.1." *Id.*

Here, the jury found that defendant violated the Board's regulations regarding manufactured housing by failing to perform repairs, alterations and/or additions completely and in a workmanlike and competent manner, and repeatedly failing to respond promptly to consumer complaints and inquiries. We conclude that the trial court properly decided that defendant's violations of the Board's regulation regarding UDTP constitute factors sufficient to support a claim under N.C. Gen. Stat. § 75-1.1. Thus, the court did not err in denying defendant's motion for JNOV or a new trial.

[2] Defendants also argue that the court erred in allowing plaintiff Staten to maintain a UDTP claim because she was not a buyer of the home, and that the court erred in its award of damages and attorney's fees to both plaintiffs. We disagree.

Two chapters of the North Carolina General Statutes are at the heart of this case: Article 9A of Chapter 143, North Carolina Manufactured Housing Board—Manufactured Home Warranties, and Chapter 75, Monopolies, Trusts and Consumer Protection, which creates a right of recovery for unfair and deceptive trade practices. Defendant contends that Article 9A of Chapter 143 allows only buyers of homes to recover for UDTP claims, thus barring plaintiff

Staten's claims. Plaintiffs admit that Walker, and not Staten, was the buyer here, but assert that Chapter 143 does not prohibit Staten from recovery, and that Chapter 75 allows her to proceed with her claim.

The purpose of Chapter 143 is stated as follows:

> The General Assembly finds that manufactured homes have become a primary housing resource for many of the citizens of North Carolina. The General Assembly finds further that it is the responsibility of the manufactured home industry to provide homes which are of reasonable quality and safety and to offer warranties to buyers that provide a means of remedying quality and safety defects in manufactured homes. The General Assembly also finds that it is in the public interest to provide a means for enforcing such warranties.

N.C. Gen. Stat. § 143-143.8 (2004). N.C. Gen. Stat. § 143-143.12 is entitled "Bond required" and describes who must have bonds and in what amounts, also stating that

> [a]ny buyer of a manufactured home who suffers any loss or damage by any act of a licensee that constitutes a violation of this Article may institute an action to recover against the licensee and the surety.

N.C. Gen. Stat. § 143-143.12(c) (2004). As set forth in these quoted sections, the General Assembly specifically created a remedy for buyers of such homes.

However, we conclude that defendant's reliance N.C. Gen. Stat. § 143-143.12(c) is misplaced as it addresses only who may bring an action against the required surety bonds. While N.C. Gen. Stat. § 143-143.12 specifically sets forth the recourse a buyer may have, it does not limit the remedies one who is not the buyer may have under other provisions of law, such as Chapter 75. Thus to determine who may pursue a claim for unfair and deceptive trade practices, we believe defendant should look to N.C. Gen. Stat. § 75-16.

Chapter 75 provides, in pertinent part:

> If *any person* shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of

> such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

N.C. Gen. Stat. § 75-16 (2004). The statute covers "any person who suffers an injury under Chapter 75, regardless of whether that person purchased directly from the wrongdoer." *Hyde v. Abbott Lab.*, 123 N.C. App. 572, 577, 473 S.E.2d 680,684, *disc. review denied*, 344 N.C. 734, 478 S.E.2d 5 (1996). Thus, we conclude that the court did not err in ruling that plaintiff Staten may maintain a claim for recovery against defendants pursuant to N.C. Gen. Stat. § 17-16. The dissent's conclusion that "any person" does not include Staten would result in her having no remedy at all, as she would not be able to recover as a buyer under the bond, nor could she recover damages under Chapter 75. Such a result would be inconsistent with the *Hyde* case, and with the broad remedial purpose behind Chapter 75.

[3] Defendant next argues that the trial court erred in denying its motion for a new trial for damages pursuant to N.C. Gen. Stat. § 1A-1 Rule 59(a)(7) and (8) (2004), arguing that allowing the jury to consider "loss of privacy" and "mental and emotional distress" as a part of Walker's damages in his UDTP claim constituted error. Even assuming *arguendo* that these are proper bases for damages in an UDTP claim, we hold that because plaintiffs failed to plead these as damages, the trial court erred in submitting these issues to the jury. *Lassiter v. Cecil*, 145 N.C. App. 679, 682, 551 S.E.2d 220, 222, *disc. review denied*, 354 N.C. 363, 556 S.E.2d 302 (2001). Plaintiffs' complaint does not include any claim for damages due to loss of privacy or mental and emotional distress. In fact, plaintiffs' complaint does not mention loss of privacy or emotional and mental distress, and does not allege facts supporting these claims as a basis for damages. *Id.* at 681-82, 551 S.E.2d at 222. Plaintiffs' complaint does not even contain a general request for recovery of damages for pain and suffering. Plaintiffs made no attempt to amend their complaint to include these claims for damages, and defendant objected to the trial court's jury instruction containing the emotional distress charge. Because plaintiffs' complaint did not "give defendants sufficient notice of such [claims] for damages[,]" the trial court erred in instructing the jury on emotional distress and loss of privacy, and further erred in denying defendant's motion for a new trial on damages. *Id.* at 682, 551 S.E.2d at 222. We conclude that a new trial on damages is warranted. At the new trial, the court should carefully instruct the jury so that there is no duplication in damages as to the claims of Walker and Staten.

Because during that trial, the court will revisit the issues of attorney's fees and costs, we need not address these issues here.

[4] Defendant next argues that the trial court erred in failing to reduce plaintiffs' damages award by the settlement amount paid by New Way Housing. New Way Housing, the retail seller of the defective mobile home, settled with plaintiffs for $12,500.00. Defendant argues that the damages awarded by the jury should have been reduced by this amount. However, defendant did not bring this issue forward in its motion for JNOV or for a new trial. Because it is only from this motion defendant appeals, this issue has not been properly preserved and the Court has no jurisdiction to hear it. *Boger v. Gatton*, 123 N.C. App. 635, 637, 473 S.E.2d 672, 675, *disc. review denied*, 344 N.C. 733, 478 S.E.2d 3 (1996). This argument is dismissed.

Affirmed in part, dismissed in part, and remanded for new trial on damages.

Judge STEELMAN concurs.

Judge JACKSON concurs in part, dissents in part.

JACKSON, Judge concurring in part, dissenting in part.

For the reasons stated below, I must respectfully dissent from the majority's conclusion that the trial court acted properly in allowing Staten to maintain her claim for unfair and deceptive trade practices. I concur, however, with the majority's conclusion that the trial court acted properly in denying defendant's motions as to the claims of plaintiff Walker. I also concur with the majority's conclusion that the trial court erred in submitting to the jury the issues of Walker's damages based on loss of privacy and mental and emotional distress, and that defendant failed to preserve for appeal the issue of whether the trial court erred in failing to reduce plaintiffs' damages.

Defendant's motion for judgment notwithstanding the verdict specifically stated that one of the grounds for its motion was that "Plaintiff Staten was not a buyer of the mobile home and therefore cannot maintain a cause of action for unfair and deceptive trade practices pursuant to G.S. § 143-143.8, *et seq*. and G.S. § 75-16." The facts of this case are largely undisputed, in that Walker purchased the mobile home for Staten, and that Walker's name appeared on all paperwork involved in the sale and manufacture of the home. In addi-

tion, Walker paid all monies which were exchanged as a result of the contract. At no point during the manufacture of this home was defendant made aware of Staten's existence or that the home was being built for her use.

Article 9A of our General Statutes sets forth provisions pertaining to enforcement of warranties for manufactured homes purchased in North Carolina. N.C. Gen. Stat. § 143-143.8 (2001). As found by the jury, and upheld by the majority, defendant was found to have engaged in acts in violation of North Carolina General Statutes, section 143-143.13. North Carolina General Statutes, section 143-143.12(c) (2001) provides that "[a]ny *buyer* of a manufactured home who suffers any loss or damage by any act of a licensee that constitutes a violation of this Article may institute an action to recover against the licensee and the surety." (Emphasis added). However, a "buyer" is defined as "[a] person who purchases at retail from a dealer or manufacturer a manufactured home for personal use as a residence or other related use." N.C. Gen. Stat. § 143-143.9(2) (2001). In the instant case, plaintiff Staten was not the person who purchased the mobile home or who paid money for the home. Therefore, she can not be considered to be a "buyer" who would be entitled to bring a cause of action based upon violations of North Carolina General Statutes, section 143-143.13, and thus she did not have standing to bring an action based on violations of this statute.

As noted by the majority, a plaintiff may maintain a claim for unfair and deceptive trade practices under North Carolina General Statutes, section 75-1.1, however, I believe plaintiff Staten was without standing under this statute as well. Our courts permit consumers not in privity to the original contract to recover when they are injured as a result of unfair and deceptive trade practices. *Hyde v. Abbott Laboratories*, 123 N.C. App. 572, 584, 473 S.E.2d 680, 688, *disc. review denied*, 344 N.C. 734, 478 S.E.2d 5 (1996) ("allowing indirect *purchasers* to sue for Chapter 75 violations will best advance the legislative intent that such violations be deterred, and that aggrieved consumers have a private cause of action to redress Chapter 75 violations" (emphasis added)). Under North Carolina General Statutes, section 75-16 (2001), "any person" who is injured by the acts of another person, firm or corporation, which were done in violation of Chapter 75, has a right of action to recover for their injury.

Staten argues that the words "any person" should permit her to recover for defendant's unfair and deceptive trade practices. As the

majority has held, and I concur, the trial court properly concluded that defendant committed acts constituting unfair and deceptive trade practices in violation of North Carolina General Statutes, section 75-1.1. However, I would hold Staten is not entitled to the use of the broad classification of "any person" based on our well-settled canons of statutory construction.

Our Supreme Court has held that " 'a statute dealing with a specific situation controls, with respect to that situation, [over] sections which are general in their application.' " *In re Charnock*, 358 N.C. 523, 529, 597 S.E.2d 706, 710 (2004) (quoting *State ex rel. Util. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969)). "In such situation the specially treated situation is regarded as an exception to the general provision." *State ex rel. Util. Comm.*, 275 N.C. at 260, 166 S.E.2d at 670 (citation omitted). "This rule of construction is especially applicable where the specific provision is the later enactment." *Id.* North Carolina General Statutes, section 75-16 was originally enacted in 1913, and was amended in 1969 to include the language "[i]f any person shall be injured." However, North Carolina General Statutes, section 143-143.12 originally was enacted in 1981. When two statutes " 'deal with the same subject matter, they must be construed in *pari materia* and harmonized to give effect to each.' " *State ex rel. Util. Comm.*, 275 N.C. at 260, 166 S.E.2d at 670 (quoting *Gravel Co. v. Taylor*, 269 N.C. 617, 620, 153 S.E.2d 19, 21 (1967)). However, when the statute "dealing with a specific matter is clear and understandable on its face, it requires no construction." *Id.* (citing *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E.2d 22 (1967); *Davis v. Granite Corporation*, 259 N.C. 672, 131 S.E.2d 335 (1963); *Long v. Smitherman*, 251 N.C. 682, 111 S.E.2d 834 (1960)).

As previously noted, Chapter 143 of Article 9A of our General Statutes specifically provides remedies for individuals injured as a result of the purchase of a manufactured home in our State. As such, I believe the specificity of North Carolina General Statutes, section 143-143.12, which provides a cause of action for buyers injured by violations of Chapter 143 of Article 9A, should be controlling in the instant case over the general requirements for an unfair and deceptive trade practice claim pursuant to North Carolina General Statutes, section 75-16. As Staten lacks standing to maintain a claim under North Carolina General Statutes, section 143-143.12, then she also cannot be entitled to maintain a claim entitling her to treble damages under North Carolina General Statutes, section 75-16. *See Smith v.*

King, 52 N.C. App. 158, 161, 277 S.E.2d 875, 877 (1981) (court held that where plaintiff was unable to satisfy the statutory requirements in order to maintain a claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 58-54.4(11), plaintiff therefore was not entitled to treble damages under N.C. Gen. Stat. § 75-16).

The majority argues that this position is inconsistent with this Court's holding in *Hyde*, however I cannot agree that it is. In *Hyde*, the plaintiffs actually were purchasers, in that they each spent monies and purchased infant formula through parties other than the defendant manufacturer. The Court concluded plaintiffs were indirect purchasers based on the fact that they actually purchased the infant formula themselves, and that they were alleged to have been damaged as a result of paying higher prices for the formula than they would have absent the illegal conduct. *Hyde*, 123 N.C. App. at 574, 473 S.E.2d at 681-82. In the instant case, Staten did not purchase the mobile home, nor did she expend any of her own monies to assist in the purchase. Therefore, I do not believe that a finding that Staten was without standing to maintain her claim for unfair and deceptive trade practices would be inconsistent with *Hyde* or the broad remedial purpose behind Chapter 75.

Accordingly, I would hold Staten was without standing to bring her claim for unfair and deceptive acts. Therefore, I must respectfully dissent from the majority's opinion to the extent that it finds the trial court acted properly in denying defendant's motion for judgment notwithstanding the verdict as to Staten's claim for unfair and deceptive trade practices.

STATE OF NORTH CAROLINA v. DAVID ALLEN JONES, DEFENDANT

No. COA05-311

(Filed 21 March 2006)

1. Evidence— videotape—failure to lay proper foundation—plain error analysis

The trial court did not commit plain error in a robbery of a convenience store with a dangerous weapon case by admitting into evidence a surveillance videotape of the crime, because: (1) although the State established an unbroken chain of custody but failed to present either evidence regarding the maintenance and

operation of the recording equipment or testimony that the videotape accurately portrayed the robbery, defendant did not cite a case, nor was one found, where our courts have found an inadequacy in the foundation for the admission of a videotape to constitute plain error; and (2) defendant made no showing that the foundational prerequisites, upon objection, could not have been supplied and has pointed to nothing suggesting that the videotape in this case is inaccurate or otherwise flawed.

2. Constitutional Law; Evidence— right to confrontation— hearsay—plain error analysis

The trial court did not commit plain error in a robbery of a convenience store with a dangerous weapon case by permitting a police officer to testify as to statements of the convenience store clerk even though defendant contends the testimony violated his Sixth Amendment right to confrontation and constituted inadmissible hearsay, because: (1) in regard to defendant's Sixth Amendment argument, defendant failed to preserve this constitutional issue for appellate review since he did not raise it at trial; and (2) in regard to defendant's hearsay contention, assuming arguendo that the trial court erred by admitting these statements, defendant nonetheless failed to establish that their admission tilted the scales so as to cause the jury to render a guilty verdict.

3. Evidence— prior crimes or bad acts—second robbery— identity

The trial court did not commit plain error in a robbery of a convenience store with a dangerous weapon case by failing to exclude testimony regarding a second robbery involving defendant, because: (1) the similarities with the second robbery, only two weeks later, was sufficient to identify defendant as the perpetrator of both when it again involved defendant and a coparticipant working together, plus the unusual but basically same scenario of one robber, who knew the victim, distracting the victim while the other robber entered the building to commit the robbery, N.C.G.S. § 8C-1, Rule 404(b); (2) even if the robberies were not sufficiently similar, defendant failed to establish that the error was so fundamental that absent the error the jury probably would have reached a different result; and (3) even though defendant contends the trial court committed plain error by also failing to exclude the evidence under N.C.G.S. § 8C-1, Rule 403, our Supreme Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion.

4. Constitutional Law— effective assistance of counsel—dismissal of claim without prejudice

Defendant's claim of ineffective assistance of counsel based on counsel's failure to object to certain evidence is dismissed without prejudice to his filing a motion for appropriate relief asserting this claim because the Court of Appeals has no way of knowing without further investigation whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse.

Appeal by defendant from judgment entered 14 October 2004 by Judge William C. Griffin, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 16 November 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

GEER, Judge.

Defendant David Allen Jones appeals his conviction for robbery of a convenience store with a dangerous weapon. On appeal, he argues that the trial court committed plain error by (1) admitting into evidence a surveillance videotape of the crime, (2) failing to exclude testimony regarding another robbery involving defendant, and (3) permitting a police officer to testify as to statements of the convenience store clerk. Based upon our review of the record, we hold that defendant has failed to meet his burden of showing plain error with respect to any of this evidence and we, therefore, uphold his conviction.

Facts

Defendant was indicted for robbery with a dangerous weapon in connection with the September 2002 robbery of the Bridge Street 66 convenience store in Washington, North Carolina. Upon defendant's plea of not guilty, the case was tried beginning on 11 October 2004. The State called as witnesses: (1) Washington Police Department Detective Brad Boyd, who initially investigated the robbery; (2) Terrance Satchel, who joined with defendant in committing the robbery; and (3) Narcotics Detective Jonathan Kuhn, who interviewed

Satchel. In his defense, defendant offered alibi testimony by his girlfriend, Brandy Elliott, and her father, Clifton Lee Elliot.

Detective Boyd testified that he was called to the Bridge Street 66 during the very early morning hours of 3 September 2002 to investigate an armed robbery. At the scene, Detective Boyd interviewed both Satchel and the clerk at the store, Corey Hill. Detective Boyd testified that Satchel reported he was checking the price on a candy bar when he saw a man with a do-rag covering his face approach the door. According to Satchel, the masked man entered the store, pointed a chrome nine-millimeter handgun at the clerk, and demanded money. Satchel told Detective Boyd that, after the clerk turned over cash from the register, the robber then demanded the phone from the store's wall, smashed it on the floor, and left the store.

Detective Boyd also testified that Hill—who did not testify at trial—told him that at around 11:00 p.m., a heavy-set male, wearing a black shirt and black jeans, entered the store with a do-rag over his face. Hill reported to Detective Boyd that the man produced a chrome handgun and said, "Give me your money." According to Hill, he gave the man the money from the store's cash register but, when the robber demanded the store's "money bag," Hill told the robber he did not have it. Hill, like Satchel, described the robber as demanding the store's phone, which the robber then threw to the floor and broke. The robber made Hill lie on the floor until after he left.

During his investigation of the robbery, Detective Boyd obtained the store's surveillance videotape. After the detective testified that it had not been altered and was in substantially the same condition as on the evening of the robbery, the tape was admitted into evidence, without objection, and played for the jury. The tape shows events substantially similar to those described to the detective by both Satchel and Hill.

The State next called Satchel to testify. Satchel told the jury that he was friends with defendant. Prior to the robbery on 2 September 2002, defendant had complained to Satchel about not having enough money to both pay rent and buy marijuana and had told Satchel they were going to rob the Bridge Street 66 around midnight. Satchel would be the "lookout," while defendant committed the robbery. According to Satchel, they met at a park near the store at about 11:30 p.m. At that time, defendant had a chrome nine-millimeter handgun with him.

Sometime before midnight, Satchel entered the store to distract anyone inside. Satchel, who knew Hill from shopping at the Bridge Street 66 in the past, asked Hill for the price of several items. Defendant then approached Hill with a do-rag covering most of defendant's face. Satchel's trial testimony describing the actual robbery was substantially similar to what he had previously told Detective Boyd.

The State next called Detective Kuhn as a witness. He testified that Satchel contacted him about two weeks after the robbery and told him that, on 2 September 2002, defendant had mentioned committing a robbery to get money for bills and marijuana. Satchel told Detective Kuhn that he had agreed to help defendant rob the Bridge Street 66 by going into the store first "to buy something and pretend to be looking around," so that the clerk would not see defendant coming. Satchel's description to Detective Kuhn of the actual robbery was substantially similar to the previous accounts.

Defendant did not testify in his own defense. Rather, he first called Clifton Lee Elliot, the father of his girlfriend, Brandy Elliot. According to Mr. Elliot, defendant lived with him and his daughter. Mr. Elliot testified that, on 2 September 2002, defendant and his daughter had left in the afternoon to go to a party that evening in Greenville, North Carolina. Brandy Elliot similarly testified that she and defendant went to the party in Greenville, stayed there until nearly midnight, and then returned directly to the Elliots' apartment.

On 14 October 2004, the jury found defendant guilty of robbery with a dangerous weapon. The trial court sentenced defendant within the presumptive range to 90 to 117 months imprisonment. Defendant timely appealed.

I

[1] Defendant first contends that the trial court committed plain error when it admitted the surveillance videotape into evidence because the State failed to establish a proper foundation. " 'The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant.' " *State v. Duke*, 360 N.C. 110, 138-39, 623 S.E.2d 11, 29-30 (2005) (internal

citations omitted) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986)).

In *State v. Mason*, 144 N.C. App. 20, 550 S.E.2d 10 (2001), this Court considered the admission of a surveillance camera videotape showing an armed robbery of a drug store. This Court held that there are "three significant areas of inquiry for a court reviewing the foundation for admissibility of a videotape: (1) whether the camera and taping system in question were properly maintained and were properly operating when the tape was made, (2) whether the videotape accurately presents the events depicted, and (3) whether there is an unbroken chain of custody." *Id.* at 26, 550 S.E.2d at 15. In *Mason*, although the State's witnesses testified that the video camera was in working order, they subsequently admitted that they knew nothing about the maintenance or operation of the system. In addition, no testimony was offered as to the accuracy of the events shown on the tape, and the State failed to establish an unbroken chain of custody. Based on this showing, the Court held that the tape was improperly admitted over the defendant's objection and ordered a new trial. *Id.* at 27, 550 S.E.2d at 15-16. *See also State v. Sibley*, 140 N.C. App. 584, 586, 537 S.E.2d 835, 838 (2000) (ordering new trial when "[t]he State did not call any witnesses to testify that the camera was operating properly or that the information depicted on the videotape was an accurate representation of the events at the time of filming").

In this case, although the State established an unbroken chain of custody, it failed to present either evidence regarding the maintenance and operation of the recording equipment or testimony that the videotape accurately portrayed the robbery. Nevertheless, defendant has not cited any case—and we have found none—in which our courts have found an inadequacy in the foundation for the admission of a videotape to constitute plain error.

Based upon our review of the record, it appears that if defendant had made a timely objection, the State could have supplied the necessary foundation through testimony of the police officer, Satchel, or other witnesses. Cases addressing the admissibility of surveillance videotapes suggest it is a relatively straightforward matter to lay the necessary foundation. *See, e.g.*, *State v. Mewborn*, 131 N.C. App. 495, 498-99, 507 S.E.2d 906, 909 (1998) (concluding that police officers' testimony was sufficient to lay foundation when they testified that they watched surveillance videotape twice on the day of the robbery, and that clip shown at trial was in same condition and had not

been edited); *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988) (concluding store manager's testimony laid a sufficient foundation when she testified that surveillance videotape accurately showed robbery, camera was only six weeks old, and system was working properly both before and after robbery), *disc. review denied in part*, 324 N.C. 249, 377 S.E.2d 757, *appeal dismissed in part sub nom. State v. Redmon*, 324 N.C. 249, 377 S.E.2d 761 (1989), *rev'd in part on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990).

Since defendant has made no showing that the foundational prerequisites, upon objection, could not have been supplied and has pointed to nothing suggesting that the videotape in this case is inaccurate or otherwise flawed, we decline to conclude the omissions discussed above amount to plain error. Any error in the introduction of the videotape "into evidence without adequate foundation is not the type of exceptional case where we can say that the claimed error is so fundamental that justice could not have been done." *State v. Cummings*, 352 N.C. 600, 620-21, 536 S.E.2d 36, 51-52 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641, 121 S. Ct. 1660 (2001). *See also State v. McNeil*, 165 N.C. App. 777, 784-85, 600 S.E.2d 31, 36-37 (2004) (concluding that, where trial court admitted unauthenticated judgment sheets of defendant's prior convictions, defendant failed to establish plain error when he had an opportunity to inspect judgment sheets at trial and offered no evidence they were not authentic or that prior convictions had not occurred), *aff'd on other grounds*, 359 N.C. 800, 617 S.E.2d 271 (2005). This assignment of error is, therefore, overruled.

II

[2] Defendant next assigns plain error to the admission of Detective Boyd's testimony regarding certain statements made to him by the store clerk Hill on the grounds that the testimony violated his Sixth Amendment right of confrontation and constituted inadmissible hearsay. Defendant acknowledges that no objection was made to this testimony at trial.

"[C]onstitutional error will not be considered for the first time on appeal. Because defendant did not raise these constitutional issues at trial, he has failed to preserve them for appellate review and they are waived." *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) (internal citations omitted). Accordingly, we decline to consider defendant's Sixth Amendment argument.

Regarding defendant's hearsay contention, defendant challenges only Detective Boyd's testimony as to Hill's statements that (1) the robber had a large chrome gun, (2) the robber demanded money, and (3) Hill gave the robber $67.69. Assuming, without deciding, that the trial court did err by admitting these statements, defendant has nonetheless failed to establish under the plain error doctrine that their admission "tilted the scales" so as to cause the jury to render a guilty verdict. *State v. Dyson*, 165 N.C. App. 648, 653, 599 S.E.2d 73, 77 (2004), *disc. review denied*, 359 N.C. 412, 612 S.E.2d 326 (2005).

Both the surveillance videotape and Satchel's trial testimony, as corroborated by Detectives Boyd and Kuhn, provided substantial evidence that the robber had a chrome gun, that he demanded money, and that Hill gave the robber currency from the store's register. The precise amount of money taken from the register was immaterial. *See State v. Call*, 349 N.C. 382, 417-18, 508 S.E.2d 496, 518 (1998) (concluding State met its burden on "taking" element of armed robbery where, despite not proving exactly how much money was taken, evidence suggested victim commonly carried large sums of money but was found dead with only $9.00). Although defendant has challenged the admission of the videotape, this Court has held: "Where, as here, defendant contests separate admissions of evidence under the plain error rule, each admission will be analyzed separately for plain error, not cumulatively." *State v. Bellamy*, 174 N.C. App. 649, 662, 617 S.E.2d 81, 90 (2005). We cannot conclude, in light of the other evidence presented at trial, that the specific statements challenged had a probable effect on the verdict. Accordingly, we overrule this assignment of error.

III

[3] Defendant next argues that the trial court erred, under North Carolina Rule of Evidence 404(b), by admitting the testimony of Detective Boyd and Satchel regarding defendant's involvement in a second robbery. During the course of the trial, Satchel testified that he and defendant had been arrested on another charge approximately two weeks after the Bridge Street 66 robbery. Detective Boyd similarly testified that he had received another call regarding a common law robbery at a residence on 15 September 2002 and that, in the course of his investigation, he had determined that Satchel and defendant, together with a third person, had committed that robbery. Detective Boyd described the robbery as "basically the same scenario: One of the suspects went in somewhat as a lookout because she knew the victim, and at that point in time, the other two entered

and robbed him or attempted to rob him." Since defendant did not object to this testimony at trial, we again review only for plain error. N.C.R. App. P. 10(c)(4).

"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.R. Evid. 404(b). It is well-established that Rule 404(b) sets forth "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

The State argues in this case that the evidence of a second robbery involving defendant and Satchel is admissible to establish the identity of the perpetrator of the Bridge Street 66 robbery by showing a *modus operandi*. *See State v. Sokolowski*, 351 N.C. 137, 150, 522 S.E.2d 65, 73 (1999) ("[T]he other crime may be offered to show defendant's identity as the perpetrator when the *modus operandi* is similar enough to make it likely that the same person committed both crimes."). Another crime "is sufficiently similar to warrant admissibility under Rule 404(b) if there are some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes." *Id.* (internal quotation marks omitted). It is not, however, "necessary that the similarities between the two situations rise to the level of the unique and bizarre." *Id.* (internal quotation marks omitted). Instead, "the similarities must tend to support a reasonable inference that the same person committed both the earlier and later acts." *Id.*

On appeal, defendant argues that the two robberies did not possess any unusual facts, but rather involved only facts generic to all robberies. We disagree. As Detective Boyd testified, the second robbery, only two weeks later, again involved Satchel and defendant working together plus the unusual but "basically . . . same scenario" of one robber, who knew the victim, distracting the victim while the other robber entered the building to commit the robbery. In our view, these similarities are sufficient to identify defendant as the perpetrator of both. *See State v. Davis*, 340 N.C. 1, 14, 455 S.E.2d 627, 633-34 (finding sufficient similarity between robbery and attempted robbery

where suspects in both: (1) entered premises armed and waited until closing time, (2) pretended to be on premises to conduct legitimate business, and (3) one suspect remained silent during both crimes), *cert. denied*, 516 U.S. 846, 133 L. Ed. 2d 83, 116 S. Ct. 136 (1995); *State v. Diehl*, 147 N.C. App. 646, 652, 557 S.E.2d 152, 156-57 (2001) (holding that evidence of a second robbery was admissible when the defendant was driven to and picked up from the crime scene by a single accomplice, the robberies occurred in the same area at night, the defendant used a knife, and the crimes occurred within five days of each other), *cert. denied*, 356 N.C. 170, 568 S.E.2d 624 (2002); *State v. Allred*, 131 N.C. App. 11, 18, 505 S.E.2d 153, 158 (1998) (finding evidence admissible under Rule 404(b) when both robberies occurred at midnight beginning with a knock at the door, involved two perpetrators, included a demand that the victims give up their "stash," and occurred within 10 days of each other).

Even if the robberies were not sufficiently similar, defendant has failed to establish under the plain error standard that " 'the error was so fundamental that, absent the error, the jury probably would have reached a different result.' " *State v. Augustine*, 359 N.C. 709, 717, 616 S.E.2d 515, 523 (2005) (quoting *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002)). We do not believe, given Satchel's testimony as corroborated by his statements to the detectives and the videotape, that the jury would have "probably" reached a different result had the challenged testimony been excluded.

Defendant also argues that the trial court committed plain error in failing to exclude the evidence under Rule 403. "Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). Our Supreme Court has previously held: "[T]his Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now." *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997, 121 S. Ct. 1131 (2001). We, therefore, do not address defendant's Rule 403 argument.

IV

[4] Finally, defendant argues that because his trial counsel failed to object to the admission of the videotape, Detective Boyd's hearsay testimony regarding what he was told by Hill, and the evidence

regarding defendant's involvement in another robbery, he received ineffective assistance of counsel. Claims of ineffective assistance of counsel are, however, most properly raised in a motion for appropriate relief. Our Supreme Court has held that an ineffective assistance claim brought on direct review will be decided on the merits only "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002).

In this case, we "have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse." *Massaro v. United States*, 538 U.S. 500, 505, 155 L. Ed. 2d 714, 720, 123 S. Ct. 1690, 1694 (2003). Because we cannot assess without "further investigation" whether defendant received ineffective assistance of counsel, we dismiss defendant's appeal on this issue without prejudice to his filing a motion for appropriate relief asserting this claim.

No error.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. ARNOLD MICHAEL PENDER

No. COA04-1198

(Filed 21 March 2006)

1. Appeal and Error— preservation of issues—objection not required during sentencing

Defendant did not waive appellate review in a double armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury case as to the issue of whether the trial court erroneously considered evidence from his codefendant's trial, because: (1) an error at sentencing is not considered an error at trial for the purpose of N.C. R. App. P. 10(b)(1) since 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; and (2) defendant was not

required by Rule 10(b)(1) to object during sentencing in order to properly preserve this issue for appellate review.

2. Sentencing— aggravating factors—*Blakely* error

The trial court did not err in a double armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury case by increasing defendant's sentences beyond the prescribed statutory maximum based upon its own finding of aggravating factors that were not alleged in the indictments or found by the jury beyond a reasonable doubt, because: (1) in North Carolina there is no requirement that aggravating factors be alleged in an indictment; (2) the situations contemplated by *State v. Allen*, 359 N.C. 425 (2005), are not present in the instant case since defendant was indicted as of the certification date of the *Allen* opinion, his appeal is not now pending direct review, and his case was final; and (3) defendant did not appeal the trial court's acceptance of his *Alford* plea agreement, the finding of aggravating and mitigating factors by the trial court, nor his sentence of twenty-five years for each armed robbery case and five years for assault.

3. Sentencing— aggravating factors—taking property of great monetary value

The trial court erred in a double armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury case by finding the aggravating factor that the offense involved the actual taking of property of great monetary value, and defendant is entitled to a new sentencing hearing, because: (1) both defendant and the State agreed that according to earlier decisions of the Court of Appeals, $2,500 is the least amount previously held to be of great monetary value, while other decisions of our Supreme Court and the Court of Appeals consistently have held that great monetary value included amounts of approximately $3,000; and (2) although there is no bar or case law that prevents the Court of Appeals from holding that a great monetary amount may include an amount less than $2,500, the amounts of $1,300 and $700 in this case do not constitute great or extraordinary amounts.

4. Sentencing— nonstatutory aggravating factor—great monetary loss—medical expenses

The trial court did not err in a double armed robbery and assault with a deadly weapon with intent to kill inflicting serious

injury case by finding the nonstatutory aggravating factor that the offense involved monetary loss of $29,837.29, because: (1) the victim's medical expenses were excessive and surpassed those normally incurred from an assault of this type; and (2) defense counsel stipulated to the amount of the victim's medical expenses when he did not object to the State's recitation of the $29,837.29 figure as the amount of the victim's medical bills nor did he take exception to the amount of medical expenses offered by the State in support of its argument.

Appeal by defendant from judgments entered 9 May 1995 by Judge Clifton W. Everett, Jr. in Washington County Superior Court. Heard in the Court of Appeals 17 May 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brandon L. Truman, for the State.

Appellant Defender Staples Hughes, by Assistant Appellant Defender Daniel R. Pollitt, for defendant-appellant.

JACKSON, Judge.

On 26 August 1994, Clarence Williams, Sr., Clarence Williams, Jr., and Marcus Simpson were playing cards in a game room owned by Clarence Williams, Sr. in Plymouth, North Carolina. Around 1:00 a.m., Arnold Michael Pender ("defendant") and Jason Troy Hackett ("co-defendant") entered the game room, showed their firearms, demanded money, and told the card players to get on the floor. As Clarence Williams, Sr. began to turn, defendant shot him in the buttocks. Defendant and co-defendant took money from the card table, the game room's cash register, and the card players' pockets. Defendant and co-defendant subsequently left the scene.

On 13 March 1995, a grand jury indicted defendant on two counts of armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury on Clarence Williams, Sr.

On 8 May 1995, three witnesses testified for the State in co-defendant's trial. Clarence Williams, Sr. testified that defendant and co-defendant took between approximately one thousand dollars ($1,000.00) and eleven hundred dollars ($1,100.00) in cash from his pocket and one hundred and fifty dollars ($150.00) to one hundred and sixty dollars ($160.00) from the cash register. He also testified that his medical bills from the shooting were close to between

twenty-seven thousand dollars ($27,000.00) and twenty-eight thousand dollars ($28,000.00). Clarence Williams Jr. testified that defendant and co-defendant took seven hundred dollars ($700.00) in cash from his pocket and person. During co-defendant's trial, co-defendant changed his plea from not guilty to guilty on the armed robbery charges and the State dismissed the assault charge. The trial court accepted his pleas and entered Judgment and Commitment against him. At his sentencing proceedings, the State stated that Clarence Williams, Sr. incurred medical expenses in the amount of twenty-nine thousand eight hundred and thirty-seven dollars and twenty-nine cents ($29,837.29) as a result of the shooting. Co-defendant's attorney did not object to or dispute the State's recitation of the amount of medical expenses.

On 9 May 1995, defendant's case came before the trial court. Pursuant to a plea agreement that left the matter of defendant's sentencing to the trial court's discretion, defendant entered *Alford* pleas on two counts of armed robbery and the lesser offense of assault with a deadly weapon inflicting serious injury. At the sentencing hearing, the trial court found in aggravation that the offenses involved the actual taking of property of great monetary value. The trial court also found in mitigation that defendant had no prior criminal record. During defendant's sentencing hearing, defendant's attorney stipulated that the State could summarize the evidence. Included in the State's recitation was the fact that Clarence Williams Sr.'s medical bills totaled twenty-nine thousand eight hundred thirty-seven dollars and twenty-nine cents ($29,837.29). Defendant objected on the grounds that the monetary loss of the medical expenses was an element of the charge of assault with a deadly weapon inflicting serious injury.

At the sentencing hearing, neither the State nor defendant called witnesses to testify. Rather, defendant's attorney stipulated that there was a factual basis for the entry of the plea, that the State's attorney could make a recitation if he wished to do so, and that the trial court could consider information from co-defendant's case. The State submitted that the trial court had "heard the evidence of the assault where [Clarence Williams, Sr.] was shot in the right buttocks with the weapon being fired, shot in and up around his hip. . . . [and that Clarence Williams, Sr.'s] medical bills [were in the amount of] $29,837.29." The trial court then stated that it did not "need to hear anything else about that." Subsequently, defendant's attorney summarized the evidence and contentions supporting possible mitigating

factors, including the absence of any prior criminal convictions in defendant's record.

The trial court sentenced defendant to twenty-five years imprisonment for each armed robbery case, which carried a prescribed statutory maximum presumptive sentence of fourteen years. The trial court then sentenced defendant to five years imprisonment for the assault with intent to inflict bodily injury case, which carried a prescribed statutory maximum presumptive sentence of three years. The trial court ordered all sentences to run consecutively for a total consecutive sentence of fifty-five years imprisonment. Defendant did not appeal.

On 26 November 2003, this Court allowed defendant's petition for the purpose of reviewing the trial court's 9 May 1995 judgments and provided that review was limited to those issues within defendant's appeal of right pursuant to North Carolina General Statutes, section 15A-1444(a1) and (a2). On 26 January 2005, this Court allowed the State's motion to amend the record on appeal to include the restitution worksheet, which had been referenced by the trial court at the bottom of each judgment in defendant's three cases.

[1] Prior to reaching the merits of the case before us, we first must address the State's contention that defendant waived appellate review as to the issue of whether the trial court erroneously considered evidence from his co-defendant's trial. Specifically, the State contends that defendant failed to properly preserve this issue for appeal pursuant to Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure which provides, in relevant part, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."

This Court recently stated 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) (citing *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991))). Accordingly, defendant was not required by Rule 10(b)(1) to object during sentencing in order to properly "preserve this issue for appellate review." *Id.*

[2] Defendant initially contends that the trial court erred by increasing his sentences beyond the prescribed statutory maximum based upon its own finding of aggravating factors that were not alleged in the indictments or found by the jury beyond a reasonable doubt in violation of *Blakely v. Washington*, 542 U.S. ——, 159 L. Ed. 2d 403 (2004). We disagree.

In North Carolina, there is no requirement that aggravating factors be alleged in an indictment. *State v. Everette*, 172 N.C. App. 237, 244, 616 S.E.2d 237, 242 (2005). This Court recently stated, "*Blakely* made no reference to the Fifth Amendment indictment guarantee, and instead relied on the Sixth Amendment right to a jury trial. . . . Therefore, we hold that it was not error for defendant's aggravating factors not to have been alleged in an indictment." *Everett*, 172 N.C. App. at 244, 616 S.E.2d at 242.

Further, in *State v. Allen*, our Supreme Court held that "*Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible per se." 359 N.C. 425, 444, 615 S.E.2d 256, 269 (2005). The Court concluded that "those portions of N.C.G.S. § 15A-1340.16 (a), (b), and (c) which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence" are unconstitutional. *Id.* at 438-39, 615 S.E.2d at 265. Our Supreme Court in *Allen* also clearly stated, however, that its holdings applied only to those cases " 'in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final.' " *Id.* at 427, 615 S.E.2d at 258 (quoting *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001), *overruled on other grounds by Allen*, 359 N.C. 425, 615 S.E.2d 256).

The situations contemplated by *Allen* are not present before this Court in the instant case. Defendant was indicted as of the certification date of the *Allen* opinion, his appeal is not now pending direct review, and his case was final. Defendant was indicted on 13 March 1995 for: (1) endangering the life of Clarence Williams, Sr. by taking and carrying away another's personal property for a value of more than one thousand dollars ($1,000.00) and by using a pistol to endanger and threaten the life of Clarence Williams, Sr.; (2) endangering the life of Clarence Williams, Jr. by taking and carrying away another's personal property for a value of less than one thousand dollars ($1,000.00) and by using a pistol to endanger and threaten the life of

Clarence Williams, Jr.; and (3) unlawful, willful, and felonious assault of Clarence Williams, Sr. with a pistol, a deadly weapon, with the intent to kill and inflict serious injury. Pursuant to a plea agreement, defendant entered *Alford* pleas to two counts of armed robbery and the lesser offense of assault with a deadly weapon inflicting serious injury. Defendant did not appeal the trial court's acceptance of the plea agreement, the finding of aggravating and mitigating factors by the trial court, nor his sentence of twenty-five years imprisonment for each armed robbery case and five years imprisonment for assault. It was not until 7 November 2003 that defendant filed a petition for a writ of certiorari with this Court. On 26 November 2003, this Court issued an order allowing defendant's petition for the purpose of reviewing those judgments from 9 May 1995, but limiting review to only those issues within defendant's appeal of right pursuant to North Carolina General Statutes, section 15A-1444(a1) and (a2). Accordingly, in the instant case we do not reach the issue of whether a *Blakely* violation has occurred.

[3] Defendant further asserts that he is entitled to a new sentencing hearing in the armed robbery of Clarence Williams Sr. and of Clarence Williams Jr. because the trial court's finding of the aggravating factor that the offense involved the actual taking of property of great monetary value was not supported by the evidence. Defendant specifically contends that the amounts of thirteen hundred dollars ($1,300.00) and seven hundred dollars ($700.00) did not involve property of "great monetary value" as defined by this Court. The State, however, asserts that pursuant to North Carolina General Statutes, section 14-87, only an attempted taking, not the taking itself, is necessary to establish armed robbery. Accordingly, it is the mere attempt to take property of any value that is punishable as a felony of a higher class than any statutory provision governing the taking of property from the victim's person.

Although the State's assertion may be true, the State attempts to use this contention to disguise the central issue: whether the trial court could find that thirteen hundred dollars ($1,300.00) and seven hundred dollars ($700.00) constituted property of "great monetary value" within the aggravating factor list. We hold that it could not.

In the instant case, both defendant and the State agree that according to earlier decisions of this Court, twenty five hundred dollars ($2,500.00) is the least amount previously held to be of "great monetary value." *State v. Simmons*, 65 N.C. App. 804, 806, 310 S.E.2d

139, 141 (1984). Other decisions by our Supreme Court and this Court consistently have held that great monetary value included amounts of approximately three thousand dollars. *See generally State v. Barts*, 316 N.C. 666, 695, 343 S.E.2d 828, 846-47 (1986), *overruled on other grounds by, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988) (upholding finding of great value based upon evidence of $3200.00 property taken); *State v. Thompson*, 314 N.C. 618, 623-24, 336 S.E.2d 78, 81 (1985) ($3177.40); *State v. Coleman*, 80 N.C. App. 271, 277, 341 S.E.2d 750, 753-54 ($3000.00*) disc. review denied*, 318 N.C. 285, 347 S.E.2d 466 (1986). As the State asserts, there is no bar that prevents this Court from holding that a great monetary amount may include an amount less than twenty five hundred dollars ($2,500.00), ***nor*** is there case law in this State that contains language that precludes this Court from holding that thirteen hundred dollars ($1,300.00) and seven hundred dollars ($700.00) constitute great monetary amounts. Nonetheless, we do not believe that the amounts of thirteen hundred dollars ($1,300) and seven hundred dollars ($700.00) constitute great or extraordinary amounts such that the trial court should properly find that either represented a sum of "great monetary. Therefore, the trial court's finding of the aggravating factor that the offense involved the actual taking of property of great monetary value was not supported by the evidence, and defendant is entitled to a new sentencing hearing. Accordingly, this assignment of error is sustained.

[4] Defendant further asserts that he is entitled to a new sentencing hearing in the assault case because the trial court's finding of the non-statutory aggravating factor that the offense involved monetary loss of twenty-nine thousand eight hundred thirty-seven dollars and twenty-nine cents ($29,837.29) was not supported by the evidence. Defendant contends that the amount must be supported by the evidence adduced at trial or at the sentencing hearing.

"The State bears the burden of proof if it wishes to establish the existence of an aggravating factor." *State v. Jones*, 104 N.C. App. 251, 256, 409 S.E.2d 322, 325 (1991) (citing *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983)). "Where the State presents insufficient evidence to support an aggravating circumstance the defendant is entitled to a new sentencing hearing." *Id.* at 256, 409 S.E.2d at 325 (citing *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985)); *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983)). "While medical expenses, which represent a financial burden on the victim, may be considered as a non-statutory factor in aggravation, . . . we find that they may not be so used unless they are excessive and go beyond that

normally incurred from an assault of this type." *Jones*, 104 N.C. App. at 258, 409 S.E.2d at 326 (internal citation omitted). "With serious bodily injury necessarily goes, to a greater or lesser extent, the attendant pain and suffering, lost wages, medical bills and the like." *Id.* at 257, 409 S.E.2d at 325.

We agree, in the instant case, with the State's contention that Clarence Williams, Sr.'s medical expenses were "excessive" and surpassed those "normally incurred from an assault of this type." The State contends that defendant stipulated to Clarence Williams, Sr.'s medical bills in the amount of twenty nine thousand eight hundred thirty-seven dollars and twenty- nine cents ($29,837.29), based on the following colloquy:

> Court: [Counsel], do you stipulate that there's a factual basis for the entry of the plea?
>
> Counsel: Yes, sir. *We will stipulate there's a factual basis for the entry of the plea, allow the District Attorney to make a recitation if he so desires, and Your Honor I heard all of the evidence in the case yesterday, which was a companion with this case, and we would stipulate that you can also consider the information that was received in yesterday's case.* I heard the testimony of the witnesses yesterday.
>
> State: Your Honor, you heard the evidence of the assault where he was shot in the right buttocks with the weapon being fired, shot in and up around his hip. Medical bills were $29,837.29. Anything else you want to hear?

(Emphasis added).

"[D]uring sentencing, a defendant need not make an affirmative statement to stipulate . . . to the State's summation of the facts, particularly if defense counsel had an opportunity to object to the stipulation in question but failed to do so." *State v. Alexander*, 359 N.C. 824, 829, 616 S.E.2d 914, 918 (2005). Defendant's counsel did not object to the State's recitation of the $29,837.29 figure as the amount of Clarence Williams, Sr.'s medical bills. Nor did defendant's counsel take exception to the amount of medical expenses offered by the State in support of its argument for the existence of the nonstatutory aggravating factor of great monetary loss. Defense counsel's only argument against that aggravating factor was that it was

an element of the charge of assault inflicting serious injury. Accordingly, we hold that defendant did stipulate to the amount of Clarence Williams, Sr.'s medical expenses as $29,837.29 and overrule this assignment of error.

Affirmed in part, reversed in part, and remanded for re-sentencing not inconsistent with this opinion.

Judges WYNN and BRYANT concur.

SUMMIT LODGING, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, AND WALTER W. KENNEDY, JOSEPH J. TURNER, JR., WILLIAM KELLY DURHAM, ROBERT J. MCGINN, AND JAMES H. TINDAL, JR., AS MEMBERS OF SUMMIT LODGING, LLC, PLAINTIFFS v. JONES, SPITZ, MOORHEAD, BAIRD & ALBERGOTTI, P.A., AND EDWARD A. SPITZ, DEFENDANTS

No. COA05-248

(Filed 21 March 2006)

Jurisdiction— personal—specific—long-arm statute—minimum contacts

The trial court erred by granting defendants' motion to dismiss based on the erroneous conclusion that it lacked personal jurisdiction in a case where plaintiffs claim they were economically injured by defendant South Carolina law firm's failure to advise them regarding the anti-deficiency statute for a loan restructuring in North Carolina, because: (1) plaintiffs made a prima facie case for personal jurisdiction under the long-arm statute by showing that defendants' activities regarding the loan, including correspondence and phone conversations with the seller's North Carolina counsel, constitute service activities being carried on within North Carolina by or on behalf of defendants; (2) defendants had sufficient contacts with North Carolina even though they have never been physically present in North Carolina since the quantity or even the absence of actual physical contacts with the forum state merely constitutes a factor to be considered and is not controlling weight in light of modern business practices; (3) defendants purposefully availed themselves of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its law, and they should have

reasonably anticipated being subject to jurisdiction in North Carolina; (4) the Court of Appeals has readily found jurisdiction constitutional in tort cases based on the powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors; (5) South Carolina does not have an anti-deficiency statute, and thus, their courts will not be as familiar with North Carolina law; and (6) there is minimal travel burden on defendants to defend a claim in North Carolina.

Appeal by plaintiffs from order entered 11 January 2005 by Judge W. Russell Duke, Jr., in Superior Court in Pitt County. Heard in the Court of Appeals 12 October 2005.

Ward and Smith, P.A., by A. Charles Ellis and E. Bradley Evans, for plaintiff-appellants.

Parker, Poe, Adams & Bernstein, L.L.P., by James C. Thornton, for defendant-appellees.

HUDSON, Judge.

In July 2004, plaintiffs filed suit against defendants, attorneys who had represented plaintiffs, for professional malpractice. Defendants filed a motion to dismiss for lack of personal jurisdiction. On 11 January 2005, the trial court granted defendants' motion to dismiss. Plaintiffs appeal. We reverse.

Summit Lodging is a North Carolina limited liability company with its principal place of business in Greenville, North Carolina. Defendant Jones, Spitz, Moorheard, Baird & Albertgotti, P.A., ("defendant firm") is a law firm located in Anderson, South Carolina. Defendant Edward A. Spitz ("Spitz") is an attorney licensed to practice law in South Carolina, but not in North Carolina; Spitz was employed by defendant firm at all times relevant here.

In 1999, the members of Summit Lodging ("Summit members") retained Spitz and defendant firm to organize Summit Lodging as a limited liability company pursuant to North Carolina law. None of the Summit members are North Carolina residents. Summit Lodging was organized to facilitate the purchase, ownership, and operation of a Fairfield Inn hotel in Greenville, North Carolina. Spitz prepared, signed, and filed the Articles of Organization for Summit Lodging with the North Carolina Secretary of State. Spitz and defendant firm also prepared a 33-page operating agreement for Summit Lodging,

which included terms that it would be interpreted under North Carolina law. Spitz and Stephen J. Potts, also an attorney employed by defendant firm, also represented Summit Lodging in connection with its purchase of the Fairfield Inn, by preparing the bill of sale and an assignment and assumption of leases and contracts. Spitz and defendant firm communicated by mail and telephone with counsel for Quality Oil Company, LLC ("Quality Oil"), the seller of the Fairfield Inn. In September 1999, defendant firm sent a letter to North Carolina attorney Charles L. McLawhorn, Jr., requesting that McLawhorn serve as North Carolina counsel for Summit Lodging in the purchase transaction of the Fairfield Inn. McLawhorn, whose office is in Greenville, North Carolina, performed legal services in connection with the purchase of the Fairfield Inn and billed defendant firm for these services. None of the members of defendant firm participated in the closing, which took place on 4 January 2000 in North Carolina.

At the closing, Summit members signed a purchase money promissory note ("the note") for most of the $3.75 million purchase price. The note provided for a maturity date of one year and contained personal guarantees by each of the individual summit members. After Summit Lodging failed to meet its obligation to repay the note within a year, Summit member Turner and the President of Quality Oil, Graham Bennett, negotiated extensions to the note. In December 2001, Summit Lodging prepared a proposal to restructure the debt by splitting the note into two separate promissory notes. In January 2002, Turner contacted Spitz to draft documents for this deal. Thereafter, Spitz sent two letters and a few emails to Bennett regarding the proposed split of the note. Spitz and Bennett also discussed the matter on the telephone. On 25 January 2002, North Carolina counsel for Quality Oil sent a letter to Spitz proposing the terms of a new promissory note whereby Reliable Tank, an affiliate of Quality Oil, would loan $1,775,000 to Summit Lodging to pay a portion of its indebtedness to Quality Oil; the loan was to be secured by personal guarantees of the Summit members. Spitz reviewed the letter, forwarded it to one of the Summit members, and spoke with the member regarding the proposal presented in the letter. Spitz claims that he reminded Summit member Turner that defendant firm could not advise Summit Lodging regarding North Carolina law, that only North Carolina counsel could do so. Summit Lodging executed a promissory note to Reliable Tank for $1,775,000 and the Summit members signed personal guarantees for the Reliable Tank note. In February 2002, Spitz sent a letter to counsel for Quality Oil and Reliable Tank directing Reliable Tank to disburse the loan proceeds.

After Summit Lodging defaulted on the Reliable Tank note, Reliable Tank sought to collect from Summit Lodging and the individual Summit members. At the time of this appeal, none of the $1,775,000 had been paid. The North Carolina Anti-Deficiency Statute, N.C. Gen. Stat. § 45-21.38 (2001), limits the holder of a purchase money mortgage or deed of trust, upon default and foreclosure, to recovery of the security or the proceeds from the sale of the security. *Id.* The statute prohibits deficiency judgments where a mortgage on real property represents part of the purchase price. *Id.* Here, when Summit Lodging executed the Reliable Tank note, that portion of the debt became unsecured, with personal guarantees, and not subject to the anti-deficiency statute. Reliable Tank thus seeks recovery from the individual Summit members. Plaintiffs brought suit for legal malpractice contending that Spitz and defendant firm failed to inform them of this consequence of the debt restructuring.

Plaintiffs argue that the trial court erred in granting defendants' motion to dismiss for lack of personal jurisdiction. Plaintiffs contend that the findings of fact made by the trial court, as well as the evidence of record, establish that North Carolina courts have jurisdiction over defendants.

On appeal, we review an order determining personal jurisdiction to determine whether the trial court's findings of fact are supported by competent evidence; if so, we must affirm the trial court. *Cooper v. Shealy*, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000). Here, plaintiffs do not challenge the court's findings of fact, but rather, argue that the findings and additional evidence of record do not support the court's conclusion that it lacked personal jurisdiction over defendants. We review a trial court's conclusion that it lacks personal jurisdiction *de novo*. *Starco, Inc. v. AMG Bonding & Ins. Servs., Inc.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

To determine whether our courts have personal jurisdiction, we engage in a two-part analysis. First, we must "examine whether the exercise of jurisdiction over the defendant falls within North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4." *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995) (internal citation omitted). We must then determine "whether the defendant has sufficient minimum contacts with North Carolina such that the exercise of jurisdiction is consistent with the due process clause of the Fourteenth Amendment to the United States Constitution." *Id.* Plaintiffs bear the burden of proving *prima facie*

that the court has jurisdiction. *See Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 671, 541 S.E.2d 733, 736 (2001).

Plaintiffs argue that the trial court erred in concluding that the requirements of the long-arm statute were not met and that defendants lack sufficient contacts with North Carolina to satisfy due process. We agree.

We first note that our Courts construe our long-arm statute in favor of establishing the existence of personal jurisdiction. *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 757 (1998). Under the "local injury/foreign act" subsection of our long-arm statute, in order to establish jurisdiction over defendant, a plaintiff must claim that: (1) it suffered an injury within North Carolina which arose out of a defendant's acts or omissions outside the state; and (2) that at or about the time of the injury, "solicitation or services activities were carried on within this State by or on behalf of defendant." N.C. Gen. Stat. § 1-75.4(4) (2004). "The statute requires only that the action 'claim' injury to person or property within this state in order to establish personal jurisdiction. It does not mandate evidence or proof of such injury." *Godwin v. Walls*, 118 N.C. App. 341, 349, 455 S.E.2d 473, 480 (1995).

Plaintiffs claim that Summit Lodging, a North Carolina corporation, was injured economically, by defendants' failure to advise them regarding the anti-deficiency statute. The failure to advise occurred in South Carolina, thus satisfying the foreign act requirement. It is undisputed that at or about the time of the injury, defendants provided legal services to plaintiffs to secure loan restructuring for Summit Lodging from Quality Oil and Reliable Tank, both North Carolina companies. We conclude that defendants' activities regarding the loan, including correspondence and phone conversations with North Carolina counsel for Quality Oil and Reliable Tank, constitute "services activities" being carried on within North Carolina by or on behalf of defendants, within the meaning of the statute. Thus, we conclude that plaintiffs have made out a *prima facie* case for personal jurisdiction pursuant to the long-arm statute. Regardless, by enacting N.C. Gen. Stat. § 1.75-4, "the General Assembly intended to make available to North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977). "[T]he critical inquiry in determining whether North Carolina may assert *in personam* jurisdiction over a defendant is whether the

assertion comports with due process." *J.M. Thompson Co. v. Doral Mfg. Co.*, 72 N.C. App. 419, 424, 324 S.E.2d 909, 913 (internal citation omitted) (1985).

"Due process requires that the defendant have 'minimum contacts' with the state in order to satisfy 'traditional notions of fair play and substantial justice.' " *Cooper v. Shealy*, 140 N.C. App. 729, 734, 537 S.E.2d 854, 857 (2000) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)). "Because the controversy in this case arises out of defendant's contacts with this State, specific jurisdiction is the type sought here." *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 366, 348 S.E.2d 782, 786 (1986). "To establish specific jurisdiction, the court looks at the relationship among the parties, the cause of action, and the forum state to see if minimum contacts are established." *Carson v. Brodin*, 160 N.C. App. 366, 372, 585 S.E.2d 491, 496 (2003) (internal citation and quotation marks omitted). "Whether minimum contacts are present is determined not by using a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable under the circumstances." *Better Business Forms*, 120 N.C. App. at 500, 462 S.E.2d at 833. "There must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* (internal citation omitted). "The activity must be such that defendant could reasonably anticipate being brought into court there." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114, 516 S.E.2d 647, 650 (1999) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 62 L. Ed. 2d 490, 498 (1980)). In determining whether there are sufficient minimum contacts, we consider the following factors:

> (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.

New Bern Pool & Supply Co. v. Graubart, 94 N.C. App. 619, 624, 381 S.E.2d 156, 159 (1989), *aff'd*, 326 N.C. 480, 390 S.E.2d 137 (1990).

We conclude that defendant had sufficient contacts with North Carolina. In so concluding, we considered that defendants have never been physically present in North Carolina. However, "[i]n light of modern business practices, the quantity, or even the absence, of actual physical contacts with the forum state merely constitutes a factor to be considered and is not of controlling weight." *Ciba-Geigy*

Corp. v. Barnett, 76 N.C. App. 605, 607-08, 334 S.E.2d 91, 93 (1985) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 85 L. Ed. 2d 528 (1985)); *see also New Bern Pools*, *Inspirational Network*, *Inc. v. Combs*, 131 N.C. App. 231, 506 S.E.2d 754 (1998) (both cases allowing personal jurisdiction over foreign defendant who was never physically present in the state).

Although defendants were not physically present in North Carolina, they represented Summit Lodging, a North Carolina company, from its inception and during its loan restructuring. Indeed, defendants drafted the Operating Agreement for Summit Lodging, pursuant to North Carolina law. Defendant Spitz prepared, signed (as "Organizer"), and filed the Articles of Organization for Summit Lodging with the North Carolina Secretary of State. Summit Lodging was organized to purchase and run a motel in North Carolina. During the negotiations for the purchase of the Fairfield Inn, defendants communicated, by mail and telephone, with North Carolina counsel for seller Quality Oil. Defendants also communicated by letter and telephone with Charles McLawhorn, Jr., the Greenville, North Carolina attorney who attended the closing on plaintiffs' behalf. McLawhorn sent the bills for his services to defendant firm.

Approximately two years later, in January 2002, defendants assisted plaintiffs in modifying the original debt instrument. Defendants, as counsel for plaintiffs, sent two letters to North Carolina counsel for Quality Oil and Reliable Tank, proposing how the debt would be modified. Defendants also exchanged emails and spoke on the telephone with counsel for Quality Oil and Reliable Tank about the matter. Thereafter, Summit Lodging and the Summit members signed a promissory note to Reliable Tank for $1,775,000. The following month, defendants sent a letter to North Carolina counsel for Reliable Tank to proceed with disbursement of the loan. We conclude that through all of the above-mentioned contacts with North Carolina, defendants "purposefully availed" themselves of "the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Better Business Forum*, 120 N.C. App. at 500, 462 S.E.2d at 833. By these activities, defendants should have reasonably anticipated being subject to jurisdiction in North Carolina.

Furthermore, this Court has "readily" found jurisdiction constitutional in tort cases, because of the "powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors." *Saxon v. Smith*, 125 N.C. App. 163, 173, 479 S.E.2d 788, 794 (1997). It

is also important to note that South Carolina does not have an anti-deficiency statute and that South Carolina courts will not be as familiar with North Carolina law as our courts are. Finally, as South Carolina is our neighboring state, there is minimal travel burden on defendants to defend a claim in North Carolina.

For the reasons discussed, we conclude that the trial court erroneously dismissed plaintiffs' claims for lack of personal jurisdiction.

Reversed.

Judges BRYANT and CALABRIA concur.

JULIE HARRIS AND DUANE HARRIS, PLAINTIFFS v. PINEWOOD DEVELOPMENT CORPORATION, WILLOW CREEK, A LIMITED PARTNERSHIP, RAY RITCHIE, DEFENDANTS

No. COA05-606

(Filed 21 March 2006)

Judgments— preliminary injunction against transfer of assets—prior to execution

Where there is no pending litigation, there is no jurisdiction to grant a preliminary injunction, and the trial court here erred by granting a preliminary injunction against the conveyance of land by defendants after plaintiffs had obtained a judgment for unfair and deceptive trade practices. The General Assembly has provided creditors with the means to address problems with the execution of judgments, but only after execution has been returned wholly or partially unsatisfied (N.C.G.S. § 1-352), or the terms of N.C.G.S. § 1-355 are met.

Judge TYSON dissenting.

Appeal by defendant Ray Ritchie from order entered 12 January 2005 by Judge W. Erwin Spainhour in the Superior Court in Rowan County. Heard in the Court of Appeals 8 December 2005.

Homesley, Jones, Gaines & Dudley, by Mitchell P. Johnson, for plaintiffs.

Ferguson, Scarborough & Hayes, P.A., by Edwin H. Ferguson, Jr., for defendant Ritchie.

HUDSON, Judge.

On 27 August 2004, a jury rendered a verdict for plaintiffs Julie and Duane Harris against defendants for unfair and deceptive trade practices and awarded judgment in the amount of $326,901 plus interest. The court denied plaintiffs' claim for attorney's fees. On 9 November 2004, plaintiffs filed a motion for an *ex parte* temporary restraining order ("TRO") enjoining defendant Ray Ritchie and various non-party entities from conveying interest in various parcels of land held by defendant Pinewood Homes, Inc., as trustee. The court entered a TRO, and on 24 November 2004, plaintiffs moved for a preliminary injunction. Following a hearing, the court granted a preliminary injunction against Ritchie and Pinewood Homes. Defendant Ritchie appeals the order granting the preliminary injunction. As discussed below, we vacate.

This case arose from Ritchie's sale of land to plaintiffs for use as a home site. Plaintiffs alleged that defendant Ritchie concealed the fact that debris had been buried on the property. After obtaining judgment, plaintiffs began the process of execution. In the months following entry of the judgment against him, Ritchie took various actions to transfer and hide various assets of his companies, including transferring his North Carolina corporations to Nevada, transferring the presidency of Pinewood Homes to another person, and submitting a motion stating that Pinewood Homes had virtually no assets. Plaintiffs sought a preliminary injunction to prevent Ritchie and his companies from transferring assets until post-judgment proceedings were completed by satisfaction of the judgment. Ritchie is the only defendant appealing the preliminary injunction.

A preliminary injunction is interlocutory in nature. *A.E.P. Industries v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983); *State v. Fayetteville St. Christian School*, 299 N.C. 351, 261 S.E.2d 908, *appeal dismissed*, 449 U.S. 807 (1980). Thus, issuance of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order "escape appellate review before final judgment." *Fayetteville St. Christian School*, 299 N.C. at 358, 261 S.E.2d at 913. Defendant Ritchie contends that the preliminary injunction "essentially shut down all business activity" of Ritchie and his companies, thereby affecting a substantial right to be lost. "Our courts have recognized the inability to practice one's livelihood and the deprivation of a significant property interest to be substantial rights . . . ." *Bessemer City Express, Inc. v. City of Kings Mountain*,

155 N.C. App. 637, 640, 573 S.E.2d 712, 714 (2002), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 384 (2003).

Ritchie argues that the trial court erred in granting the preliminary injunction against Ritchie and his non-party companies post-judgment and in denying his motion to dismiss the motion for preliminary injunction. We agree.

Although his brief lists two separate assignments of error and two separate questions presented, defendant Ritchie combines their discussion, and we do the same.

> The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary and lasts no longer than the pendency of the action.

Fayetteville St. Christian School, 299 N.C. at 357-58, 261 S.E.2d at 913. N.C. Gen. Stat. § 1-485(2) provides that a preliminary injunction may be issued:

> [w]hen, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual.

N.C. Gen. Stat. § 1-485(2) (2003). "The assumption is that a plaintiff seeking a temporary restraining order or a preliminary injunction eventually wants permanent relief. [T]here has to be an action pending to which the temporary injunction can be ancillary." *Brown v. Brown*, 91 N.C. App. 335, 339, 371 S.E.2d 752, 755 (1988) (internal citation and quotation marks omitted). Where "there is no pending litigation . . ., there is no action to which the ancillary remedy against petitioner may attach and the trial court had no jurisdiction to grant the preliminary injunction." *Revelle v. Chamblee*, 168 N.C. App. 227, 231, 606 S.E.2d 712, 714 (2005).

In reviewing the ruling on a preliminary injunction, the appellate court is not bound by the findings of the lower court, but there is a presumption that the lower court decision was correct. *A.E.P. Indus., Inc. v. McClure*, 58 N.C. App. 155, 157, 293 S.E.2d 232, 233 (1982), *rev'd on other grounds*, 308 N.C. 393, 302 S.E.2d 754 (1983) (internal citation omitted). A decision by the trial court to issue or deny an

injunction will generally be upheld on appeal if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings. *Id.* at 158, 293 S.E.2d at 234.

Ritchie contends that the preliminary injunction was improperly entered because it was no longer part of a pending action. He asserts that the proceedings in 00CVS3117 were concluded, in that judgment had been entered. Defendants maintain that supplemental proceedings such as injunctive relief were not yet available because execution had not yet been returned unsatisfied, pursuant to N.C. Gen. Stat. § 1-352, which reads in pertinent part as follows:

> When an execution against property of a judgment debtor, . . . is returned wholly or partially unsatisfied, the judgment creditor at any time *after the return*, . . . is entitled to an order from the court . . . requiring such debtor to appear and answer concerning his property . . . .

N.C. Gen. Stat. § 1-352 (2005). Other remedies are available in N.C. Gen. Stat. § 1-355, which provides as follows:

> Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the State or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought before the court or judge, the debtor may be examined on oath, and, if it appears that there is danger of his leaving the State, and that he has property which he has unjustly refused to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as directed, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt.

N.C. Gen. Stat. § 1-355 (2005) In light of this statutory language, we conclude that the General Assembly has provided means by which the creditor may address problems with execution, but only after it has been returned wholly or partially unsatisfied, or if the terms of

§ 1-355 are met. We do not see that the legislature has authorized the procedure followed here. The record contains no evidence of other proceedings pending in 00CVS3117 at the time the preliminary injunction was granted. We conclude that the court did not follow the statutory procedures and it erred in granting a preliminary injunction against defendants.

Vacated.

Judge LEVINSON concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

The majority's opinion vacates the trial court's preliminary injunction barring defendant's transfer of assets subject to satisfying plaintiffs' judgment and holds the court erred when it granted a preliminary injunction against defendants. I respectfully dissent.

I. Statutory Remedy

The majority's opinion states, "the General Assembly has provided means by which the creditor may address problems with execution, but only after it has been returned wholly or partially unsatisfied, or if the terms of § 1-355 are met." While I agree this statute is an available remedy, it is not exclusive and does not address the issue before us. Plaintiffs filed this action as a "motion in the cause" from which the judgment resulted and sought an equitable remedy of injunction. The trial court possesses inherent power to grant a preliminary injunction to prohibit the fraudulent transfer of assets that are subject to execution for satisfaction of that judgment.

As noted in the majority's opinion, N.C. Gen. Stat. § 1-355 (2005) provides:

> Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the State or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought before the court or judge, the

> debtor may be examined on oath, and, if it appears that there is danger of his leaving the State, and that he has property which he has unjustly refused to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as directed, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt.

Nothing in the plain language nor in any precedent cited by defendant or the majority's opinion tends to show N.C. Gen. Stat. § 1-355 is the sole or exclusive method for a court to administer justice to a judgment debtor who threatens to conceal or transfer assets subject to execution post judgment. Nor does the statute evidence any legislative intent to limit the court's inherent power to provide relief to a judgment creditor in the original action upon a showing that the judgment debtor is attempting to fraudulently conceal or transfer assets subject to execution. *See* N.C. Gen. Stat. § 1A-1, Rule 64 ("At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of this State.").

II. Preliminary Injunction

A preliminary injunction is an equitable remedy, and the trial court, in its discretion, may grant an injunction to protect its judgments and prevent irreparable harm. The United States Supreme Court has stated:

> A court of equity in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. *It is a power inherent in the court*, as a court of equity, and has been exercised from time immemorial.

Inland Steel Co. v. United States, 306 U.S. 153, 156, 83 L. Ed. 557, 560 (1939) (citations and internal quotations omitted) (emphasis in original).

Our Supreme Court has stated:

> a court of equity, or a court in the exercise of its equity powers, may use the writ of injunction as a remedy subsidiary to and in aid of another action or special proceeding. However, in such cases, in order to justify continuing the writ until the final hearing, ordinarily it must be made to appear (1) that there is probable cause the plaintiff will be able to establish the asserted right, and (2) that there is a reasonable apprehension of irreparable loss unless the temporary order of injunction remains in force, or that in the opinion of the court such injunctive relief appears to be reasonably necessary to protect the plaintiff's rights until the controversy can be determined.

Edmonds v. Hall, 236 N.C. 153, 156, 72 S.E.2d 221, 223 (1952).

This Court has held, to support a grant of preliminary injunction, "[t]he danger sought to be enjoined must be real and immediate. There must be at least a reasonable probability that the injury will be done if no injunction is granted." *Asheville Mall, Inc. v. Sam Wyche Sports World*, 97 N.C. App. 133, 135, 387 S.E.2d 70, 71 (1990) (internal quotations and citations omitted).

Plaintiffs filed this motion in the original cause in which the final judgment was entered to protect themselves against defendant's efforts to fraudulently transfer or remove assets to render execution on the final judgment ineffectual or unsatisfied citing N.C. Gen. Stat. § 1A-1, Rule 65. The trial court agreed and concluded:

> That during the pendency of Plaintiff's post-judgment actions for collection against Ray Ritchie for the amount of their judgment, Ritchie has threatened to remove and dispose of and may already have removed (e.g. by moving the state of incorporation of Pinewood Homes, Inc. to Nevada) and disposed of assets in an attempt to defraud the Plaintiffs (e.g. by making material misrepresentations in Ritchie's Motion to Claim Exemptions).
>
> . . . .
>
> That good cause and the interests of substantial justice and equity compel this Court to freeze any and all transfers and exchanges of assets in which Ray Ritchie has any ownership. That Pinewood Homes, Inc. appears to be in active concert with Ray Ritchie, in his wrongful attempts to avoid accountability for the Judgment against him.

Plaintiffs argue "[t]he threat of irreparable harm . . . is that while they will be entitled to collect damages, they will not be able to collect against their judgment because Ritchie will have stripped himself of the very assets against which the [plaintiffs] are entitled to take." Plaintiffs presented sufficient evidence from which a court could find a "real and immediate" danger that defendant would conceal or transfer assets subject to execution beyond the reach of plaintiff's ability or feasibility to satisfy the judgment against him. *Id*. Defendant's argument that the preliminary injunction, a temporary remedy, "essentially shut down all business activity" is without merit. Defendant holds in his hands control of the resolution of the preliminary injunction—pay the judgment. The trial court's order should be affirmed.

III. Conclusion

The trial court, sitting as a court of equity, possesses the inherent authority to protect its judgment and to issue an injunction to prevent a judgment debtor from concealing, removing, or transferring assets that are subject to execution to satisfy that judgment. Nothing in the statute or any precedent abrogates this inherent authority. The trial court did not err when it granted plaintiff's motion for a preliminary injunction. I vote to affirm the trial court's judgment. To hold otherwise would allow the judgment debtor to transfer assets subject to execution beyond the jurisdiction of the court. I respectfully dissent.

BRADLEY P. UNION, BY AND THROUGH HIS GUARDIAN, C. DOUGLAS MAXWELL, JR., PLAINTIFF v. BRANCH BANKING & TRUST COMPANY, DEFENDANT

No. COA05-663

(Filed 21 March 2006)

1. Trusts— breach of fiduciary duty—negligent management—mental incompetency

The trial court did not err by granting summary judgment in favor of defendant bank on plaintiff's claims for breach of fiduciary duty and negligent management of the 1977 and 1981 trust accounts, because: (1) when properly requested, no provisions in the 1977 trust agreement afford defendant any discretion on withholding distributions from the 1977 trust to the trust beneficiary's checking account regardless of the beneficiary's alleged mental

incompetency at the time of the request; (2) requests for money from the 1977 trust came from the beneficiary or from someone representing him; and (3) in distributing the funds from the 1977 trust to the beneficiary's account at his request, defendant performed the duties expressly required by the 1977 trust agreement. N.C.G.S. § 32-71(a).

2. Banks and Banking— honoring forged checks—failure to meet one-year notice period

The trial court did not err by granting summary judgment in favor of defendant bank on plaintiff guardian's claim that defendant improperly honored forged checks drawn on the pertinent checking account, because: (1) N.C.G.S. § 25-4-406(f) provides that failure of a customer or his representative to report his unauthorized signature within one year after the bank makes account statements available precludes a claim against the bank, even if the customer is incompetent (whether adjudicated or unadjudicated) during the one-year period for providing notice; (2) even if the Court of Appeals accepted the guardian's argument that the requirements of the statute should not be triggered until he was appointed guardian of the estate since the prior guardian was the alleged wrongdoer, the guardian notified the bank of the unauthorized signatures still outside the one-year notification period; (3) a material factual dispute did not exist as to whether the guardian's freezing of the pertinent checking account upon his appointment as interim guardian in December 2000 satisfied the notice requirements; and (4) the guardian's argument that defendant received notice of the unauthorized signatures when defendant's employees attended the pertinent competency hearing where evidence was presented to show that the prior guardian had been forging signatures is without merit.

Appeal by Plaintiff from order entered 28 February 2005 by Judge Gregory A. Weeks in Superior Court, Cumberland County. Heard in the Court of Appeals 24 January 2006.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., Steven C. Lawrence for plaintiff-appellant.

McCoy, Weaver, Wiggins, Cleveland, & Raper, PLLC, Jim Wade Goodman for defendant-appellee.

WYNN, Judge.

Plaintiff C. Douglas Maxwell, acting in his capacity as guardian of the estate of Bradley P. Union[1] brought this action to recover damages from Defendant Branch Banking and Trust Company ("BB&T") alleging negligent management of Mr. Union's two trust accounts, and wrongful payment on fraudulently endorsed checks drawn on Mr. Union's checking account. Because BB&T is entitled to judgment as a matter of law, we affirm the trial court's order granting summary judgment.

Mr. Union is the beneficiary of two trusts established by his father, respectively the "1977 Trust" and the "1981 Trust". The 1977 Trust funded Mr. Union's personal checking account at BB&T. The 1981 Trust, established as a revocable trust, paid income to Mr. Union's father until his death in 1986; thereafter, it funded the 1977 Trust for the benefit of Mr. Union.

On 17 April 1998, Mr. Union executed a power of attorney to James Johnson, his personal caretaker and assistant since the 1960s, authorizing him to handle his banking transactions. Mr. Johnson testified that his wife, Louise Johnson, assisted in caring for Mr. Union, handled the payroll, and wrote checks to pay Mr. Union's bills. Mrs. Johnson testified that when she wrote the checks, she normally signed the name "Brad Union." Both testified that the checks written in Mr. Union's name were authorized by Mr. Union or Mr. Johnson as attorney-in-fact.

Lou Gentry, Vice President of BB&T's Wealth Management Division and manager of Mr. Union's trust accounts since the 1990s, testified that all of the money paid from the 1977 Trust was made pursuant to a request from Mr. Union or one of his representatives, including Mr. Johnson.

In 2000, Mr. Union's primary care physician became concerned with his healthcare and condition and contacted the Department of Social Services for Adult Protection Services ("DSS"). DSS instituted a competency hearing, and the Clerk of Superior Court, Cumberland County appointed Mr. Maxwell as interim guardian for Mr. Union. In that capacity, Mr. Maxwell revoked the Power of Attorney issued to Mr. Johnson and notified BB&T of his appointment.

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1. Mr. Union suffers from a mental condition and was adjudicated incompetent by the Clerk of Superior Court, Cumberland County on 27 December 2000. The Clerk appointed Mr. Maxwell guardian of Mr. Union's estate.

On 21 December 2000, Mr. Union was declared incompetent. Mr. Maxwell qualified as guardian of Mr. Union's estate and requested financial records from BB&T. By mid-July 2001, BB&T provided Mr. Maxwell with nearly all of the returned checks requested from Mr. Union's checking account. Upon review of the checks with the assistance of a handwriting expert, Mr. Maxwell alleged that before 1997 and through December 2000, Mr. Johnson and his family members forged Mr. Union's signature on personal checking account checks and improperly converted large sums of money from the checking account.

On 13 October 2003, Mr. Maxwell brought this action against BB&T alleging negligence in its management and handling of the 1977 and 1981 Trust Accounts and payment on fraudulently endorsed checks drawn on Mr. Union's checking account. From the trial court's grant of summary judgment in favor of BB&T, Mr. Maxwell appealed.

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[1] Mr. Maxwell first contends the trial court erred in granting BB&T summary judgment[2] on his claims for breach of fiduciary duty and negligent management of the 1977 and 1981 Trust Accounts. He alleges "[t]hat the Defendant breached its contractual obligations under the trusts and N.C. Gen. Stat. § 36A-2(a), by failing to properly manage, administer, retain and protect the trust assets for Brad Union[.]"

Section 32-71(a) of the North Carolina General Statutes provides in pertinent part:

> In . . . managing property for the benefit of another, a fiduciary shall observe the standard of judgment and care under the cir-

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2. 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.R. Civ. P. 56(c)). The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that the non-moving party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *Id.* 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." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988).

> cumstances then prevailing, which an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others would observe as such fiduciary; and if the fiduciary has special skills or is named a fiduciary on the basis of representation of special skills or expertise, the fiduciary is under a duty to use those skills.

N.C. Gen. Stat. § 32-71(a) (2005) (recodified from N.C. Gen. Stat. § 36A-2 by S.L. 2005-192, § 1, eff. 1 Jan. 2006).

Mr. Maxwell does not dispute the evidence showing that the requests for money from the 1977 Trust came from Mr. Union, or from someone representing Mr. Union. Instead, he asserts (without citing any authority to support his argument) that in light of Mr. Union's impaired judgment, BB&T had a duty to take measures to protect the 1977 Trust assets and, by continuing to allow the withdrawal of funds from the 1977 Trust to deposit into Mr. Union's checking account, BB&T breached its fiduciary duty under section 32-71(a) to protect the trust assets.

The dispositive portions of the 1977 Trust, which Mr. Maxwell admits is the only trust from which funds were disbursed into Mr. Union's checking account, provide in relevant part:

> 1. DISPOSITIVE PROVISIONS.
>
> The Trustees shall hold, manage, invest and reinvest the trust property, and shall collect the income thereof and dispose of the net income and principal as follows:
>
> A. The trustees *shall* accumulate the net income of the trust property for the benefit of Trustors' son, Bradley P. Union and, *as long as he shall live, pay to him for his benefit periodically, not less frequently than quarter-annually, so much of the net income of the Trust as the said Bradley P. Union shall request* or, absent such a request, so much of the net income as the trustees in their discretion deem proper and in the best interest of Bradley P. Union.

(Emphasis added).

In *First Nat'l Bank of Catawba Cty. v. Edens*, this Court distinguished between the mandatory and discretionary powers of a trustee, stating:

> [a] power is mandatory when it authorizes and commands the trustee to perform some positive act. . . . A power is discretionary

> when the trustee may either exercise it or refrain from exercising it, . . . or when the time, manner, or extent of its exercise is left to his discretion.

First Nat'l Bank of Catawba Cty. v. Edens, 55 N.C. App. 697, 701, 286 S.E.2d 818, 821 (1982) (internal citation and quotation omitted). "The court will always compel the trustee to exercise a mandatory power." *Woodard v. Mordecai*, 234 N.C. 463, 471, 67 S.E.2d 639, 644 (1951) (citation omitted).

Here, the 1977 Trust Agreement *required* BB&T to distribute funds to Union "so much of the net income of the Trust as the said BRADLEY P. UNION shall request." The record reveals that when BB&T made the distributions, the net income was in the 1977 Trust, and that Mr. Union requested the funds to be deposited from the 1977 Trust into his checking account. When properly requested, no provisions in the 1977 Trust Agreement afford BB&T any discretion on withholding distributions from the 1977 Trust to Mr. Union's checking account, regardless of Mr. Union's alleged mental incompetency at the time of the request. In distributing the funds from the 1977 Trust to Mr. Union's account at his request, BB&T performed the duties expressly required by the 1977 Trust Agreement. Because there is no evidence in the record to support a breach of BB&T's fiduciary duty as it relates to the 1977 or the 1981 Trust, Mr. Maxwell's assignment of error is without merit.

[2] In his final argument on appeal, Mr. Maxwell contends the trial court erred in granting summary judgment on his claim that BB&T improperly honored forged checks drawn on Mr. Union's checking account. Specifically, Mr. Maxwell contends that there is a material factual dispute as to whether Mr. Maxwell complied with the notice requirement for this claim under section 25-4-406(f) of the North Carolina General Statutes. Mr. Maxwell's argument is without merit.

> Section 25-4-406(f) provides in pertinent part:
>
> Without regard to care or lack of care of either the customer or the bank, *a customer who does not within one year after the statement or items are made available to the customer* . . . discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration.

N.C. Gen. Stat. § 25-4-406(f) (2005). As a matter of first impression, to interpret the language of section 25-4-406(f) to determine whether Mr.

Maxwell's claims are precluded, we first look to the plain meaning of the statute. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 388 S.E.2d 134 (1990). Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. *Id.* Notwithstanding, "where 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." *Mazda Motors of Am., Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (internal quotation and citation omitted).

In this case, we conclude that the language of section 25-4-406(f) is clear: failure of a customer or his representative to report his unauthorized signature within one year after the bank makes account statements available precludes a claim against the bank, even if the customer is incompetent (whether adjudicated or unadjudicated) during the one-year period for providing notice.

Our interpretation of section 25-4-406(f) is consistent with the courts of other jurisdictions interpreting similar statutes. *See Siecinski v. First State Bank of East Detroit*, 531 N.W.2d 768 (Mich. App. 1995) (affirming the trial court's grant of summary judgment to a bank where plaintiff, although incompetent, failed to comply with notice requirement for filing a claim against a bank for honoring unauthorized checks); *Brown v. Cash Management Trust of America*, 963 F. Supp. 504 (D. Md. 1997) (holding that the one-year notice provision for forged checks is "an unalterable condition precedent to suit," against a bank and mental incompetence does not excuse failure to provide notice); *see also Jensen v. Essexbank*, 483 N.E.2d 821 (Mass. 1985) (holding that the one-year notice requirement for filing a claim against a bank for forged checks governed the time within which a party to a contract was obligated to act, and was not a statute of limitations subject to tolling); *Indiana Nat'l Corp. v. Faco, Inc.*, 400 N.E.2d 202 (Ind. Ct. App. 1980) (same).

Here, the undisputed record shows that during the period of 1997-2000, BB&T sent monthly statements and returned checks to Mr. Union's residence. Mr. Johnson, who was Mr. Union's personal assistant and attorney-in-fact, reviewed these statements and never reported an unauthorized check written on Mr. Union's checking account. Mr. Maxwell argues that because Mr. Union was incompe-

tent at the time the fraudulent checks were written, and the power of attorney given to Mr. Johnson, the alleged wrongdoer, was thus invalid, he should be entitled to recover for the wrongfully endorsed checks for one year preceding the 27 December 2000 date he was appointed interim guardian for Mr. Union.

Even if this Court were to accept Mr. Maxwell's argument that the requirements of section 25-4-406(f) should not be triggered until he was appointed guardian of Mr. Union's estate, Mr. Maxwell's claims would still be barred by the statute. The record shows that Mr. Maxwell obtained the allegedly forged checks from BB&T by mid-July 2001. At the earliest, Mr. Maxwell notified BB&T of the unauthorized signatures by letter dated 1 August 2002, which is still outside the one-year notification period required in section 25-4-406. We reject Mr. Maxwell's contention that a material factual dispute exists as to whether Mr. Maxwell's "freezing" Mr. Union's checking account upon his appointment as interim guardian in December 2000 satisfied the notice requirements of section 25-4-406(f). Likewise, Mr. Maxwell's argument that BB&T received notice of the unauthorized signatures when BB&T's employees attended Mr. Union's competency hearing where evidence was presented to show that Mr. Johnson had been forging Mr. Union's signature is without merit.

Because Mr. Maxwell failed to comply with the notice requirements of section 25-4-406(f), Mr. Maxwell is barred from asserting the unauthorized signatures against BB&T. Accordingly, the trial court properly granted BB&T summary judgment on Mr. Maxwell's claim of negligent payment on forged checks drawn on Mr. Union's checking account.

Affirmed.

Judges HUNTER and JACKSON concur.

STATE OF NORTH CAROLINA v. NATHANIEL LEE SIMPSON, DEFENDANT

No. COA05-632

(Filed 21 March 2006)

1. Sentencing— *Blakely* error—case final before effective date of rule

The trial court's imposition of an aggravated sentence upon defendant based upon an aggravating factor found by the trial court and not submitted to the jury did not entitle defendant to appropriate relief where his case was final as of 23 December 2003; *Blakely* errors are limited to cases that were not final as of 21 July 2005.

2. Constitutional Law— effective assistance of counsel— issue not raised on appeal

Defendant received effective assistance of appellate counsel even though his counsel did not challenge his sentence for error under *Apprendi v. New Jersey*, 530 U.S. 466, and *Ring v. Arizona*, 536 U.S. 584, because, at the time, the prevailing law in North Carolina and many jurisdictions was that there was no applicability to noncapital cases. Moreover, a criminal defendant has no right to counsel past the initial appeal; defendant's argument that counsel should have pursued the case through the state and federal Supreme Courts is without merit.

On a writ of *certiorari* from order entered 15 October 2004 by Judge William C. Griffin, Jr. in Superior Court, Martin County. Heard in the Court of Appeals 20 February 2006.

Attorney General Roy Cooper, III, by Assistant Attorney General Kathleen U. Baldwin and Assistant Attorney General Robert C. Montgomery, for the State.

M. Gordon Widenhouse, Jr., for defendant-appellant.

WYNN, Judge.

Although *Blakely*[1] errors arising under North Carolina's Structured Sentencing Act are reversible *per se*, our Supreme Court in *State v. Allen*[2] limited the application of this rule to cases that were

1. *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004).

2. 359 N.C. 425, 427, 615 S.E.2d 256, 258 (2005).

not final as of 21 July 2005. In this case, Defendant contends the use of a sentencing aggravating factor that was neither submitted to a jury nor stipulated by Defendant constituted a *Blakely* error. Because Defendant's case was final as of 23 December 2003, *Allen* requires us to hold that he is not eligible for a new sentencing hearing.

The facts pertinent to this appeal indicate that following Defendant's pleas of guilty to burglary, larceny, and habitual felon status, the trial court found as an aggravating factor that the victim was physically infirm. Thereafter, the trial court sentenced Defendant to a single term of imprisonment within the aggravated range for a minimum of 190 months and a maximum of 237 months.

Defendant appealed to this Court, challenging the evidence to support the trial judge's finding as an aggravating factor that the victim was physically infirm. In an unpublished opinion filed on 18 November 2003, this Court found no error in Defendant's trial. *State v. Simpson*, 161 N.C. App. 350, —— S.E.2d —— (2003).

Subsequently, Defendant filed a *pro se* motion for appropriate relief in Superior Court, Martin County, contending the trial court violated his Sixth Amendment right to trial by jury as to the aggravating factor and he received ineffective assistance of counsel due to counsel's failure to raise these issues at trial and on appeal. On 15 October 2004, the trial judge entered an order denying Defendant's motion, concluding "as a matter of law that *Blakely v. Washington* is not retroactive and does not apply to [Defendant's] case." Thereafter, Defendant filed a *pro se* petition for *writ of certiorari* seeking review of the trial court's order denying his motion for appropriate relief. On 20 November 2004, this Court allowed Defendant's petition "limited to those issues . . . regarding retroactive application of *Blakely v. Washington*, 542 U.S. ——, 159 L. Ed. 2d 403 (2004) and possible ineffective assistance of counsel in light of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000)."

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[1] On appeal, Defendant first contends that because he received an imprisonment sentence based on an aggravated factor neither submitted to a jury nor proved beyond a reasonable doubt, his sentence is in violation of *Apprendi v. New Jersey* and *Blakely v. Washington*, and is therefore invalid as a matter of law.

In *Apprendi v. New Jersey*, 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." 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000). The Supreme Court of North Carolina interpreted *Apprendi* in *State v. Lucas*, and held that the statutory maximum for purposes of *Apprendi* was the longest sentence a defendant could receive at the highest prior record level for a particular class of offense. 353 N.C. 568, 596, 548 S.E.2d 712, 731 (2001), *overruled on other grounds by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

The United States Supreme Court defined statutory maximum for applying the *Apprendi* rule in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). The *Blakely* Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413. Thus, "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." *Id.* at 303-04, 159 L. Ed. 2d at 413-14.

The Supreme Court of North Carolina examined the constitutionality of North Carolina's Structured Sentencing Act in light of *Apprendi* and *Blakely* in *Allen*, 359 N.C. 425, 615 S.E.2d 256. In *Allen*, our Supreme Court concluded that "those portions of N.C.G.S. § 15A-1340.16 (a), (b), and (c) which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence" are unconstitutional. *Id.* at 438-39, 615 S.E.2d at 265. The Court held, "*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. However, the *Allen* Court made clear that its holdings applied only to those cases "in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final." *Id.* at 427, 615 S.E.2d at 258 (internaal citation and quotation omitted). The *Allen* opinion was certified on 21 July 2005.

In this case, Defendant pled guilty to burglary, larceny, and habitual felon status, and was sentenced to a single term of imprisonment within the aggravated range based upon the trial judge's finding the victim was physically infirm. On direct appeal, Defendant challenged the sufficiency of the evidence to support the trial judge's finding, and this Court filed its opinion affirming the trial court's judgment on 18

November 2003. Defendant did not seek discretionary review of this Court's opinion in the Supreme Court of North Carolina. Thus, Defendant's case became final on 23 December 2003, the date his time expired for seeking discretionary review of this Court's opinion. *See* N.C. R. App. P. 15(b) (providing that the time for filing a petition for discretionary review expires fifteen days after the mandate of this Court has issued); *see also State v. Zuniga*, 336 N.C. 508, 512 n.1, 444 S.E.2d 443, 445 n.1 (1994) (noting that "final" meant "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for petition for *certiorari* elapsed or a petition for *certiorari* finally denied[.]" (citation omitted)). Although this Court allowed Defendant's petition for writ of *certiorari* on 30 November 2004, Defendant's case was pending before this Court on collateral review, not direct review. Because Defendant's conviction was already final when *Allen* was certified on 21 July 2005, and our Supreme Court held that *Allen* only applies to cases that were pending on direct review or were not yet final as of the certification date of the *Allen* opinion, we find no error in the trial court's denial of Defendant's motion for appropriate relief. *See Allen*, 359 N.C. at 427, 615 S.E.2d at 258.

[2] In his final argument on appeal, Defendant contends the trial court erroneously denied his request for a new trial based on ineffective assistance of appellate counsel which violated his constitutional rights.[3] Specifically, Defendant argues that his appellate counsel failed to challenge the constitutionality of the trial court imposing a sentence in excess of the presumptive range that was neither submitted to the jury, nor proved beyond a reasonable doubt in violation of *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455, and *Ring v. Arizona*, 536 U.S. 584, 609, 153 L. Ed. 2d 556, 576-77 (2002). Defendant's arguments are without merit.

To show ineffective assistance of appellate counsel, Defendant must meet the same standard for proving ineffective assistance of trial counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 145 L. Ed. 2d 756, 780 (2000). The United States Supreme Court outlined a two-part test in *Strickland v. Washington* to determine if an ineffective assistance of counsel claim has merit:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so seri-

3. Although Defendant argued in his motion for appropriate relief that he received ineffective assistance of counsel at the trial and appellate phases of his case, he only argues he received ineffective appellate counsel in his brief.

> ous 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.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). Our Supreme Court adopted the *Strickland* test in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985).

Defendant contends he received ineffective assistance due to counsel's failure to raise an issue on appeal based upon *Apprendi* and *Ring*. As discussed above, in *Apprendi*, 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." 530 U.S. at 490, 147 L. Ed. 2d at 455. In *Ring*, the United States Supreme Court held that the Sixth Amendment requires a jury, not a judge, to find aggravating circumstances necessary to impose the death penalty. 536 U.S. at 609, 153 L. Ed. 2d at 576-77.

At the time Defendant filed his direct appeal in this Court on 27 February 2003, the prevailing law in North Carolina and many jurisdictions was that the rules of *Apprendi* and *Ring* did not apply to aggravating factors in non-capital cases. *See, e.g.*, *Lucas*, 353 N.C. at 596, 548 S.E.2d at 730-31; *see also Blakely* 542 U.S. at ––– n.1, 159 L. Ed. 2d at 424 n.1 (O'Connor, J., dissenting) (outlining a number of cases concluding that *Apprendi* did not apply to aggravating factors in non-capital cases). *But see State v. Gould*, 23 P.3d 801 (Kan. S.C. 2001).

In light of the number of arguably reasonable jurists rejecting the notion that *Apprendi* and *Ring* had any effect on non-capital sentencing prior to *Blakely*, we hold that it was well within reason for Defendant's appellate counsel not to pursue this issue on appeal. Our holding is consistent with other jurisdictions that have found no ineffective assistance of counsel in similar circumstances. *See, e.g.*, *United States v. Carew*, 140 Fed. Appx. 15, 18 (10th Cir. 2005) (holding that even after *Apprendi* was decided, "counsel's failure to predict *Booker's* constitutional and remedial holdings is not objectively unreasonable"); *State v. Febles*, 210 Ariz. 589, 597, 115 P.3d 629, 637 (2005) (holding that "[c]ounsel's failure to predict future changes in

the law, and in particular the *Blakely* decision, is not ineffective because clairvoyance is not a required attribute of effective representation." (citation omitted)); *State v. Vlahopoulos*, —– Ohio App. 3d —–, —– N.E.2d —– (No. 82035) (16 Aug 2005) (holding that "[a]ppellate counsel cannot be required to anticipate future changes in the law and argue such potential changes on appeal.").

Similarly, Defendant's argument that appellate counsel should have pursued his case through our Supreme Court and to the United States Supreme Court is also without merit. A criminal defendant has no right to counsel past the initial appeal. *Ross v. Moffitt*, 417 U.S. 600, 612, 41 L. Ed. 2d 341, 352 (1974). Thus, a defendant cannot base an ineffective assistance of counsel claim on the failure of appellate counsel to pursue an appeal past the initial appeal. *Wainwright v. Torna*, 455 U.S. 586, 587-88, 71 L. Ed. 2d 475, 477-78 (1982) (holding that where there is no constitutional right to counsel for a discretionary appeal there can be no ineffective assistance of counsel for failing to seek discretionary review). Because Defendant's appellate counsel acted reasonably in not raising an issue under *Apprendi* and *Ring* where courts had rejected similar claims, and there is no constitutional right to counsel for a discretionary appeal, Defendant's assignment of error is rejected.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

HUGH K. EVANS AND JACKIE EVANS, PLAINTIFFS v. LOCHMERE RECREATION CLUB, INC. D/B/A LOCHMERE SWIM & TENNIS CLUB, DEFENDANT

No. COA05-956

(Filed 21 March 2006)

1. Nuisance— private—motion to dismiss—sufficiency of complaint—effect of prior judgment

The trial court erred by dismissing plaintiffs' claim for private nuisance allegedly arising from noise at defendant's swim and tennis club, because: (1) while plaintiffs allege most of the specific acts in order to prove defendant was in violation of an

injunction arising out of a 1994 lawsuit, all of these acts are realleged in their claim for nuisance; (2) as the complaint is to be liberally construed, it is sufficient on its face to provide defendant with sufficient notice of the conduct on which the claim is based to enable defendant to respond and prepare for trial, and it stated enough to satisfy the substantive elements of a private nuisance claim against defendant; (3) successors in ownership of real property are not automatically bound by prior judgments granting injunctions concerning the use of the property, and as there was no evidence offered of any active concert or participation between defendant and the previous owners, plaintiffs could not enforce the previous injunction against defendant thus entitling plaintiffs to bring a new suit against defendant requesting relief in the form of an injunction; and (4) the verdict and award in the 1994 lawsuit was not explicitly for permanent damages, and thus, plaintiffs' remedy is to recover in separate and successive actions for damages sustained to the time of the trial.

2. Appeal and Error— preservation of issues—failure to argue—waiver

While plaintiffs assign error to the dismissal of their claims against defendant for violating a 1994 permanent injunction and restraining order, plaintiffs correctly abandoned this argument in their brief, and thus, this assignment of error is deemed waived under N.C. R. App. P. 28(b)(6).

Appeal by plaintiffs from an order entered 27 April 2005 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 February 2006.

Wallace, Nordan & Sarda, LLP, by Peter J. Sarda, for plaintiff-appellants.

Ellis & Winters, LLP, by Jonathan D. Sasser, for defendant-appellee.

BRYANT, Judge.

Hugh K. Evans and Jackie Evans (plaintiffs) appeal from an order entered 27 April 2005 dismissing their claims against Lochmere Recreation Club, Inc. (defendant). We reverse the order of the trial court and remand for further proceedings.

Facts & Procedural History

In 1994, plaintiff Hugh Evans (Evans) filed suit against MacGregor Development Co. (MacGregor) and Lochmere Swim & Tennis Club, Inc. (LSTC), claiming the noise from the speakers and crowds located at the Swim Club interfered with the use and enjoyment of his property. At trial, a jury found in favor of Evans and awarded him $50,000.00 in compensatory damages and $135,000.00 in punitive damages. The trial court further granted a permanent injunction and restraining order against MacGregor and LSTC instructing them to take measures, such as repositioning their speakers, to reduce the noise encroachment on plaintiff's property. This final judgment was affirmed on appeal. *Evans v. MacGregor Dev. Co.*, 126 N.C. App. 224, 491 S.E.2d 566 (1997) (unpublished). In 1998 defendant Lochmere Recreation Club acquired the property from LSTC.

Plaintiffs initiated the instant civil action against defendant on 22 December 2004, alleging that between May and September of each year from 1998-2004, defendant operated their swim and tennis club in a manner that created a nuisance. Plaintiff's complaint listed several different ways in which plaintiffs assert that defendant caused an unreasonable interference with the enjoyment of their home. Plaintiffs initially sought a permanent injunction against defendant's alleged nuisance and damages for trespass, intentional infliction of emotional distress, contempt for the enforcement of a prior injunction, nuisance, and damages for violations of the local noise control ordinance. On 13 January 2005, defendant moved to dismiss plaintiffs' complaint under Rule 12(b)(6). On 5 April 2005, plaintiffs filed an amendment to their complaint retracting their claims for contempt, trespass, and violations of the noise control ordinance.

Defendant's motion was heard on 5 April 2005 before the Honorable Howard E. Manning, Jr. On 27 April 2005, the trial court granted defendant's motion to dismiss finding plaintiffs had received "permanent damages" as well as prior injunctive relief for the nuisance created by the swim and tennis club as a result of the 1994 lawsuit. The trial court dismissed all of plaintiffs' claims, although the claim for violation of the 1994 permanent injunction was dismissed without prejudice to allow Evans to seek enforcement of the 1994 permanent injunction. Plaintiffs' current claims seeking damages for violation of the 1994 permanent injunction and seeking further injunctive relief against defendant were dismissed on the basis that the proper recourse was for plaintiffs to seek enforcement of the 1994 judgment. The trial court further dismissed plaintiffs' claims for dam-

ages for nuisance due to the previous recovery of "permanent" economic damages by Evans. Plaintiffs appeal.

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[1] Plaintiffs argue that the trial court erred in dismissing their claim for private nuisance. For the reasons below, we reverse the order of the trial court dismissing plaintiffs' claim for private nuisance and remand for further proceedings.

Standard of Review

"The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (citations omitted). In considering a Rule 12(b)(6) motion to dismiss, the trial court must determine whether the factual allegations in the complaint state a claim for relief. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). A plaintiff must state the "substantive elements of a legally recognized claim" in order to survive a Rule 12(b)(6) motion to dismiss. *Booher v. Frue*, 86 N.C. App. 390, 392, 358 S.E.2d 127, 128 (1987) (citations omitted). To support a complaint for private nuisance, a plaintiff must allege "sufficient facts from which it may be determined what liability forming conduct is being complained of and what injury plaintiffs have suffered." *Hill v. Perkins*, 84 N.C. App. 644, 648, 353 S.E.2d 686, 689 (1987). When hearing a motion to dismiss, the trial court must take the complaint's allegations as true and determine whether they are " 'sufficient to state a claim upon which relief may be granted under some legal theory.' " *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)).

Sufficiency of Complaint

"[A] private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor." *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953) (citations omitted). In their complaint plaintiffs alleged several specific actions which would support a private nuisance claim against defendant, including that defendant "has used amplified sound from speakers aimed directly at [plaintiffs'] premises" and that when the public address system is used, "it can be clearly heard in plaintiffs' home even with all plaintiffs' doors and windows closed and their television playing." While plaintiffs allege most of the specific acts in order to prove

defendant was in violation of the injunction arising out of the 1994 lawsuit, all of these acts are re-alleged in their claim for nuisance. As the complaint is to be liberally construed, we find it is sufficient on its face to "provide defendant sufficient notice of the conduct on which the claim is based to enable defendant to respond and prepare for trial" and "state[s] enough . . . to satisfy the substantive elements" of a private nuisance claim against defendant. *Hill v. Perkins*, 84 N.C. App. 644, 647, 353 S.E.2d 686, 688 (1987) (citations omitted).

Prior Injunction & Permanent Damages

In its order granting defendant's motion to dismiss relating to plaintiffs' claim for private nuisance, the trial court found:

> . . . to the extent that the claim seeks damages for diminution in value of the property owned by Hugh Evans, must be dismissed as Hugh Evans has already received permanent economic damages for the nuisance. *Phillips v. Chesson*, 231 N.C. 566, 570 (1950).
>
> As for that portion of the [] Claim for Relief that seeks injunctive relief to abate the nuisance, the [c]ourt is of the opinion that this claim is in essence a claim for permanent injunctive relief, the subject matter of which resides in the 1994 lawsuit and its permanent injunction. Put another way, the [c]ourt views the [] Claim for Relief as seeking additional injunctive relief, a claim which is rationally and logically resident in the cause of the 1994 lawsuit and its permanent injunction. . . .
>
> . . .
>
> . . . A motion in the cause [filed within the 1994 lawsuit] followed by an evidentiary hearing could result, upon the proper evidentiary presentation, in the restraint of the use of the swim club . . . .
>
> Having determined the foregoing, the [] Claim For Relief to the extent it seeks additional monetary damages for diminution in value is dismissed because permanent damages have already been awarded in the 1994 lawsuit and the injunctive relief sought . . . lies within the subject matter jurisdiction of the 1994 lawsuit and its Permanent Injunction.

These findings are in error.

Rule 65 of the North Carolina Rules of Civil Procedure states that "[e]very order granting an injunction . . . is binding only upon the par-

ties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise." N.C. Gen. Stat. § 1A-1, Rule 65(d) (2005). This Court has held that successors in ownership of real property are not automatically bound by prior judgments granting injunctions concerning the use of the property. *Ferrell v. Doub*, 160 N.C. App. 373, 378-80, 585 S.E.2d 456, 459-61 (2003). As there was no evidence offered of any "active concert or participation" between defendant and the previous owners, plaintiffs could not enforce the previous injunction against defendant and thus were entitled to bring a new suit against defendant requesting relief in the form of an injunction.

Regarding permanent damages resulting from a continuing nuisance, our Supreme Court has held:

> [A] landowner may not as a matter of right recover permanent damages from a private corporation or individual for the maintenance of a continuing nuisance or trespass. His remedy is to recover in separate and successive actions for damages sustained to the time of the trial. However, the parties may consent that an issue as to permanent damages be submitted; and in such case the defendant, upon payment of permanent damages so assessed, acquires a permanent right to continue such nuisance or trespass as in condemnation.

Wiseman v. Tomrich Constr. Co., 250 N.C. 521, 524, 109 S.E.2d 248, 251 (1959) (internal citations omitted). The verdict and award in the 1994 lawsuit does not indicate that an issue as to permanent damages was submitted to the jury. Rather, the verdict merely determined MacGregor and LSTC created a private nuisance and Evans was entitled to recover for his damages. Further, as an injunction was entered against MacGregor and LSTC, it follows they did not acquire a permanent right to continue the nuisance and therefore the damages awarded were not permanent damages.

This Court's unpublished opinion affirming the verdict and award in the 1994 lawsuit is not controlling on whether the original award was for permanent damages. The relevant issue determined by this Court was whether the trial court erred in allowing Evans to testify regarding the purported diminution of value of his property due to the sound nuisance. *Evans v. MacGregor Dev. Co.*, 126 N.C. App. 224, 491 S.E.2d 566 (1997) (unpublished). This Court held that the trial

court did not err in admitting Evans' testimony, however it made no indication that the jury's award for damages was based solely on the diminution of Evans' property, stating, "plaintiff's evidence showed he suffered both pecuniary loss and personal discomfort." *Evans*, slip op. at 4. As the verdict and award in the 1994 lawsuit was not explicitly for permanent damages, plaintiffs' remedy is to recover in separate and successive actions for damages sustained to the time of the trial. *Phillips v. Chesson*, 231 N.C. 566, 569-70, 58 S.E.2d 343, 346-47 (1950).

[2] For the reasons above we find the trial court erred in dismissing plaintiffs' claim for private nuisance. While plaintiffs also assign as error the dismissal of their claims against defendant for violating the 1994 permanent injunction and restraining order, plaintiffs correctly abandon this argument in their brief. This assignment of error is therefore deemed waived. N.C. R. App. P. 28(b)(6) (2006); *State v. Sakobie*, 157 N.C. App. 275, 279, 579 S.E.2d 125, 128 (2003).

Affirmed in part, reversed in part, and remanded for further proceedings on plaintiffs' claim for private nuisance.

Judges McGEE and HUDSON concur.

REBEKAH CHANTAY REVELS, Plaintiff v. MISS NORTH CAROLINA PAGEANT ORGANIZATION, INC., Defendant, REBEKAH CHANTAY REVELS, Plaintiff v. MISS AMERICA ORGANIZATION, MISS NORTH CAROLINA PAGEANT ORGANIZATION, INC., ALAN CLOUSE, BILLY DUNCAN, CHARLENE HAY, DOUG HUFF, TOM ROBERTS, DAVID CLEGG, BEVERLY ADAMS, and CANDACE RUSSELL, Defendants

No. COA05-618

(Filed 21 March 2006)

1. Arbitration and Mediation— motion to compel—unconscionability—inequality of bargaining power—cost

The trial court did not err by granting defendants' motion to compel arbitration in an action arising out of a Miss North Carolina contract, because: (1) plaintiff assented to all terms of the pertinent contract including the arbitration clause where plaintiff's signature appears at the end of the contract on the signature line, and plaintiff placed her initials on each page of the contract including the one containing the arbitration clause; (2)

although plaintiff argues the inequality of bargaining power deprived her of a meaningful choice, she freely and willingly decided to enter the Miss North Carolina Pageant in which each contestant was required to sign this agreement; (3) the public policy of North Carolina strongly favors the settlement of disputes by arbitration and requires the courts to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration; and (4) although plaintiff contends the cost of arbitration was so expensive as to effectively deny her a forum, plaintiff did participate in the arbitration and was not denied a forum.

2. Arbitration and Mediation— discoverable materials—discretion of arbitrator—photographs

The trial court did not err by confirming the arbitrator's award even though plaintiff contends the arbitrator improperly compelled disclosure of photographs taken of her which prompted the suit, because: (1) as a general rule an arbitration award is presumed valid and the party seeking to vacate it must shoulder the burden of proving the grounds for attacking its validity; (2) the decision of the arbitrator to determine that certain materials were discoverable was within his broad discretion and therefore not appealable; and (3) it would be contrary to the process of conducting a meaningful arbitration were the parties to decide what was discoverable.

Appeal by plaintiff from orders entered 8 October 2002, 24 February 2003, 7 April 2003 and 28 October 2004 by Judge Narley L. Cashwell in Wake County Superior Court and judgment entered 14 May 2004 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 7 February 2006.

Barry Nakell for plaintiff appellant.

Edwards, Ballard, Clark, Barrett and Carlson, P.A., by Kenneth P. Carlson, Jr.; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by C. Matthew Keen and Debra L. Dewar; and Brown Crump Vanore & Tierney, L.L.P., by Andrew A. Vanore, III and Michael E. McDaniel, for defendant appellees.

McCULLOUGH, Judge.

Plaintiff appeals from orders compelling arbitration, confirming the arbitrator's award and denying a request for new hearing and motion for relief from order.

FACTS

On 15 June 2002 Rebekah Revels ("Revels") entered into a contract with Miss North Carolina Pageant Organization, Inc. ("MNCPO") pursuant to entering and winning the Miss North Carolina Pageant. The contract provided that Revels had not "done any act or engaged in any activity which could be characterized as dishonest, immoral, immodest, indecent, or in bad taste." A subsequent clause stated if any of the representations proved false, the contract would be terminated and Revels would forfeit her rights as Miss North Carolina. The contract further contained a clause in Section 9, labeled "RIGHT TO ARBITRATION" which stated that, "Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in Raleigh, North Carolina, in accordance with the Rules of the American Arbitration Association." The clause further stated that the arbitration clause would in no way affect the rights of MNCPO to seek injunctive relief in the event of breach or threatened breach.

Around 19 July 2002 MNCPO became aware of alleged nude photographs of Revels by communication with an ex-boyfriend which led to the resignation of Revels on 23 July 2002. On 29 August 2002, Revels filed a complaint against MNCPO for specific performance, injunction, and damages for breach of contract arising out of the Miss North Carolina contract between the two parties. On 5 September 2002, the lower court issued a preliminary injunction ordering MNCPO to withdraw its termination of the contract between the two parties and to honor its obligations under the contract pending trial. On 30 August 2002 MNCPO filed a motion to compel arbitration which was granted by the lower court and further ordered that all matters in the case be stayed until an arbitration award had been issued.

Revels also filed a complaint against Miss America Organization ("MAO") in September 2002. The complaint was subsequently amended to add MNCPO and eight individual officials. These organizations and individuals also filed motions to compel arbitration which were granted by the lower court.

All parties mutually agreed to the Honorable G. Conley Ingram as the arbitrator for the matter. During the course of the arbitration, the arbitrator determined that the photos taken of Revels were discoverable and must be made available to the opposing parties for use in deposing Revels. It was further stated that the photos were not to be

furnished for public view and counsel was not permitted to comment on the photos outside of the arbitration. The arbitrator additionally noted that "[e]very effort shall be made to protect the privacy of the Claimant consistent with the use of the pictures in this arbitration." The arbitrator informed Revels that if she failed to comply with this direction of the arbitrator, then that decision would be construed as a deliberate decision by her and her counsel to dismiss arbitration. After repeated refusals by Revels to comply with the order of the arbitrator, the arbitrator found that "in view of the contumacious conduct of Claimant's counsel by repeatedly and consistently disobeying multiple directions from the arbitrator to engage in discovery and preparation for the scheduled hearing in this case, the Claimant's case must be, and it is hereby, dismissed."

After the issuance of the order dismissing Revels' case, cross motions to confirm and vacate arbitration were filed by the parties. The lower court granted the motion to confirm the arbitration award dismissing Revels' case.

Revels appeals.

ANALYSIS

I

[1] Revels contends on appeal that the trial court erred in granting the motions to compel arbitration where the agreement to arbitrate was unconscionable and so expensive as to effectively deny her a forum. We disagree.

This Court conducts a *de novo* review in determining whether a particular dispute is subject to arbitration. *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). In making this determination, this Court must look to "(1) the validity of the contract to arbitrate and (2) whether the subject matter of the arbitration agreement covers the matter in dispute." *Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 455, 531 S.E.2d 874, 876, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 129 (2000).

We first address Revels' contention that the arbitration clause is unenforceable on the ground of unconscionability. Revels only argues on appeal that the first prong of the test to determine whether the dispute is subject to arbitration was not met and therefore this Court will not address the second prong of the test. It is well established that a valid contract arises only where there is assent between the

parties, amounting to a meeting of the minds. *See Walker v. Goodson Farms, Inc.*, 90 N.C. App. 478, 486, 369 S.E.2d 122, 126, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 556 (1988), *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645-46, 562 S.E.2d 64, 66, *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). There must be a mutual agreement to all terms for there to be a valid and enforceable contract. *Id.* " 'If a question arises concerning a party's assent to a written instrument, the court must first examine the written instrument to ascertain the intention of the parties.' " *Id.* (citation omitted).

Revels relies on this Court's holdings in *Sciolino* and *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 423 S.E.2d 791 (1992); however, the facts of these cases stand in stark contrast to the facts of the instant case. In *Sciolino*, the plaintiffs signed an application in which they agreed to be bound by the terms of the customer agreement; however, there was no customer agreement attached to the application. The defendants presented two customer agreements at trial which contained arbitration clauses and argued that, because plaintiffs agreed to be bound by the terms of this agreement, they were therefore bound. The customer agreements did not bear plaintiffs' signatures, plaintiffs' initials, plaintiffs' account number, or any indication that the plaintiffs had ever seen the document. This Court found that there was no evidence of assent and therefore no valid agreement to arbitrate.

In *Routh*, the plaintiff signed a termination agreement which contained an additional term not included in the standard termination agreement in which he agreed to repay the defendant $1000 per month. However, the plaintiff's signature appeared directly below the additional language rather than on the signature line. This Court determined that these facts created an ambiguity as to which terms the plaintiff was assenting at the time of contracting and further determined based on extrinsic evidence that the plaintiff did not assent to the arbitration clause.

In the instant case, it is clear that Revels assented to all terms of the contract including the arbitration clause. Revels' signature appears at the end of the contract on the signature line and, further, Revels placed her initials on each page of the contract, including the one containing the arbitration clause. No ambiguity exists as to whether there was assent to each of the terms.

Revels further argues that the arbitration clause was unenforceable where the inequality of bargaining power deprived her of a meaningful choice. However, Revels freely and willingly decided to enter the Miss North Carolina Pageant in which each contestant was required to sign this agreement. Where Revels could enter other pageants or choose to not enter a pageant at all, we find that this contention lacks merit.

We also note that the public policy of North Carolina strongly favors the settlement of disputes by arbitration and requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). Where there is no evidence of lack of a valid agreement to arbitrate, it was proper for the lower court to grant the motion to compel arbitration.

Finally, Revels contends that the trial court erred in granting the motion to compel arbitration where the cost of arbitration was so expensive as to effectively deny her a forum. We hold that where Revels did participate in the arbitration and was not denied a forum, this contention also lacks merit. Therefore, this assignment of error is overruled.

II

[2] Next we address Revels' argument that the trial court erred by granting the motion to confirm the arbitrator's award where the arbitration was conducted in a manner prejudicial to her, the award was procured by undue means, and there was evident partiality and misconduct by the arbitrator. This contention lacks merit.

The gravamen of Revels' contention is that she disagreed with the decision of the arbitrator to compel disclosure of photographs taken of her which prompted the suit. "[A]s a general rule an arbitration award is presumed valid and the party seeking to vacate it must shoulder the burden of proving the grounds for attacking its validity." *Pinnacle Group, Inc. v. Shrader*, 105 N.C. App. 168, 171, 412 S.E.2d 117, 120 (1992). A court's review of an arbitration award is limited and does not permit review based on a contention of mistake of law. *Sholar Bus. Assocs. v. Davis*, 138 N.C. App. 298, 302, 531 S.E.2d 236, 239 (2000).

The decision of the arbitrator to determine that certain materials were discoverable was within his broad discretion and therefore not appealable. *See Pinnacle Group, Inc.*, 105 N.C. App. at 172, 412

S.E.2d at 121 (Arbitrations are not governed by the rules of evidence and further the determination of what materials are discoverable is within the discretion of the arbitrators.). It would be contrary to the process of conducting a meaningful arbitration were the parties to decide what was discoverable. Therefore, this assignment of error is overruled.

Accordingly, the trial court did not err in granting the motion to compel arbitration nor did the trial court err in confirming the arbitrator's award. Based on the foregoing reasons, the trial court's decisions are

Affirmed.

Judges ELMORE and LEVINSON concur.

JAMES A. KOCH AND WIFE, KATHLEEN T. KOCH, PLAINTIFFS v. BELL, LEWIS & ASSOCIATES, INC., KENNETH V. TRAVIS, SOUTHERN GUARANTY INSURANCE COMPANY, AND SOUTHERN PILOT INSURANCE COMPANY, FORMERLY KNOWN AS JEFFERSON-PILOT FIRE & CASUALTY COMPANY, DEFENDANTS

No. COA04-1532

(Filed 21 March 2006)

1. **Insurance— synthetic stucco—action against adjustor by third-party**

   An independent adjuster for a stucco contractor's liability insurers owed no duty to homeowners as third-party claimants and thus could not be held liable to them on a negligence theory for representations made by the adjuster regarding the stucco contractor's ability to do stucco work pursuant to the homeowners' settlement agreement with the insurer.

2. **Unfair Trade Practices— third party claim against insurance company—not recognized**

   North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices, and the trial court correctly dismissed plaintiffs' claims.

3. Release— insurance companies—summary judgment

The trial court did not err by granting summary judgment in favor of two insurance companies in a synthetic stucco case where the two companies had been discharged by a release.

Appeal by plaintiffs from orders entered 8 June 2004 and 20 July 2004 by Judge Andy Cromer in the Superior Court in Guilford County. Heard in the Court of Appeals 18 August 2005.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., and Rebecca A. Niburg, for plaintiff-appellants.

Horton and Gsteiger, P.L.L.C., by Urs R. Gsteiger, for defendant-appellees Bell, Lewis & Associates, Inc. and Kenneth V. Travis.

Pinto Coates Kyre & Brown, P.L.L.C., by Richard L. Pinto, for defendant-appellees Southern Guaranty Insurance Company and Southern Pilot Insurance Company, formerly known as Jefferson-Pilot Fire & Casualty Company.

HUDSON, Judge.

In 1995, R & H Stucco & Wall Systems, subsequently known as Quality Stucco Systems Inc. ("Quality") applied synthetic stucco cladding to the outside of plaintiffs' new home. In 1996, after they discovered that the cladding was defective, plaintiffs made a claim against Quality. Quality had liability insurance through defendants Southern Guaranty Insurance Company ("Southern") and Southern Pilot Insurance Company ("Southern Pilot"). Defendant Bell, Lewis & Associates ("Bell Lewis") served as the adjusters for defendant insurers. After plaintiffs filed their claim, defendant Kenneth V. Travis, a senior adjuster employed by Bell Lewis, contacted plaintiffs and informed them that the insurance companies would pay a portion of the cost to re-clad their home only if they agreed to use Quality to do so. Plaintiffs expressed reluctance to use Quality again and Travis assured them that Quality would apply durable stucco and do a good job. Plaintiffs agreed to allow Quality to re-clad their home and received $10,000 in return, and plaintiffs signed a general release of all claims. Quality replaced the synthetic stucco with hard coat stucco in 1997.

In 2001, plaintiffs discovered that the hard coat stucco applied by Quality had completely failed. A third-party inspection revealed that Quality had violated building code provisions and had failed to prop-

erly apply the base coat, seal the system penetrations, and install necessary elements of the stucco system. Defendant insurance companies refused to pay for any of plaintiffs' losses because Quality had not renewed its liability insurance.

In 2004, plaintiffs filed suit in Superior Court in Guilford County, alleging negligence, negligent failure to warn, negligent misrepresentation, and unfair and deceptive trade practices. Each cause of action concerned the representations made by Travis regarding Quality's ability to do the stucco work. Defendants Bell Lewis, Southern, and Southern Pilot were included under master-servant and principal-agent theories.

[1] Plaintiffs argue first that the trial court erred in dismissing their actions. We disagree. Although the claims against Bell Lewis and Travis were dismissed pursuant to a 12(b)(6) motion, while those against Southern and Southern Pilot were dismissed when the court granted these defendants summary judgment, plaintiffs argue these assignments of error together in their brief. However, we will address them separately.

We review the trial court's grant of a 12(b)(6) motion to dismiss *de novo*. *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001). "The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Id.* (internal citation omitted). "[A] complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim*." *Id.* (emphasis in original, internal citations and quotation marks omitted).

In order for plaintiffs to prevail on negligence claims, they must show both that defendants owed them a legal duty and that they failed to exercise due care in their performance of this duty. *Barnes v. Caulborne*, 240 N.C. 721, 725, 83 S.E.2d 898, 901 (1954). This case presents a question of first impression for this Court: whether under North Carolina law an independent insurance adjuster (Bell Lewis and Travis) owes a legal duty to claimants (plaintiffs) who are not the insured (Quality) of the insurance company (Southern and Southern Pilot). Recognizing that there are no North Carolina cases on point, plaintiffs cite cases from other jurisdictions that they contend support their theory that they could recover as third-party claimants

from independent insurance adjusters for negligence. Our review of these cases reveals that they do not support plaintiffs' position; indeed, none of them involve an independent adjuster's duty to a third-party claimant in the context of a negligence claim. *Dussault v. Am. Int'l Group, Inc.*, 99 P.3d 1256 (Wash. Ct. App. 2004) (insurer only owes duty to third-party claimant to refrain from intentional tortious acts); *Railsback v. Mid-Century Ins. Co.*, 680 N.W.2d 652 (S.D. 2004) (insurer may not materially misrepresent its policy limits in settlement negotiations with third-party claimant); *McGee v. Omni Ins. Co.*, 840 So.2d 1248 (La. App. 3d Cir. 2003) (insurer must consider interests of insured and protect it from excess liability in handling claim); *Farm Bureau Mut. Ins. Co. of Indiana v. Seal*, 179 N.E.2d 760 (1962) (fraud claim against insurance company whose employee fraudulently induced plaintiff into signing a release is no different than any other action for fraud); *Obad v. Allstate Ins. Co.*, 27 A.D.2d 795 (N.Y.A.D. 1967) (complaint alleging bad faith by insurance company in procuring settlement sufficient to satisfy pleading rules).

Courts in a majority of jurisdictions have held that a negligence claim cannot be brought against an independent insurance adjuster by a claimant. *Charleston Dry Cleaners & Laundry v. Zurich Am. Ins. Co.*, 586 S.E.2d 586, 589 (2003); *Meineke v. GAB Business Servs.*, 991 P.2d 267, 270 (Ariz. Ct. App. 1999); *Sanchez v. Lindsey Morden Claims Servs., Inc.*, 84 Cal.Rptr.2d 799, 802 (Cal. Ct. App. 1999); *King v. National Security Fire and Cas.* Co., 656 So.2d 1338 (Fla. Dist. Ct. App. 1995), *Velastequi v. Exchange Ins. Co.*, 505 N.Y.S.2d 779, 780 (N.Y. Civ. Ct. 1986). *Cf. Bass v. California Life Ins. Co.*, 581 So. 2d 1087, 1090 (Miss. 1991) (adjuster not liable to insured for simple negligence, but can incur liability for gross negligence, malice, or reckless disregard). In so holding, courts have noted that because the relationship between an independent adjuster and an insurer is contractual, the adjuster is subject to the control of the insurer to which it owes a duty. In contrast, an independent adjuster has no contractual duties to an insured. Thus, as the Arizona Court held, "the relationship between adjuster and insured is sufficiently attenuated by the insurer's control over the adjuster to be an important factor that militates against imposing a further duty on the adjuster to the insured." *Meineke*, 991 P.2d at 270. We note that in *Meineke*, as well as the other cases cited above, the plaintiffs were the insured. Here, as the plaintiffs are not the insured, but are third-party claimants, we conclude that the relationship between the adjuster and plaintiff claimants is even more "attenuated" than if they were the insured.

Indeed, the minority of jurisdictions that have concluded that an independent adjuster may be held liable for negligence have held that the independent adjuster owes the duty to *the insured. See Continental Ins. Co. v. Bayless and Roberts, Inc.*, 608 P.2d 281 (Alaska 1980); *Morvay v. Hanover Ins. Co.*, 506 A.2d 333 (N.H. 1986); *Brown v. State Farm Fire and Cas. Co.*, 58 P.3d 217 (Okla. Ct. App. 2002). Furthermore, we conclude that the same logic that compelled the the California Court of Appeals to hold that there was no duty of an adjuster to the insured, applies even more clearly here, where the claimants are not the insured:

> Imposing a duty [] would subject the adjuster to conflicting loyalties. Insurers and insureds often disagree as to coverage or the amount of loss. An adjuster cannot argue both sides of such disputes, any more than a lawyer can represent opposite sides in a lawsuit. An adjuster owes a duty to the insurer who engaged him. A new duty to the insured would conflict with that duty, and interfere with its faithful performance. This is poor policy.

Sanchez, 84 Cal.Rptr.2d at 802. Thus, we hold that the trial court did not err in dismissing plaintiffs' negligence claims against Bell Lewis and Travis.

[2] We also conclude that the trial court correctly dismissed plaintiffs' claims against Bell Lewis and Travis for unfair and deceptive trade practices. In *Wilson v. Wilson*, this Court held that North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1. 121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996).

[3] We also disagree with plaintiffs' argument that the court erroneously granted summary judgment to defendants Southern and Southern Pilot. We review a trial court's grant of summary judgment to determine whether there is a genuine issue of material fact or 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). It is well-established that summary judgment is appropriate where the movant establishes a complete defense to plaintiffs' claims. *See, e.g., Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 26, 348 S.E.2d 524, 528 (1986). The execution of a valid release for consideration provides a complete defense to an action for damages. *Talton v. Mac Tools, Inc.*, 118 N.C. App. 87, 90, 453 S.E.2d 563, 565 (1995). Here, it is undisputed that plaintiffs signed

a release of all claims relating to problems with the cladding in exchange for the $10,000 settlement with Southern on behalf of its insured. The release expressly provides that plaintiffs

> release, acquit and forever discharge R & H Stucco and Wall Systems, Inc., and *any and all other persons, firms and corporations, whether herein named or referred to or not*, of and from *any and all past, present and future actions*, causes of action, claims, demands, damages, costs, loss of services, expenses, compensation, third party actions, suits at law or in equity, including claims or suits for contribution and/or indemnity, of whatever nature, and all consequential damage on account of, or *in any way growing out of any and all known and unknown* personal injuries, death and/or property damage . . .

(emphasis added). Plaintiffs do not challenge the validity of the release. In fact, they do not mention it in their brief. "[A] comprehensively phrased general release, in the absence of proof of contrary intent, is usually held to discharge all claims . . . between the parties." *Sykes v. Keiltex Industries, Inc.*, 123 N.C. App. 482, 473 S.E.2d 341 (1996) (ellipses in original, internal citation and quotation marks omitted). As we conclude that Southern and Southern Pilot were discharged from plaintiffs' claim by the release, we overrule this assignment of error.

Affirmed.

Judges STEELMAN and JACKSON concur.

KINGSLEY CHUKS UGOCHUKWU, PLAINTIFF v. CHIOMA UGOCHUKWU, DEFENDANT

No. COA05-919

(Filed 21 March 2006)

1. Pleadings— conflict with foreign law—not raised—not considered

Plaintiff failed to raise properly the issue of whether English law should be applied in a child support case by not raising the issue in the pleadings or giving any other reasonable notice that an issue regarding foreign law existed. The mere fact that a foreign order was attached to one of defendant's motions does not

provide written notice of a conflict between the laws of this state and those of a foreign jurisdiction, and the court did not err by failing to apply English law.

2. Appeal and Error— English Law—statutes not included in brief—issue not addressed

The Court of Appeals did not address the question of whether the trial court erred by deciding that excess child support payments were a gift under English law where plaintiff did not include relevant statutes, rules, or regulations in the brief.

3. Child Support, Custody, and Visitation— support—noncompliance with English order—contempt

The trial court's findings supported a contempt judgment for willful noncompliance with an English child support order.

4. Contempt— failure to pay child support—attorney fees

The trial court acted within its authority in awarding reasonable attorney fees to defendant after finding plaintiff in contempt for not complying with a child support order.

5. Child Support, Custody, and Visitation— child care costs—no error in awarding

The trial court did not err by awarding costs pertaining to child care expenses which defendant established she will pay each month for work-related child care.

Appeal by plaintiff from order entered 23 March 2005 by Judge Ann E. McKown in Durham County District Court. Heard in the Court of Appeals 8 February 2006.

Tracy H. Barley for plaintiff-appellant.

Solomon & Mitchell, PLLC, by Laurel E. Solomon for defendant-appellee.

CALABRIA, Judge.

Kingsley Chuks Ugochukwu ("plaintiff") appeals a child support order, requiring payment of all current child support and child support in arrears as a purge for being held in civil contempt for failure to pay child support. We affirm.

Plaintiff and Chioma Ugochukwu ("defendant") divorced in 1998 in England. At the time of the divorce, plaintiff and defendant were the parents of two minor children, who have resided primarily with

defendant since plaintiff and defendant separated. In early 1999 the Coventry County Court in England ordered plaintiff to pay child support to defendant in the sum of 375 pounds per month, per child. Both plaintiff and defendant subsequently relocated to the United States, and plaintiff and defendant agreed that the monthly amount of child support for both children in United States dollars equaled $1,252.50. The English order was registered in Cuyahoga County, Ohio for enforcement purposes.

Plaintiff paid the amount of child support ordered under the English order until September 2002. Plaintiff also paid defendant an additional amount of approximately $2,000.00 each month, which plaintiff claims was advance child support payments. The trial court determined, however, that these payments "were gifts to the [d]efendant[] and were not advances on child support."

Beginning in November 2002 and continuing through entry of the Durham County District Court's order, plaintiff unilaterally varied his monthly child support payments, for a total arrearage of $10,415.91. At the time of entry of the Durham County District Court's order, plaintiff was employed as a family physician, earning a monthly gross salary of $10,866.00. Plaintiff's gross yearly earnings at the time he varied his child support payments were as follows: $122,327.21 for 2004; $40,065.36 for 2003; and $40,114.88 for 2002. Defendant is a university professor who earns a monthly salary of $4,893.12 for nine months each year as well as $3,000.00 for a summer course.

Defendant subsequently filed a notice of registration of a foreign support order and a motion to modify and enforce child support. Based on, *inter alia*, the aforementioned findings, the trial court concluded that there had been a substantial change of circumstances affecting the welfare of the minor children, increased plaintiff's required monthly child support payments, held plaintiff in civil contempt, and awarded defendant attorney fees. Plaintiff appeals.

[1] On appeal, plaintiff initially argues that "the trial court erred in failing to apply English law in determining whether payments to appellant in excess of the amount owed for child support were advance payments of child support." We note that it is unclear from the record whether the trial court applied English law or North Carolina law in determining whether arrears existed under the English order because the trial court made no finding as to the applicable law. This Court has recognized that substantive questions of law regarding support orders are determined according to the law of

the "issuing state." *New Hanover County v. Kilbourne*, 157 N.C. App. 239, 247, 578 S.E.2d 610, 616 (2003). The Uniform Interstate Family Support Act ("UIFSA") defines the "issuing state" as "the state in which a tribunal issues a support order[.]" N.C. Gen. Stat. § 52C-1-101(9) (2005). England is a "state" given that it has enacted laws or procedures for enforcement of support orders that are "substantially similar to [UIFSA], the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Child Support Act." N.C. Gen. Stat. § 52C-1-101(19)(b) (2005); *Foreman v. Foreman*, 144 N.C. App. 582, 550 S.E.2d 729 (2001).

North Carolina General Statutes § 8-4 (2005) states:

> When any question shall arise as to the law of . . . any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this State.

Our Supreme Court has said, under this statute, "[t]he party seeking to have the law of a foreign jurisdiction apply has the burden of bringing such law to the attention of the court." *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 95, 305 S.E.2d 528, 531 (1983). Moreover, the North Carolina Rules of Civil Procedure state, in pertinent part,

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or by other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Chapter 8 of the General Statutes and State law. The court's determination shall be treated as a ruling on a question of law.

N.C. Gen. Stat. § 1A-1, Rule 44 (2005).

In this case, plaintiff failed to raise either by the pleadings or any other reasonable written notice that an issue regarding foreign law existed. Although plaintiff claims that the foreign order, which was submitted with defendant's motion to modify, sufficiently raised this issue, we disagree. The mere fact that a foreign order was attached to one of defendant's motions does not provide the trial court with written notice that there is a *conflict* between the laws of this state and a foreign jurisdiction. The law of North Carolina and the law of England may have been substantially similar on the issue of arrears, and plaintiff provided no written notice to the contrary. This matter was, therefore, not appropriately raised to the trial court in accord-

ance with the North Carolina Rules of Civil Procedure. Accordingly, even if the trial court failed to apply English law in determining whether arrears existed under the order, it did not err in failing to do so given that plaintiff failed to properly raise this issue. Thus, this assignment of error is without merit.

[2] Plaintiff next argues, "the trial court erred in finding that the payments to defendant in excess of the amount for child support constituted gifts[] and not advance payments of child support." In his argument, plaintiff argues that the trial court was in error under English law by determining that plaintiff's excess payments amount to a gift. We have no basis by which to review this assignment of error given that plaintiff failed to comply with N.C. R. App. P. 28 (d)(1)c (2005) ("the appellant must reproduce as appendixes to the brief . . . relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief"). Accordingly, we need not address this assignment of error.

[3] Plaintiff further argues that the trial court erred in holding him in civil contempt. Our review of a contempt proceeding "is limited to whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment." *McMiller v. McMiller*, 77 N.C. App. 808, 810, 336 S.E.2d 134, 136 (1985). The trial court made the following findings of fact:

> 19. The Plaintiff's financial affidavit evidences his ability to pay on the arrears as set forth below. The Court specifically notes that said financial affidavit shows that effective March 1, 2005, Plaintiff commenced contributing the sum of $1,624.99 to his employer sponsored 401(k) plan. Said financial affidavit further shows that the Plaintiff contributes $1,000 per month as religious contributions and $100 per month as charitable contributions. The plaintiff is able to pay the total arrears due of $10,415.91 in the sum of $1,100 per month for five months commencing April 1, 2005, and at the monthly rate of $200 per month thereafter until paid in full.
>
> 20. The Plaintiff testified that he knew that the existing order was in effect and required him to pay the sum of $1252.50 to the Defendant, and that he did not seek to modify that order and did not pay the amounts due under that Order. Even when the Plaintiff was earning in excess of $100,000 per year in 2004, he did

not make payments on his under-payments from November of 2002.

21. The existing order remains in effect as to child support arrears due, and the purpose of the existing order may still be served by compliance therewith. The Plaintiff's non-compliance therewith was willful, and the Plaintiff is able to make payments as set forth herein to cure the arrears due to Defendant.

22. The Plaintiff is in civil contempt of the existing child support order due to willful failure to make payment pursuant to the terms of said order, when he has had the ability for at least a significant portion of the time that said order has been in effect to make payments pursuant to the terms of that order.

Plaintiff does not assign error to the trial court's findings other than to the "finding that the payments to Defendant in excess of the amount for child support constituted gifts, and not advance payments of child support." We have previously rejected this contention, and the challenged finding is supported by competent evidence. Because plaintiff has failed to assign error to the other pertinent findings, they are conclusively established. *Patterson v. Patterson*, 137 N.C. App. 653, 662, 529 S.E.2d 484, 489 (2000).

North Carolina General Statutes § 5A-21 (2005) states:

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

(1) The order remains in force;

(2) The purpose of the order may still be served by compliance with the order;

(2a) The noncompliance by the person to whom the order is directed is willful; and

(3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

The trial court's findings established that the English order remained in effect, that the purpose of the order may still be served, that plaintiff's non-compliance was willful, and that he was able to comply with the order. Accordingly, the trial court's conclusively established findings support the judgment, and this assignment of error is without merit.

[4] Plaintiff next argues that the trial court erred in awarding attorney fees to the defendant. The trial court stated that its award of attorney fees was based on plaintiff's willful contempt. This Court has held that the contempt power "includes the authority for a district court judge to require one whom he has found in willful contempt of court for failure to comply with a child support order . . . to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt." *Blair v. Blair*, 8 N.C. App. 61, 63, 173 S.E.2d 513, 514 (1970). Accordingly, since the trial court found plaintiff in willful contempt for failure to comply with the child support order, it acted within its authority in awarding reasonable attorney fees, and this assignment of error is without merit.

[5] Plaintiff's final argument on appeal is that the trial court erred in awarding defendant child care expenses. This Court will not disturb an amount of child support awarded by a trial court absent an abuse of discretion. *Sawyer v. Sawyer*, 21 N.C. App. 293, 296, 204 S.E.2d 224, 225 (1974). An abuse of discretion occurs when the trial court's ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted). The applicable child support guidelines state, "Reasonable child care costs that are, or will be, paid by a parent due to employment or job search are added to the basic child support obligation and prorated between the parents based on their respective incomes." N.C. Child Support Guidelines (eff. 1 October 2002). The trial court found that "Defendant will pay the amount of $400 per month for work-related child care for the minor children." Plaintiff did not assign error to this finding, and it is, therefore, conclusively established. Since defendant pays $400 per month in child care costs, the trial court did not abuse its discretion in awarding her related costs. For the foregoing reasons, we affirm the order of the trial court.

Affirmed.

Judges McGEE and BRYANT concur.

IN THE MATTER OF THE WILL OF ROBERT L. KERSEY, DECEASED

No. COA05-832

(Filed 21 March 2006)

1. Wills— caveat proceeding—statute of limitations—notice

Where, as here, a caveator enters a caveat to the probate of a will within three years after the application for the probate of such will and complies with the bond requirements of N.C.G.S. § 31-33, the proceeding has been properly filed within the limitations period of N.C.G.S. § 31-32.

2. Wills— caveat proceeding—failure to prosecute

The trial court erred by dismissing under N.C.G.S. § 1A-1, Rule 41(b) a caveat proceeding on the basis of failure to prosecute, because: (1) the trial court's dismissal on the basis of failure to prosecute within the statute of limitations period improperly conflates the time in which a party may provide notice in a caveat with the time in which a party may commence a caveat; (2) provided a plaintiff has not been lacking in diligence, the mere passage of time does not justify dismissal for failure to prosecute as our courts are primarily concerned with the trial of cases on their merits; and (3) nothing in the record indicates caveator attempted to thwart progress or implemented a delay tactic that would otherwise justify the trial court's dismissal under Rule 41(b).

Appeal by caveator from judgment entered 15 April 2005 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 20 February 2006.

Hedrick, Murray, & Cheek, P.L.L.C., by Josiah S. Murray, III, and John C. Rogers, III, for propounder-appellee.

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

MARTIN, Chief Judge.

Katherine Ann Crowder Kersey ("caveator") appeals from summary judgment entered in favor of Mary DeBlanc Norfleet ("propounder"), dismissing a caveat proceeding involving the will of Robert L. Kersey ("decedent") on the grounds of the statute of limitations and a failure to prosecute. We reverse and remand.

Caveator and decedent were married sometime in or before 1953. They lived together until the mid-1980's, when caveator moved out of the home and established a separate residence. Caveator lived separate and apart from decedent until decedent's death on 19 August 2001; however, they never divorced, and the record indicates they communicated by telephone with great frequency. Prior to his death, decedent executed both a document purporting to be his last will and testament and a codicil.

Propounder worked as decedent's long-term executive secretary and assisted in managing his contract consulting engagements and personal business affairs. Decedent named propounder as his executrix in his purported will, and she was issued letters testamentary as the executrix of decedent's estate following his death. In the will document, decedent made various monetary bequests, devised certain real property to propounder, and left the remainder of his estate to caveator.

On 19 July 2002, caveator filed a caveat to the will, asserting (1) it was "obtained by [propounder] through undue and improper influence" and (2) decedent "by reason of both physical and mental weakness and infirmity [was] not capable of executing" a will. That same day, the clerk of superior court ordered the cause transferred to superior court for trial. In October 2002, caveator moved to compel the production of decedent's medical records, which the trial court subsequently ordered on 15 November 2002. In a verified response filed 8 September 2004, propounder asserted, in relevant part, defenses of the statute of limitations and failure to prosecute.

On 7 March 2005, propounder moved for summary judgment. In its order, the trial court stated the following:

> [T]he statutory requirement imposed upon *Caveator* pursuant to N.C. Gen. Stat. § 31-33 mandating that "Such *Caveator* shall cause notice [citation] of the *Caveat* proceeding to be given to all devisees, legatees, or other persons in interest in the manner provided for service of process by G.S. 1A-1, Rule 4(j) and (k)" requires, as a corollary, that such notice be given contemporaneously in time with the transfer of the cause by the Clerk [of] Superior Court to the Superior Court for trial, or within a reasonable time thereafter, but in no event later than the expiration of the three-year time limitation period provided for by N.C. Gen. Stat. § 31-32[.]"

The trial court, accordingly, allowed propounder's motion for summary judgment "for either or both of the reasons" of the statute of limitations and failure to prosecute. Caveator appeals.

In reviewing an appeal from summary judgment, we must determine whether there exists any "genuine issue as to any material fact" and whether the moving party is entitled to a "judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005); *In re Will of Campbell*, 155 N.C. App. 441, 450, 573 S.E.2d 550, 557 (2002), *disc. review denied*, 357 N.C. 63, 579 S.E.2d 385 (2003). "In ruling on a motion for summary judgment, the court may consider 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits[.]' " *In re Will of Priddy*, 171 N.C. App. 395, 396-97, 614 S.E.2d 454, 456 (2005) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). "All such evidence must be considered in the light most favorable to the non-moving party." *Id.* We examine the two bases of the trial court's summary disposition in turn.

I. Statute of Limitations

[1] The relevant statute of limitations for a will caveat proceeding is set forth in N.C. Gen. Stat. § 31-32 (2005):

> At the time of application for probate of any will, and the probate thereof in common form, or at any time within three years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will[.]

In addition, a caveator must comply with the bond requirement under N.C. Gen. Stat. § 31-33 (2005) within the statute of limitations in order for a valid caveat to arise. *In re Will of Winborne*, 231 N.C. 463, 57 S.E.2d 795 (1950). "When the statute of limitations is properly pleaded and the facts of the case are not disputed[,] resolution of the question becomes a matter of law and summary judgment may be appropriate." *Marshburn v. Associated Indemnity Corp.*, 84 N.C. App. 365, 369, 353 S.E.2d 123, 126, *disc. review denied*, 319 N.C. 673, 356 S.E.2d 779 (1987).

In the instant case, decedent's will and accompanying codicil were admitted to probate in common form on 29 August 2001. Caveator filed the caveat on 19 July 2002, well within the three-year period. In addition, the record contains an order entered by the clerk of the Durham County Superior Court on 19 July 2002 that caveator

"has given the bond required by law." Despite caveator's compliance with the statutory requirements, propounder asserts the trial court correctly granted summary judgment on the grounds of the statute of limitations because caveator failed to provide the notice required by N.C. Gen. Stat. § 31-33. Propounder argues such notice, like the bond requirement, must be complied with within the period of the statute of limitations. The error in this argument is manifest: N.C. Gen. Stat. § 31-33 requires a caveator to give an appropriate bond prior to the clerk transferring the cause to the superior court; by way of contrast, notice necessarily comes after the cause is transferred. We hold that where, as here, a caveator enters a caveat to the probate of a will within three years after the application for probate of such will and complies with the bond requirements of N.C. Gen. Stat. § 31-33, the proceeding has been properly filed within the limitations period of N.C. Gen. Stat. § 31-32. Accordingly, we turn to the second basis of the trial court's order.

II. Failure to Prosecute

[2] Our Rules of Civil Procedure authorize a court to dismiss "an action or . . . any claim therein" against a defendant where a plaintiff fails to prosecute a claim. N.C. Gen. Stat. § 1A-1, Rule 41(b). In the instant case, the trial court dismissed the caveat on this ground upon observing that the notice required by N.C. Gen. Stat. § 31-33 should "be given contemporaneously in time with the transfer of the cause by the Clerk [of] Superior Court . . . for trial, or within a reasonable time thereafter, but in no event later than the expiration of the three-year" statute of limitations as provided in N.C. Gen. Stat. § 31-32. We disavow the trial court's order based on the following reasons.

First, the trial court's dismissal on the basis of failure to prosecute within the statute of limitations improperly conflates the time in which a party may provide notice in a caveat with the time in which a party may commence a caveat. Second, provided a plaintiff has not been lacking in diligence, the mere passage of time does not justify dismissal for failure to prosecute as our courts are primarily concerned with the trial of cases on their merits. *Butler Service Co. v. Butler Service Group*, 66 N.C. App. 132, 136, 310 S.E.2d 406, 408 (1984). "Dismissal for failure to prosecute is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion." *Green v. Eure, Secretary of State*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 601 (1973) (citing 5 Moore's Federal Practice, para. 41.11(2)) (reversing dismissal under Rule

41(b) where over two years elapsed between the time the plaintiff filed the complaint and the hearing on the motion to dismiss, and the plaintiff neither took steps to prosecute his action nor requested the Calendar Committee to place the case on the calendar). *See also Simmons v. Tuttle*, 70 N.C. App. 101, 318 S.E.2d 847 (1984) (holding dismissal for failure to prosecute was improper where a plaintiff's counsel was negligent in failing to stay abreast of the calendar as such neglect was not imputable to the plaintiff).

In the instant case, propounder argues dismissal under Rule 41(b) was appropriate because (1) caveator failed to provide appropriate notice within the statute of limitations and (2) caveator failed to proceed in a timely manner, irrespective of the production of medical records, by failing to advance the litigation after the Clerk failed to designate a session of court for the caveat hearing. We have already dismissed as erroneous propounder's reliance on caveator's failure to provide notice. Propounder's second ground is likewise unavailing. Nothing in the record indicates caveator attempted to thwart progress or implemented a delaying tactic that would otherwise justify the trial court's dismissal under Rule 41(b). We hold the trial court erred in dismissing the caveat proceeding on the basis of failure to prosecute under Rule 41(b).

Our resolution of the summary judgment issue renders it unnecessary to address the remaining arguments presented on appeal. We remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges WYNN and STEPHENS concur.

STATE OF NORTH CAROLINA v. MUHUMMAD JAABER, DEFENDANT

No. COA05-853

(Filed 21 March 2006)

Criminal Law— lost witness statements—mistrial denied

The denial of a mistrial was not an abuse of discretion in a prosecution for armed robbery and breaking and entering where the State lost one or two pretrial witness statements. Defendant had the opportunity to cross-examine both witnesses, one of

whom was not present during the robbery; that witness testified that she had never before seen defendant and the other did not identify defendant as a participant in the robbery during a pretrial photographic line-up or in court; and the State presented substantial evidence of defendant's guilt from other witnesses. N.C.G.S. § 15A-501(6); N.C.G.S. § 15A-903(a).

Appeal by defendant from judgments dated 20 December 2004 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 February 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Christine M. Ryan, for the State.

Gilda C. Rodriguez for defendant-appellant.

BRYANT, Judge.

Muhummad Jaaber (defendant) appeals judgments dated 20 December 2004 entered consistent with jury verdicts finding him guilty of four counts of robbery with a dangerous weapon and one count of felonious breaking and entering. For the reasons below, we find no error.

Facts and Procedural History

Defendant was indicted on 3 February 2003 by a Mecklenburg County Grand Jury for seven counts of robbery with a dangerous weapon, one count of second degree kidnapping and one count of felonious breaking and entering. Defendant and co-defendant Jamal Bullock were tried before a jury at the 13 December 2004 Criminal Session of the Superior Court for Mecklenburg County, the Honorable W. Robert Bell presiding. At the close of all the evidence, the trial court dismissed the charge of second degree kidnapping and one charge of robbery with a dangerous weapon.

On 17 December 2004, the jury returned guilty verdicts against defendant as to the charge of felonious breaking and entering and four of the charges of robbery with a dangerous weapon. The jury found defendant not guilty of the two remaining charges of robbery with a dangerous weapon. The trial court entered, consistent with the jury's verdicts, Judgment and Commitment Orders dated 20 December 2004, sentencing defendant to two consecutive terms of sixty-one to eighty-three months imprisonment.

On 14 December 2004, prior to the empaneling of the jury, defendant requested in open court that the State provide him with statements he believed should have been in the State's file. Defendant requested any writings taken by Officers D.W. Hobson, R.D. Boyce, and R.W. Searcy all of whom were involved in the police investigation and possibly took statements from potential witnesses. Defendant also requested any statements made by Silas Mobley, one of the robbery victims, and Wandra Caldwell, a resident of the home where the robbery occurred but who was not present at the time of the robbery. Both Mobley and Caldwell were later called as witnesses for the State and both testified they made statements to investigating officers but had not seen the statements since they were first taken.

The trial court ordered Detective Arvin Fant, the investigating officer in the case, to check his files and with the other officers to determine if there were any missing statements. Detective Fant sent e-mail messages to Officers Boyce and Hobson and later contacted them directly, discovering they had no additional notes or statements. There is no indication in the record that Detective Fant ever contacted Officer Searcy. Detective Fant also searched through "everything he knew to check" including the file in the Records Office and could not find any statements made by Mobley or Caldwell.

After further direction from the trial court, Detective Fant questioned Mobley and obtained a description of the officer who took Mobley's statement the day of the robbery. Detective Fant questioned three other officers involved in the investigation who matched the description given by Mobley and was unable to produce Mobley's statement. The State admitted Mobley likely gave a statement to an investigating officer, but the statement had been lost. As to the statement Caldwell testified as having made, in response to questioning by the trial court, Detective Fant stated that a statement was probably not taken from Caldwell. In light of the failure of the State to turn over any statements made by Mobley or Caldwell defendant made two motions for a mistrial, which the trial court denied. Defendant appeals.

Defendant raises the issue of whether the trial court erred in denying defendant's motion for a mistrial when the State was unable to provide defendant with two witness statements. Defendant argues the State's failure to provide him with the two witness statements is a violation of both Section 15A-501 and Section 15A-903 of the North

Carolina General Statues and the trial court's denials of his motions for a mistrial were an abuse of the court's discretion.

Pursuant to Section 15A-501(6), a law enforcement officer "[m]ust make available to the State on a timely basis all materials and information acquired in the course of all felony investigations. This responsibility is a continuing affirmative duty." N.C. Gen. Stat. § 15A-501(6) (2005). Under Section 15A-903, "[u]pon motion of the defendant, the court must order the State to: (1) 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. The term 'file' includes . . . witness statements . . . ." N.C. Gen. Stat. § 15A-903(a) (2005). If the trial court determines the State has failed to comply with the discovery requirements of Section 15A-903, the trial court may:

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2005).

The trial court is not required to impose any sanctions. However, prior to imposing any of the above sanctions, the trial court must "consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply" with the discovery requirements. N.C. Gen. Stat. § 15A-910(b) (2005). We note and acknowledge the recent additions to the statutes governing police duties and criminal discovery described herein (N.C.G.S. §§ 15A-501(6), 903 and 910(b)). We further note that other than Section 15A-910(b), which requires additional consideration by the trial court prior to imposing sanctions, no mandatory procedures for violation of these statutes were prescribed. "Because the trial court is not **required** to impose any sanctions for abuse of discovery orders, what sanctions to impose, if any, are within the trial court's discretion." *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 35 (1995) (emphasis added) (citing *State v. Alston*, 307 N.C. 321, 298

S.E.2d 631 (1983)). Further, "[a] mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985). "Whether to grant a motion for mistrial is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *McCarver*, 341 N.C. at 383, 462 S.E.2d at 36 (citing *State v. Ward*, 338 N.C. 64, 92-93, 449 S.E.2d 709, 724 (1994)).

In the instant case, both Mobley and Caldwell testified that they had given statements to investigating officers the night of the robbery. Defendant was never given copies of these statements and claims he was prejudiced thereby because he was unable to fully cross-examine Mobley or Caldwell without them. Defendant argues the first three sanctions allowed under Section 15A-910 were not available remedies because the statements were never produced, and therefore a mistrial or dismissal was warranted.

From the record before this Court it is apparent that the State took appreciable action to locate the statements requested by defendant. While it is of great concern that the State has apparently lost at least one, if not two, of the statements from witnesses regarding the crimes with which defendant is charged, in light of the totality of the circumstances and the materiality of the missing witness statements, we cannot conclude the trial court abused its discretion by refusing to grant a mistrial in this case.

At trial, defendant had an opportunity to cross-examine both Mobley and Caldwell about any statement they may have given to the investigating officers. While Mobley was one of the robbery victims, Caldwell was not even present during the robbery. Caldwell testified she had never before seen defendant, and Mobley did not identify defendant as a participant in the robbery in either a pre-trial photographic lineup or in court.

The State, however, presented substantial evidence from other witnesses of defendant's guilt. Brian Gregory, Michael Wallace, and Victor Fybrace, three other victims of the robbery, each identified defendant in court as one of the two men involved in the robbery. All three victims gave detailed testimony regarding specific actions taken by defendant during the robbery. In addition, Gregory identified defendant as one of the participants in the robbery from a photographic lineup presented to him by Detective Fant the night after

the robbery. In light of the evidence produced by the State and the materiality of the missing witness statements, we cannot say the trial court's denial of defendant's motion for a mistrial was an abuse of discretion. This assignment of error is overruled.

No error.

Judges HUNTER and HUDSON concur.

LARRY EUGENE SMITH, PETITIONER v. THEODIS BECK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE N.C. DEPT. OF CORRECTION, RESPONDENT

No. COA05-561

(Filed 21 March 2006)

1. Sentencing— change in good time credits—loss for disciplinary reasons—not ex post facto

The application of new rules regarding the loss of good time credits by an inmate sentenced under the Fair Sentencing Act did not violate the ex post facto clauses of the United States and North Carolina constitutions. The amount of good time petitioner could earn did not change and was still governed under the old rules; the alteration was only to the amount of time which could be lost for various infractions.

2. Sentencing— change in good time credits—disciplinary infractions—definition of sentence

There was no violation of state law in new rules for an inmate's loss of good time credits after disciplinary violations where the change in rules does not affect the sentence unless the prisoner chooses to commit disciplinary infractions. As used in the session laws, "sentence" refers to the time an inmate must serve as a result of his conviction.

3. Constitutional Law— change in inmate's good time credits—argument general rather than specific—no due process violation

There was no due process violation in the application of new rules for an inmate's loss of good time credits. Petitioner's argument referred to a blanket statement that the new rules violated

his due process rights and he did not argue that he was deprived of due process on any individual infraction.

Appeal by petitioner from order entered 14 February 2005 by Judge W. Russell Duke, Jr. in the Superior Court in Wilson County. Heard in the Court of Appeals 8 December 2005.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for respondent-appellee.

North Carolina Prisoner Legal Services, Inc., by Richard E. Giroux, for petitioner-appellant.

HUDSON, Judge.

On 24 March 2004, petitioner Larry Eugene Smith filed a petition *pro se* seeking declaratory relief and writ of mandamus, claiming that respondent Theodis Beck, N.C. Department of Correction secretary, was decreasing his good time credits in violation of the *ex post facto* clause of the United States and North Carolina constitutions and in violation of state law. Respondent filed a motion to dismiss in June 2004. On 14 July 2004, the court appointed North Carolina Prisoner Legal Services to represent petitioner, who filed a motion for summary judgment on 3 February 2005. Following a hearing, the court denied the petition on 14 February 2005. Petitioner appeals. As discussed below, we affirm.

Petitioner is imprisoned for various offenses committed in August and September 1993, and for which he was sentenced beginning on 16 November 1994. Each sentence is governed by the Fair Sentencing Act ("FSA"). Section 15A-1340.7(b) of the FSA provides that

> Infractions of the rules shall be of two types, major and minor infractions. Major infractions shall be punished by forfeiture of specific amounts of accrued good behavior time, disciplinary segregation, loss of privileges for specific periods, demotion in custody grade, extra work duties, or reprimand. Minor infractions shall be punishable by loss of privileges for specific periods, demotion in custody grade, extra work duties, reprimand, but not by loss of accrued good behavior time or disciplinary segregation.

N.C. Gen. Stat. § 15A-1340.7(b) (1993). The FSA was repealed by the Structured Sentencing Act ("SSA") which applies to offenses occur-

ring on or after 1 January 1995. The SSA does not contain a counterpart to N.C. Gen. Stat. § 15A-1340.7.

Respondent's rules authorizing disciplinary procedures in effect between 1 November 1991 and 1 January 1994 ("the old rules") provided for the loss of up to thirty days of good behavior time ("good time"), with no loss of good time for minor infractions. Effective 1 January 1994, respondent approved a new set of rules ("the new rules") with new categories of infractions and new punishments for each category. Under the new rules, infractions formerly classified as minor now resulted in loss of good time. Since entering custody, petitioner has been found guilty of more than one hundred infractions, all under application of the new rules. For purposes of this litigation, the parties stipulated that petitioner would be adversely affected by the operation of the changed rules.

[1] Defendant first argues that the court erred in denying his petition because the application of the new rules violates the *ex post facto* clauses of the United States and North Carolina constitutions. We do not agree.

The United States Supreme Court considered the constitutionality of changes in good behavior time regulations in *Weaver v. Graham*, 450 U.S. 24, 67 L. Ed. 2d 17 (1981). *Weaver* concerned changes in prison regulations that prospectively reduced the amount of good behavior time a prisoner could earn. *Id.* at 25, 67 L. Ed. 2d at 20. In its analysis, the Supreme Court explained:

> First, we need not determine whether the prospect of the gain time was in some technical sense part of the sentence to conclude that it in fact is one determinant of petitioner's prison term—and that his effective sentence is altered once this determinant is changed. We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed. Second, we have held that a statute may be retrospective even if it alters punitive conditions outside the sentence. Thus, we have concluded that a statute requiring solitary confinement prior to execution is ex post facto when applied to someone who committed a capital offense prior to its enactment, but not when applied only prospectively.
>
> For prisoners who committed crimes before its enactment, [the new rules] substantially alters the consequences attached

> to a crime already completed, and therefore changes the quantum of punishment. Therefore, it is a retrospective law which can be constitutionally applied to petitioner only if it is not to his detriment.

Id. at 32-33, 67 L. Ed. 2d at 25 (internal citations and quotation marks omitted). Because the change at issue was clearly detrimental to the defendant in *Weaver*, in that it reduced the amount of good behavior time he was able to accrue, the Court held it violated the *ex post facto* clause.

Respondent draws our attention to *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993). In 1990, after the Commonwealth of Virginia passed a law requiring that every inmate of its Department of Corrections ("DOC") provide a blood sample prior to release, the DOC "issued regulations . . . which provide[d] for punishment, by loss of good conduct credits, of an inmate who refuses to provide a blood sample." *Id.* at 483. In discussing *Weaver*, the Fourth Circuit noted:

> The [*Weaver*] Court's holding, however, carefully noted that the statutory reduction in gain-time opportunities *was not related to infractions or prison behavior but applied to an inmate who complied fully with prison rules and regulations*, leading to the conclusion that the reductions of gain-time opportunities necessarily amounted to an alteration of the sentence originally imposed. . . . *In contrast, in the case before us, the opportunity for good conduct allowances of a well-behaving inmate is not altered.* An inmate who complies with rules and regulations receives the same credit for good behavior before and after the amendments to [the rules]. *A loss of good conduct credits is meted out only for infractions, and then only prospectively.*

Id. at 486-87 (internal citations and quotation marks omitted) (emphasis supplied). Petitioner contends that the new rules create an increase in his sentence *ex post facto* and that the situation here is analogous to that *Weaver*. However, in *Weaver*, the change in sentence occurred for all prisoners, no matter their behavior. Inmates could no longer earn the good time they would previously have been entitled to earn.

Here, the amount of good time petitioner could earn was unchanged and still governed under the old rules as specified in the FSA. Only the amount of good time which could be lost for various disciplinary infractions has been altered pursuant to the new rules.

The loss of good time occurs only when inmates choose to commit disciplinary infractions. We conclude that the situation before us is not analogous to *Weaver* and that decision is not applicable to the facts before us. We find the reasoning in *Ewell* persuasive, however, and accordingly, we overrule this assignment of error.

[2] Petitioner also argues that the application of the new rules to him violates his right to due process and state law. We disagree.

As quoted above, the FSA in N.C. Gen. Stat. § 15A-1340.7(b) bars the loss of good behavior time as a punishment for minor infractions. The repealing law specifies that:

> Prosecutions for, or sentences based on, offenses occurring before the effective date of this act [1 January 1995] are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences.

Session Laws 1993, c. 538. Petitioner contends that this language bars any changes in regulations that would have the effect of extending an inmate's sentence, including the new rules increasing the forfeiture of good time for certain infractions. Respondent contends that, in using this language, the General Assembly cannot have intended that the old rules be "locked in cement" and applied without modification to an inmate's sentence. Specifically, respondent urges us to interpret the word "sentence" to mean only the sentence imposed by the court, and not to any loss of good time days an inmate may have accrued. We interpret the word "sentence" as used in the session laws to refer to the amount of time an inmate must serve as a result of his conviction. As explained in the discussion of *Ewell* above, the change from the old rules to the new rules has not changed petitioner's sentence, unless he chooses to commit disciplinary infractions. We overrule this assignment of error.

[3] Petitioner also contends that the change in regulations violates his due process rights. The U.S. Supreme Court has determined that where

> the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the

circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Wolff v. McDonnell, 418 U.S. 539, 557, 951 (1974). However, petitioner does not argue that he has been deprived of due process with respect to any of the individual infractions on his record, but rather falls back on a blanket statement that his due process rights were violated by the imposition of the new rules. Having determined above that implementation of the new rules was constitutional, we conclude that petitioner's argument here is without merit.

Affirmed.

Judges TYSON and LEVINSON concur.

LINDA WYNNE ENNIS, PLAINTIFF v. WALLIE HENDERSON, JR. AND ANNIE WILLIAMS HENDERSON, DEFENDANTS

No. COA05-881

(Filed 21 March 2006)

Judgments— offer of judgment—acceptance required within ten days

The trial court erred in a negligence action arising out of an automobile accident by finding plaintiff's acceptance of an offer of judgment to be valid based on the trial court's ex parte extension of time to accept defendants' offer of judgment, because: (1) offers of judgment not accepted within ten days are deemed withdrawn under N.C.G.S. § 1A-1, Rule 68; and (2) our General Assembly did not intend for N.C.G.S. § 1A-1, Rule 6(b) to authorize the trial court to enlarge the allotted time.

Appeal by defendants from order entered 24 March 2005 by Judge Orlando Hudson in Durham County Superior Court. Heard in the Court of Appeals 8 February 2006.

Nick Galifianakis & Associates, by Millie E. Hershner for plaintiff-appellee.

Haywood, Denny & Miller, L.L.P., by John R. Kincaid for defendants-appellants.

CALABRIA, Judge.

Wallie Henderson, Jr. and Annie Williams Henderson ("defendants") appeal the order finding Linda Wynne Ellis' ("plaintiff") acceptance of an offer of judgment valid. We reverse.

On 15 July 2004, plaintiff filed a complaint against defendants for alleged injuries suffered on 11 August 1999 in an automobile accident.[1] On 12 August 2004, defendants filed an answer denying negligence and asserting several defenses.

On 6 December 2004, defendants, pursuant to Rule 68 of the North Carolina Rules of Civil Procedure, served an offer of judgment in the amount of $4,501.00 together with costs accrued to the date of the offer. On 17 December 2004, plaintiff moved the court to extend by fourteen days the time to respond to defendants' offer of judgment. On the same day, the court granted plaintiff's *ex parte* motion to extend time through and including 31 December 2004.

On 30 December 2004, plaintiff accepted defendants' offer of judgment which was served upon defendants on 3 January 2005. On 11 January 2005, plaintiff filed a motion for costs after acceptance of defendants' offer of judgment. On 13 January 2005, defendants moved the court to determine the sufficiency of plaintiff's acceptance of defendants' offer of judgment.

On 24 March 2005, the trial court, citing Rule 6(b) of the North Carolina Rules of Civil Procedure, ordered the following: plaintiff's acceptance of defendants' offer of judgment was valid and any failure of plaintiff to timely respond was due to "excusable neglect.". On the same day, the trial court entered a judgment in favor of plaintiff to include: the offer of judgment totaling $4,501.00 together with attorneys fees in the amount of $3,500.00 and costs of $94.76. Defendants appeal.

Defendants argue the trial court erred in entering judgment against them based on an untimely and ineffective acceptance of an offer of judgment. Defendants contend offers of judgment not accepted within ten days are deemed withdrawn and our General Assembly did not intend for Rule 6(b) to authorize the trial court to enlarge the allotted time. We agree.

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1. A previous suit regarding this same accident was filed and voluntarily dismissed in August 2002.

N.C. R. Civ. P. 68 provides, in pertinent part,

> [a]t any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him . . . with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance. . . . *An offer not accepted within 10 days after its service shall be deemed withdrawn* and evidence of the offer is not admissible except in a proceeding to determine costs.

N.C. Gen. Stat. § 1A-1, Rule 68 (2005) (emphasis added). Conversely, N.C. R. Civ. P. 6(b) provides, in pertinent part,

> [w]hen by *these rules . . . an act is required* or allowed to be done at or *within a specified time*, *the court* for *cause shown may* at any time in *its discretion . . . order the period enlarged* if request therefor is made before the expiration of the period originally prescribed. . . . Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of *excusable neglect* . . . provided . . . neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b), except to the extent and under the conditions stated in them.

N.C. Gen. Stat. § 1A-1, Rule 6(b) (2005) (emphasis added). Thus, the principle question before this Court is whether Rule 6(b) grants authority to the trial court to enlarge the time to accept offers of judgment pursuant to Rule 68. We hold it does not.

First, we note "[w]here an appeal presents a question of statutory interpretation, this Court conducts a *de novo* review of the trial court's conclusions of law." *Morgan v. Steiner*, 173 N.C. App. 577, 579, 619 S.E.2d 516, 518 (2005). " 'Statutory interpretation properly begins with an examination of the plain words of the statute.' " *State ex rel. Banking Comm'n v. Weiss*, 174 N.C. App. 78, 83, 620 S.E.2d 540, 543 (2005) (citing *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997) (quoting *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). Consequently, "[w]here 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." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990); *see also In re Robinson*, 172 N.C. App. 272, 274, 615 S.E.2d 884, 886

(2005) (stating when statutory language is transparent "courts . . . are without power to interpolate, or superimpose, provisions and limitations not contained therein.") Consequently, the statute "must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." *Utilities Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977).

In the instant case, defendants served plaintiff an offer of judgment on 6 December 2004. The three day window provided by North Carolina Rule of Civil Procedure 6(e) for service by mail allowed plaintiff to accept the offer until 19 December 2004. Consequently, on 17 December 2004, when plaintiff moved the trial court for an *ex parte* order to extend the time to accept defendants' offer by two weeks through 31 December 2004, the trial court did not have discretion under Rule 6(b) to extend the time allotted for plaintiff to accept defendants' offer of judgment pursuant to Rule 68. Historically, trial courts used Rule 6(b) to enlarge the time to file summons, complaints, and answers. The difference, however, between these situations and Rule 68 is that offers of judgment do not require a response by the other party. Specifically, if ten days pass from the date an offer is made and the other party does not accept, the offer is automatically rescinded per operation of the Rule. In contrast, the filing of a complaint necessitates the filing of an answer and thus, trial courts have discretion, pursuant to Rule 6(b), to grant extensions of time to parties to file these documents. There is no similar necessity regarding offers of judgment under Rule 68.

In the instant case, plaintiff failed to accept defendants' offer of judgment within ten days as required by the clear language of Rule 68. Under Rule 68, offers not accepted within 10 days "shall be deemed withdrawn." The plain meaning of Rule 68 is evident; once a party serves an offer of judgment, the other party has 10 days to accept. Absent an agreement between the parties, the other party does not have 10 days to seek an *ex parte* extension of time and then accept. Had our General Assembly desired automatic, *ex parte* extensions of time to be granted, Rule 68 would have included such a modification. Rule 68 does not include such an express modification and thus, the trial court erred in granting plaintiff an *ex parte* extension of time to accept defendants' offer of judgment.

Reversed.

Chief Judge MARTIN and Judge BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 21 March 2006

AZALEA GARDEN BD. & CARE, INC. v. BLACKWELL & ASSOCS. No. 05-770	Davidson (01CVS1631)	Affirmed
BALD HEAD ASS'N v. CURNIN No. 05-639	Brunswick (01CVS695)	Appeal dismissed; petition denied; motion denied
BUCKLAND v. HOBBS No. 05-698	Alamance (04CVD2112)	Affirmed
CHANDLEY v. FIRST CHARTER BANK No. 05-873	Buncombe (04CVD3814)	Dismissed
CREDLE v. INJECTION TECH. CORP. No. 05-922	Ind. Comm. (I.C. #200785)	Affirmed
EFIRD v. PARSON No. 05-879	Union (04CVS485)	Dismissed
FARISS v. STROH COS. No. 04-1457	Ind. Comm. (I.C. #149131)	Affirmed and remanded
HENSLEY v. ASHLAND, INC. No. 05-833	Ind. Comm. (I.C. #262983) (I.C. #263001)	Affirmed
IN RE A.A.E. & H.M.E. No. 05-723	Ashe (04J16) (04J17)	Affirmed
IN RE A.W.M. No. 05-886	Cleveland (02J109)	Affirmed
IN RE E.J.R. No. 05-668	Catawba (02J247)	Affirmed
IN RE J.P. No. 05-776	Buncombe (03J23)	Affirmed
IN RE K.D.S. No. 05-932	Ashe (04J7)	Affirmed
IN RE KNOTT No. 05-1173	Prop. Tax Comm. (02PTC389)	Affirmed
IN RE M.B. No. 05-843	Mecklenburg (03J781)	Dismissed
IN RE S.B.S. No. 05-559	Graham (03J9)	Affirmed

IN RE W.F.P. No. 05-920	Caswell (01J53) (01J54)	Affirmed
ISLEY v. McDONALD'S CORP. No. 05-837	Forsyth (03CVS5927)	Affirmed
LINDSEY v. CARDINAL HEALTH No. 05-757	Ind. Comm. (I.C. #273257)	Affirmed
ROBERTS v. COSTON No. 05-894	Henderson (03CVS1853)	Appeal dismissed
SABO v. ELECTRONIC SERVS. MART No. 05-997	Mecklenburg (04CVS9097)	Affirmed
SIGNATURE DISTRIB'N SERVS., INC. v. WRIGHT No. 05-293	Mecklenburg (02CVS19415)	Dismissed in part; affirmed in part
SLOOP v. TESFAZGHI No. 05-603	Mecklenburg (01CVS12258)	Affirmed
STATE v. ADAMS No. 05-1246	Buncombe (03CRS60414) (03CRS60507)	Affirmed
STATE v. BARRON No. 05-869	Guilford (03CRS90852)	Reversed
STATE v. BETHEA No. 05-866	Scotland (03CRS54666) (03CRS54667) (04CRS1211)	No error
STATE v. BOWDEN No. 04-1341	Davidson (02CRS60739) (02CRS60740) (02CRS60741) (03CRS51511) (03CRS51512) (03CRS51513)	No error
STATE v. CHAPMAN No. 05-254	Macon (03CRS52282) (03CRS52284) (03CRS52287) (04CRS652)	No error in part; remanded in part
STATE v. CROWDER No. 05-193	Union (99CRS17923) (99CRS17924) (00CRS3985)	No error in part; remanded for a new sentencing hearing in 99CRS17923

STATE v. EVANS No. 05-694	Forsyth (04CRS28545) (04CRS60629)	No error in part; remanded for correction of clerical error; remanded for resentencing
STATE v. FLIPPEN No. 05-842	Stokes (04CRS3231) (04CRS3357) (04CRS3363)	No error
STATE v. FORD No. 05-774	Robeson (01CRS16412) (01CRS16413) (01CRS16414) (01CRS16415) (01CRS16418) (02CRS498)	Affirmed
STATE v. GRAY No. 05-689	Rowan (04CRS9854) (04CRS9855)	Reversed and remanded
STATE v. HERNANDEZ No. 05-421	Guilford (04CRS75455) (04CRS75456)	No error
STATE v. IVEY No. 05-456	Alamance (04CRS3697) (04CRS51097) (04CRS51098)	Affirmed in part; remanded in part
STATE v. LASITER No. 05-777	Onslow (03CRS50813) (04CRS2282)	No error in part, reversed and remanded for a new sentencing hearing in 04CRS2282
STATE v. LAWS No. 05-754	Caldwell (04CRS1190) (04CRS1191) (04CRS1192) (04CRS1193)	Affirmed
STATE v. McCLAIN No. 05-438	Union (02CRS51377)	Affirmed
STATE v. MELVIN No. 05-531	Sampson (03CRS52963) (03CRS52964)	No error. Vacated and remanded as to the recommendation of restitution
STATE v. MILLS No. 05-852	Halifax (01CRS56407) (02CRS1758)	Affirmed

STATE v. MORRISON No. 05-908	Mecklenburg (04CRS212901)	No error
STATE v. POWERS No. 04-1300	Sampson (02CRS54785)	No error
STATE v. RAMOS No. 05-1109	Cabarrus (03CRS2175) (03CRS2176) (03CRS2177)	No error
STATE v. ROBERTSON No. 05-1110	Rowan (04CRS51805) (04CRS51806)	No error
STATE v. ROSS No. 05-431	Halifax (04CRS52718)	No error
STATE v. SCOTT No. 05-1093	Haywood (04CRS53521)	No error
STATE v. THOMAS No. 05-1258	Craven (04CRS52442)	No error
STATE v. WADE No. 05-1276	Greene (02CRS50814)	Affirmed
STATE v. WILSON No. 05-589	Guilford (03CRS24459) (03CRS70228) (03CRS70229)	Affirmed
TREOFAN AM., LLC v. EXCELSIOR PACKAGING GRP., INC. No. 05-735	Forsyth (04CVS1142)	Affirmed

APPENDIX

ORDER ADOPTING AMENDMENTS
TO THE NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

I. Rules 7, 9, 11, 12, 18, 28, and 37 of the North Carolina Rules of Appellate Procedure are amended as described below:

Rule 7(b) is amended to read:

(b) *Production and Delivery of Transcript.*

(1) In civil cases: from the date the requesting party serves the written documentation of the transcript arrangement on the person designated to prepare the transcript, that person shall have 60 days to prepare and deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript arrangement upon the person designated to prepare the transcript, that person shall have 60 days to produce and deliver the transcript in noncapital cases and 120 days to produce and deliver the transcript in capitally tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date listed on the Appellate Entries as the "Date order delivered to transcriptionist," ~~the clerk of the trial court serves the order upon the person designated to prepare the transcript~~, that person shall have ~~60~~ 65 days to ~~procure~~ produce and deliver the transcript in noncapital cases and ~~120~~ 125 days to produce and deliver the transcript in capitally tried cases.

The transcript format shall comply with Appendix B of these Rules.

Except in capitally tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death, shall be made directly to the Supreme Court by the appellant. ~~Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the~~

~~appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.~~

(2) The court reporter, or person designated to prepare the transcript, shall deliver the completed transcript, with accompanying ASCII disk or its functional equivalent, to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

(3) The neutral person designated to prepare the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

Rule 9 is amended as follows:

Rule 9(a)(1) is amended by replacing the period at the end of item "l" with a semicolon and adding the following language immediately thereafter:

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal.

Rule 9(a)(3) is amended by deleting the word "and" at the end of item "j", replacing the period at the end of item "k" with a semicolon, and adding the following language immediately thereafter:

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal.

Rule 9(b)(4) is amended to read:

(4) *Pagination; Counsel Identified.* The pages of the printed record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p ___)."Pages of the Rule 11(c) or Rule 18(d)(3) supplement to the record on appeal shall be numbered consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the printed record on appeal. These pages shall be referred to as "record sup-

plement pages," and shall be cited as "(S p ___)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p ___)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

Rule 11(c) is amended to read:

(c) *By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.* Within 30 days (35 days in capitally tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in his request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it is the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in three copies of a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9((d); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to Rule 9(c) or 9(d) were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within 10 days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken ~~to~~ settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings

under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

Rule 12 is amended as follows:

Rule 12(a) is amended to read:

(a) *Time for Filing Record on Appeal.* Within 15 days after the record on appeal has been settled by any of the procedures provided in ~~this~~ Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

Rule 12(c) is amended to read:

(c) *Copies of Record on Appeal.* The appellant ~~need file but a single~~ shall file one copy of the record on appeal, one copy of a transcript designated pursuant to Rule 9(c)(2), three copies of each exhibit designated pursuant to Rule 9(d), and three copies of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3). Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the

record on appeal. The clerk will reproduce and distribute copies as directed by the court.

Rule 18 is amended as follows:

Rule 18(c) is amended by deleting the word "and" at the end of item "10", replacing the period at the end of item "11" with a semicolon, and adding the following language immediately thereafter:

(12) a statement, where appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is filed with the record on appeal.

Rule 18(d) is amended to read:

(d) *Settling the Record on Appeal.* The record on appeal may be settled by any of the following methods:

(1) *By Agreement.* Within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in his request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial settlement is not appropriate for disputes concerning only the formatting or the

order in which items appear in the settled record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) *By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.* If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal; but shall be filed by the appellant with the record on appeal in a volume captioned "Rule 18(d)(3) Supplement to the Printed Record on Appeal" along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule ~~9(c) or 9(d)~~ 18(b) or 18(c); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the record on appeal, the first page of the supplement to bear the

next consecutive number following the number of the last page of the record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to Rule ~~9(c) or 9(d)~~ 18(b) or 18(c) were not filed, served, submitted for consideration, admitted, or offered into evidence, or that a statement or narration permitted by these rules is not factually accurate, then that party, within 10 days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have filed amendments, objections, or a proposed alternative record on appeal, may in writing request that the agency head convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the agency head in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule ~~9(c)(1)~~ 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency. If requested, the settling official shall return the record

items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten day period within which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

Rule 28 is amended as follows:

The first paragraph of Rule 28(b)(6) is amended to read:

(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. However, in new briefs before the Supreme Court, a party need not reference assignments of error to the extent that party was the appellee (or cross-appellee) before the Court of Appeals and is urging the Supreme Court to reverse the Court of Appeals.

The first paragraph of Rule 28(c) is amended to read:

(c) *Content of Appellee's Brief; Presentation of Additional Questions.* An appellee's brief in any appeal shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need con-

tain no statement of the questions presented, statement of the procedural history of the case, statement of the grounds for appellate review, statement of the facts, or statement of the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant. An appellee's brief may, but is not required to, include a reference to assignments of error as required by Rule 28(b)(6) for an appellant's brief.

Rule 28(d)(1) is amended by replacing the period at the end of item "c." with a semicolon and adding the following language immediately thereafter:

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal the study of which are required to determine questions presented in the brief.

Rule 28(d)(3) is amended to read:

(3) *When Appendixes to Appellee's Brief Are Required.* Appellee must reproduce appendixes to his brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement he believes to be necessary to understand the question.

b. Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal as if he were the appellant with respect to each such new or additional question.

Rule 28(i) is amended to read:

(i) *Amicus Curiae Briefs.* A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties,

~~within ten days after the printed record is mailed by the Clerk and ten days after the record is docketed in pauper cases~~. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Motions for leave to file an amicus curiae brief submitted to the Court after the time within which the amicus curiae brief normally would be due are disfavored in the absence of good cause. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

Rule 28(j)(2)(A) is amended as follows:

By adding a new third sentence to sub-subdivision 1, titled "*Page limits for briefs using nonproportional type*," to read:

> Unless otherwise ordered by the Court, the page limit for an amicus curiae brief is 15 pages.

By adding a new third sentence to sub-subdivision 2, titled "*Word-count limits for briefs in proportional type*," to read:

> Unless otherwise ordered by the Court, an amicus curiae brief may contain no more than 3,750 words.

Rule 37 is amended by adding three subsections at the end thereof to read:

(d) *Withdrawal of Appeal in Criminal Cases.* Withdrawal of appeal in criminal cases shall be in accordance with G.S. § 15A-1450. In addition to the requirements of G.S. § 15A-1450, after the record on appeal in a criminal case has been filed in an

appellate court but before the filing of an opinion, the defendant shall also file a written notice of the withdrawal with the clerk of the appropriate appellate court.

(e) *Withdrawal of Appeal in Civil Cases.*

(1) Prior to the filing of a record on appeal in the appellate court, an appellant or cross-appellant may, without the consent of the other party, file a notice of withdrawal of its appeal with the tribunal from which appeal has been taken. Alternatively, prior to the filing of a record on appeal, the parties may file a signed stipulation agreeing to dismiss the appeal with the tribunal from which the appeal has been taken.

(2) After the record on appeal has been filed, an appellant or cross-appellant or all parties jointly may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal. The motion must specify the reasons therefor, the positions of all parties on the motion to dismiss, and the positions of all parties on the allocation of taxed costs. The appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court.

(f) *Effect of Withdrawal of Appeal.* The withdrawal of an appeal shall not affect the right of any other party to file or continue such party's appeal or cross-appeal.

II. **Appendix D** of the North Carolina Rules of Appellate Procedure is amended as follows:

Section 1, titled "NOTICES OF APPEAL," subsection c, titled "to the Supreme Court from a Judgment of the Court of Appeals," is amended by rewording the second sentence thereof to read:

The appealing party shall enclose a ~~certified~~ clear copy of the opinion of the Court of Appeals with the notice.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of March 2007, and shall apply to cases appealed on or after that date.

Adopted by the Court in Conference this the 5th day of October 2006, with the exception of the amendment to Rule 28(b)(6), which was adopted by the Court on the 16th of November 2006. These

amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

s/Edmunds, J.
Edmunds, J
For the Court

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ADMINISTRATIVE LAW

Agency memoranda—not enforceable as rules—substantial compliance—An administrative law judge did not err by concluding that respondent was not required to follow interagency memoranda on forestry operations where the memoranda described internal agency procedures, were not enforceable as rules, and were substantially complied with. **Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 594.**

Burden of proof—agency action outside authority—Unless a statute provides otherwise, the petitioner has the burden of proof in OAH contested cases. Although the petitioner here argues that N.C.G.S. § 113A-64(a)(1) allocates the burden of proof in this case to respondent, petitioner's contention that the Sedimentation Pollution Control Act was inapplicable on its site falls under its burden of showing that an agency acted outside its authority. **Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 594.**

Contentions first raised in superior court—not properly brought forward—Contentions on appeal of an administrative law judge's decision that were first raised in the superior court brief were not properly brought forward. **Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 594.**

Discovery responses supplemented—no surprise—no abuse of discretion—An administrative law judge did not err by allowing respondents to supplement discovery responses four days prior to trial and then denying a motion for a continuance. The applicable statute and rules gave authority for the action, and there was no abuse of discretion. Respondent was not asserting a new theory that unfairly surprised petitioner. **Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 594.**

Evidentiary standard—substantial evidence—greater weight of evidence—no conflict—There is no conflict between the application of an evidentiary standard requiring that a decision be based on substantial evidence and a requirement that a party must persuade the fact-finder by the greater weight of the evidence. Although petitioner here argues that the ALJ improperly applied the "substantial evidence" standard, the ALJ considered and carefully weighed the evidence. **Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 594.**

Intervention—direct interests of intervenors—An administrative law judge did not err by allowing the Shellfish Growers and the Coastal Federation to intervene in a contested case involving a monetary penalty for erosion and sedimentation violations. The intervenors' interests may be directly affected by the outcome of the case, and are separate from erosion penalties, because conclusive findings indicate that sedimentation affects the waters which their members visit and from which they take fish and shellfish. **Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 594.**

Joint presentation of case—stipulation and participation without objection—Petitioner waived any objection to respondent and intervenors making a joint presentation of their case through a stipulation and by participating in the hearing for three days without complaint. **Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 594.**

Untimely written order—nunc pro tunc—A final agency decision is clearly required to be in writing and to include findings and conclusions under N.C.G.S.

ADMINISTRATIVE LAW—Continued

§ 150B-36(d), and an administrative agency cannot enter a decision under Chapter 150B nunc pro tunc. In this case, concerning the computation of petitioner's retirement benefits, the Board of Trustees of the Local Government Employees' Retirement System informed the parties of its vote but entered the written order beyond the sixty-day limitation "nunc pro tunc." That order was untimely and the Board is considered to have adopted the ALJ's recommended decision. **Walton v. N.C. State Treasurer, 273.**

ALCOHOLIC BEVERAGES

Alcoholic beverage license—intoxicated patron—driving after leaving licensed premises—injuries to others—no duties by licensee—A restaurant business licensed to sell alcoholic beverages had no legal duty to take affirmative precautionary measures to prevent an intoxicated patron from operating a motor vehicle after the patron was served his final drink or to prevent an intoxicated patron from consuming alcoholic beverages on its premises after it knew he was intoxicated, and the licensed business thus could not be held liable on either of those theories of negligence for injuries received by persons in a vehicle struck by an automobile driven by the intoxicated patron after he left the restaurant. **Hall v. Toreros, II, Inc., 309.**

APPEAL AND ERROR

Appealability—allowance of motion to dismiss—counterclaims—substantial right—identical issues of fact—possibility of inconsistent verdicts—Although defendant's appeal from the grant of a motion to dismiss his counterclaims is generally an appeal from an interlocutory order, defendant would be deprived of a substantial right if an immediate appeal is not allowed. Defendant showed that plaintiff's claims and defendant's counterclaim involve identical issues of fact with the possibility of inconsistent verdicts resulting from the same factual issues. **Bob Timberlake Collection, Inc. v. Edwards, 33.**

Appealability—"de facto denial" of motion—There is no authority to support a right of appeal from a "de facto denial" of a summary judgment motion which had not been ruled upon. There is no authority supporting the right to appeal before a motion has been heard or a ruling entered. **Pate v. N.C. Dep't of Transp., 530.**

Appealability—denial of motion for judgment on pleadings not reviewable—Although defendant-appellants contend the trial court erred in a suit seeking compensatory and punitive damages, as a result of injuries resulting from an unwashed sperm specimen in an insemination procedure, by denying defendant-appellants' motion for judgment on the pleadings, this issue is not reviewable on appeal because the trial court rendered a final judgment after a trial on the merits. **Chambliss v. Health Sciences Found., Inc., 388.**

Appealability—denial of motion to dismiss—personal jurisdiction—The denial of a motion to dismiss for lack of personal jurisdiction is statutorily deemed to be immediately appealable. **Fox v. Gibson, 554.**

Appealability—denial of motion to dismiss—personal jurisdiction—presumed findings—A party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person. The review is to determine

APPEAL AND ERROR—Continued

whether the trial court's findings are supported by competent evidence; if no findings are made, proper findings are presumed and the record is reviewed for supporting evidence. **Strategic Outsourcing, Inc. v. Stacks, 247.**

Appealability—denial of motion to dismiss—personal jurisdiction—substantial right—Motions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable. **A.R. Haire, Inc. v. St. Denis, 255.**

Appealability—denial of motion to dismiss—public duty doctrine—substantial right—Although ordinarily the denial of a motion to dismiss is an interlocutory order, defendant's appeal in an action under the Tort Claims Act arising out of a fire at a county jail is based on the public duty doctrine, and thus, involves a substantial right warranting immediate appellate review. **Multiple Claimants v. N.C. Dep't of Health & Human Servs., 278.**

Appealability—denial of motion to dismiss—public duty doctrine—substantial right—Although an appeal from the denial of a motion to dismiss is generally an appeal from an interlocutory order, an appeal based on the public duty doctrine involves a substantial right warranting immediate appellate review. **Cockerham-Ellerbee v. Town of Jonesville, 372.**

Appealability—denial of stay—interlocutory order—An appeal was interlocutory where the matter arose from a termination of workers' compensation benefits, subsequent orders, and the denial of a request for a stay. The order appealed from merely temporarily determines a portion of the action before further proceedings that may negate that order. **Perry v. N.C. Dep't of Corr., 123.**

Appealability—permanency planning order—An appeal from an initial permanency planning order was dismissed as interlocutory. *In re B.N.H.*, 170 N.C. App. 157, is directly controlling. **In re L.D.B., 561.**

Appealability—second motion for summary judgment—different legal issues from prior motion—Plaintiffs' appeal from the 29 November 2004 order granting summary judgment to defendants is properly before the Court of Appeals because: (1) where a second motion for summary judgment presents legal issues different from those raised in the prior motion, such a motion is appropriate; and (2) defendants' first summary judgment motion revolved around the agreement not complying with the Statute of Frauds whereas the second motion, among other things, questioned whether there was mutual assent between the parties. **Connor v. Harless, 402.**

Appealability—setting hearing on sanctions—interlocutory order—Plaintiff's fourth and fifth assignments of error pertaining to the 8 November 2004 order setting a hearing on sanctions against plaintiff are dismissed as an appeal from an interlocutory order, because the 8 November 2004 order did not constitute a final judgment as to any of the claims or parties, did not affect a substantial right, and contemplated further action by the trial court. **Ritter v. Ritter, 181.**

English Law—statutes not included in brief—issue not addressed—The Court of Appeals did not address the question of whether the trial court erred by deciding that excess child support payments were a gift under English law where defendant did not include relevant statutes, rules, or regulations in the brief. **Ugochukwu v. Ugochukwu, 741.**

APPEAL AND ERROR—Continued

Findings neither requested nor made—presumption—record reviewed for supporting evidence—Where there was neither a request for findings nor findings, the Court of Appeals reviewed the record for competent evidence supporting presumed findings which in turn supported the ruling that defendants were subject to personal jurisdiction. **A.R. Haire, Inc. v. St. Denis, 255.**

Lack of supporting authority—argument abandoned—Defendant's argument concerning a set-off in an agricultural contract case was deemed abandoned for failure to cite supporting statutory or case law. **Wilson v. Burch Farms, Inc., 629.**

No authority cited—argument abandoned—Arguments concerning an administrative law judge's handling of discovery were deemed abandoned where no authority was cited for the arguments. **Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 594.**

Preservation of charge objection—objection not repeated—Defendant's objection at the charge conference preserved for appeal the question of whether proper instructions were given even though he did not object again after the instructions were given. **Wilson v. Burch Farms, Inc., 629.**

Preservation of issues—assignment of error—distinction from condemnation—Defendant's failure to assign error meant that it did not preserve for appellate review the question of whether N.C.G.S. § 136-111 provides the sole remedy in an action arising from flooding caused by an undersized drainage pipe. Furthermore, N.C.G.S. § 136-111 addresses actions seeking damages for condemnation, while the Tort Claims Act governs negligence claims. **Pate v. N.C. Dep't of Transp., 530.**

Preservation of issues—failure to argue—Six of the original seven assignments of error that plaintiffs failed to argue in a negligence case are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). **Hall v. Toreros, II, Inc., 309.**

Preservation of issues—failure to argue—waiver—While plaintiffs assign error to the dismissal of their claims against defendant for violating a 1994 permanent injunction and restraining order, plaintiffs correctly abandoned this argument in their brief, and thus, this assignment of error is deemed waived under N.C. R. App. P. 28(b)(6). **Evans v. Lochmere Recreation Club, Inc., 724.**

Preservation of issues—failure to give proper notice of appeal—Although plaintiff's first two assignments of error refer to the trial court's order dated 30 June 2004, these assignments of error are dismissed because plaintiff gave notice of appeal only from the trial court's orders dated 26 August 2004 and 8 November 2004. N.C. R. App. P. 3(d). **Ritter v. Ritter, 181.**

Preservation of issues—failure to object—failure to argue plain error—The trial court did not err in a first-degree rape and assault with a deadly weapon inflicting serious injury case by transferring defendant's case from juvenile court to superior court even though he contends the probable cause determination was based in part on an alleged improperly admitted custodial statement based on the argument that defendant's stepfather, and not a parent, was present, because: (1) defendant failed to preserve this issue for appeal by presenting no objection to the trial court to the admission of his statement; and (2) a defendant waives plain error review by failing to specifically and distinctly contend the questioned judicial action amounted to plain error. **State v. Upshur, 174.**

APPEAL AND ERROR—Continued

Preservation of issues—failure to timely order transcript—failure to timely file motion for extension of time to serve proposed record—Plaintiff's third assignment of error pertaining to the 26 August 2004 order is dismissed pursuant to Rules 7 and 11 of the Rules of Appellate Procedure, because: (1) plaintiff failed to order the transcript within the requisite time and failed to serve the proper notice upon defendant; and (2) plaintiff did not file a motion for extension of time to serve the proposed record on appeal until more than eighty days after filing the notice of appeal. **Ritter v. Ritter, 181.**

Preservation of issues—final agency decision—failure to give proper notice of appeal—Although petitioner contends that respondent-intervenor impermissibly amended its certificate of need (CON) application for an MRI scanner after a final agency decision in favor of respondent-intervenor and after issuance of the CON by substituting a mobile closed MIR, this issue is not properly before the Court of Appeals, because: (1) the appellate court's review is limited to the final agency decision, and the CON section granted respondent-intervenor's request for a material compliance determination after the CON was issued; and (2) in the absence of proper notice of appeal from this decision, the Court of Appeals is without jurisdiction to review this issue. **Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs., 46.**

Preservation of issues—issue not brought forward in motion appealed from—The issue of whether damages should have been reduced by the amount of a settlement was not preserved for appeal where it was not brought forward in defendant's motion for judgment notwithstanding the verdict or a new trial, the only motion from which defendant appealed. **Walker v. Fleetwood Homes of N.C., Inc., 668.**

Preservation of issues—mootness—Although respondent-intervenor cross-assigns as error respondent North Carolina Department of Health and Human Services's (DHHS) finding that petitioner's certificate of need application was conforming with Criterion 5 and related rules, it is unnecessary for the Court of Appeals to address this issue in light of its holding that DHHS's approval of respondent-intervenor's application was supported by the evidence and conformed with the statutory criteria. **Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs., 46.**

Preservation of issues—objection not required during sentencing—Defendant did not waive appellate review in a double armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury case as to the issue of whether the trial court erroneously considered evidence from his codefendant's trial, because: (1) an error at sentencing is not considered an error at trial for the purpose of N.C. R. App. P. 10(b)(1) since 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; and (2) defendant was not required by Rule 10(b)(1) to object during sentencing in order to properly preserve this issue for appellate review. **State v. Pender, 688.**

Record and brief—multiple violations—Although not dispositive, the Department of Correction violated the Rules of Appellate Procedure by submitting an unmanageable record with an inadequate index; by placing its assignments of error at the wrong point in the record and not including any record references;

APPEAL AND ERROR—Continued

by including legal argument with citations with its "non-argumentative" summary of the facts; and by not including pertinent record page numbers with the reference to assignments of error in the brief. DOC's conditional motion to amend the record and brief was not sufficient to remedy all of the violations. **Perry v. N.C. Dep't of Corr., 123.**

Writ of certiorari—effective appellate review—no trial transcript—Defendant is not entitled to a new trial on first-degree rape and assault with a deadly weapon inflicting serious injury charges even though he contends he is unable to obtain effective appellate review of the trial proceedings in the absence of the trial transcript where defendant's appeal is presented by writ of certiorari years after the entry of judgment in 1988 and a transcript is simply not available due to no fault of the State. **State v. Upshur, 174.**

ARBITRATION AND MEDIATION

Discoverable materials—discretion of arbitrator—photographs—The trial court did not err by confirming the arbitrator's award even though plaintiff contends the arbitrator improperly compelled disclosure of photographs taken of her which prompted the suit because the decision of the arbitrator to determine that certain materials were discoverable was within his broad discretion and therefore not appealable. **Revels v. Miss N.C. Pageant Org., Inc., 730.**

Motion to compel—unconscionability—inequality of bargaining power—cost—The trial court did not err by granting defendants' motion to compel arbitration in an action arising out of a Miss North Carolina contract because: (1) plaintiff assented to all terms of the pertinent contract including the arbitration clause where plaintiff's signature appears at the end of the contract on the signature line, and plaintiff placed her initials on each page of the contract including the one containing the arbitration clause; (2) although plaintiff argues the in-equality of bargaining power deprived her of a meaningful choice, she freely and willingly decided to enter the Miss North Carolina Pageant in which each contestant was required to sign this agreement; (3) the public policy of North Carolina strongly favors the settlement of disputes by arbitration and requires the courts to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration; and (4) although plaintiff contends the cost of arbitration was so expensive as to effectively deny her a forum, plaintiff did participate in the arbitration and was not denied a forum. **Revels v. Miss N.C. Pageant Org., Inc., 730.**

ARSON

Burning public building—setting off fireworks in police interview room—There was sufficient evidence to support a charge of burning a public building where a juvenile set off fireworks in an interview room at a police station. The willful and wanton element of the offense is supported by the juvenile's laughter while an officer tried to put out the fireworks, and the "setting fire" element is supported by the fireworks causing a flame two to three feet high which caused black markings on the floor and wall. Given the proximity of the fireworks to the wall and the resulting flame and damage, an intent to "set fire" can be inferred. **In re J.L.B.M., 613.**

BAIL AND PRETRIAL RELEASE

Forfeiture—defendant surrendered to Tennessee jail—There is a clear legislative intent that a nonappearing defendant be surrendered to a North Carolina sheriff before a bond forfeiture is set aside. The trial court here correctly denied a surety's motion to set aside a bond forfeiture which occurred when defendant failed to appear on drug charges in Watauga County and was later surrendered to the Johnson County, Tennessee jail by the surety's agent. **State v. Hollars, 571.**

BAILMENTS

Instructions—perishable agricultural commodities—The trial court did not err by instructing on the Perishable Agricultural Commodities Act (PACA) in plaintiff's bailment and contract action arising from storage of his sweet potatoes. The trial court instructed the jury fully and completely on defendant's obligations to plaintiff under both federal law and the oral contract between the parties. In the context of the entire charge, the court's instruction on the requirements of PACA did not mislead the jury. **Wilson v. Burch Farms, Inc., 629.**

Storage and disposal of sweet potatoes—consignment and bailment—The trial court erred by dismissing plaintiff's bailment claim arising from the storage of his sweet potatoes where plaintiff had left the crop with defendant for sorting and selling under an oral agreement, and defendant disposed of the crop as not marketable. While a consignment relationship may have existed, the relationship was also that of a bailment. **Wilson v. Burch Farms, Inc., 629.**

BANKS AND BANKING

Honoring forged checks—failure to meet one-year notice period—The trial court did not err by granting summary judgment in favor of defendant bank on plaintiff guardian's claim that defendant improperly honored forged checks drawn on the pertinent checking account, because: (1) N.C.G.S. § 25-4-406(f) provides that failure of a customer or his representative to report his unauthorized signature within one year after the bank makes account statements available precludes a claim against the bank, even if the customer is incompetent (whether adjudicated or unadjudicated) during the one-year period for providing notice; (2) even if the Court of Appeals accepted the guardian's argument that the requirements of the statute should not be triggered until he was appointed guardian of the estate since the prior guardian was the alleged wrongdoer, the guardian notified the bank of the unauthorized signatures still outside the one-year notification period; (3) a material factual dispute did not exist as to whether the guardian's freezing of the pertinent checking account upon his appointment as interim guardian in December 2000 satisfied the notice requirements; and (4) the guardian's argument that defendant received notice of the unauthorized signatures when defendant's employees attended the pertinent competency hearing where evidence was presented to show that the prior guardian had been forging signatures is without merit. **Union v. Branch Banking & Tr. Co., 711.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Constructive breaking—window opened by 13-year-old on defendant's instructions—A reasonable jury could find that defendant committed a constructive breaking where a 13-year-old girl followed defendant's instructions in

BURGLARY AND UNLAWFUL BREAKING OR ENTERING—Continued

opening her bedroom window so that he could enter her parents' home at night for illicit sex with her. Defendant's behavior showed that he knew she lacked authority to consent to his entry. **State v. Brown, 72.**

Instruction—consent to enter by 13-year-old—The trial court's instruction as a whole was correct in a prosecution for statutory rape, burglary, and other offenses involving a 13-year-old girl opening her window for the 45-year-old defendant to enter her bedroom for illicit sex. The court focused the jury's attention on the reasonableness of defendant's belief that the child had authority to consent to his entry, and the burden of proof was emphasized elsewhere in the instructions. **State v. Brown, 72.**

Permission to enter victim's home—revoked—The trial court did not err by not dismissing a felonious breaking and entering charge where defendant had had permission to enter the victim's home when he worked for her as a handyman, but had been evicted from the victim's home for stealing her credit cards and forging her checks. **State v. Scanlon, 410.**

Window opened by 13-year-old—authority to consent to entry—There was sufficient evidence to prove burglary or felonious breaking or entering where a 13-year-old allowed defendant (45 years old) into her parent's home for illicit sex while her parents were sleeping. There was sufficient evidence to allow a jury to find that defendant could not have reasonably believed that the child had authority to allow him entry for this purpose. **State v. Brown, 72.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Child care costs—no error in awarding—The trial court did not err by awarding costs related to the child care which defendant had been conclusively ordered to pay. **Ugochukwu v. Ugochukwu, 741.**

Custody—best interest of child—primary physical custody with father—The trial court did not abuse its discretion in a child custody case by finding and concluding that it was in the minor child's best interest to award primary physical custody to plaintiff father where defendant mother had serious medical complications and admitted that she is still blind, cannot drive, and cannot cook (except on good days), and defendant is currently unable to take care of her own needs as well as those of a five-year-old child. **Everette v. Collins, 168.**

Custody—physical placement with paternal grandmother—The trial court did not violate defendant mother's constitutional rights in a child custody case by granting physical placement with the minor child's paternal grandmother where the trial court granted primary physical custody to plaintiff and specifically approved the current placement of the minor child in the home of plaintiff's mother, and plaintiff's mother was not granted any custodial rights. **Everette v. Collins, 168.**

Support—noncompliance with English order—contempt—The trial court's findings supported a contempt judgment for willful noncompliance with an English child support order. **Ugochukwu v. Ugochukwu, 741.**

CITIES AND TOWNS

Annexation—street maintenance—A municipality is in compliance with N.C.G.S. § 160A-47(3)(a) where the street maintenance in the area to be annexed is the same or substantially the same as in the city limits. There was sufficient evidence here to support the trial court's finding that a city would provide the same street maintenance services within the annexed area. **Brown v. City of Winston-Salem, 497.**

Annexation—subdivision test—evidence—The trial court did not abuse its discretion by ruling in an annexation case that petitioners' spreadsheets could be admitted only for the limited purpose of showing their contentions concerning the disputed number of lots in the area to be annexed. **Brown v. City of Winston-Salem, 497.**

Annexation—subdivision test—methodology—When a city or municipality has calculated lots one way for an annexation and a challenger argues that they should be counted a different way, the critical question is whether the method utilized is calculated to provide reasonably accurate results, not whether the city followed one method or another. The trial court here properly found that petitioners offered no reliable evidence tending to show that respondent's methodology was inaccurate and not calculated to provide reasonably accurate results. **Brown v. City of Winston-Salem, 497.**

CIVIL PROCEDURE

Motion for new trial—newly discovered evidence—The trial court did not err in a nuisance case by denying defendants' motions for a new trial based upon newly discovered evidence that plaintiffs purchased additional property adjoining their property and the airport that allegedly constituted the nuisance following the jury trial and before the permanent injunction hearing in this case, and that plaintiffs had intended to purchase this property before trial, because: (1) the fact that plaintiffs purchased additional property cannot be the basis for a new trial under N.C.G.S. § 1A-1, Rules 59 and 60 since this did not occur until after the trial was completed; and (2) even if the Court of Appeals held that plaintiffs' purported intent constituted newly discovered evidence, it cannot be said that the trial court abused its discretion in denying defendants' motions in light of the fact that plaintiffs testified at trial that they had no intention of moving. **Broadbent v. Allison, 359.**

CIVIL RIGHTS

§ 1983 action—school board a person—Eleventh Amendment—In a case of first impression, a local school board was held to be a "person" within the meaning of 42 U.S.C. § 1983. It is well settled that neither the State of North Carolina nor its respective agencies are "persons" within the meaning of § 1983 when the remedy is monetary damages, but whether school boards are local entities or part of the State is not clear from Supreme Court authority, the underlying structure of the school system, the selection of school board members, or the financing system. As for Eleventh Amendment considerations, there is no argument that any recovery would come from the State treasury, and a suit against a local school board that performs important but local functions and is its own corporate body will not hinder the State's integrity within the federal system. **Ripellino v. N.C. School Bds. Ass'n, 443.**

CIVIL RIGHTS—Continued

Unequal immunity waiver decisions—issues of fact—judgment on pleadings inappropriate—Judgment on the pleadings was inappropriate in a 42 U.S.C. § 1983 action arising from a traffic control arm closing on plaintiffs' car and a school board's decision not to waive immunity. **Ripellino v. N.C. School Bds. Ass'n, 443.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Domestic violence protective order—subsequent child custody proceeding—Collateral estoppel binds the parties and precluded a judge making a custody determination from making findings contrary to those made by a prior judge who ruled on cross-petitions for domestic violence protective orders. **Doyle v. Doyle, 547.**

CONDOMINIUMS AND TOWNHOUSES

Repair after storm—required number of votes—amendment of declaration of ownership—An amendment to a condominium declaration of unit ownership was properly passed by the unit owners, but was barred by N.C.G.S. § 47C-1-102(b) and N.C.G.S. § 47-3-113(h) because it permitted a simple majority rather the statutory percentage of unit owners to make the decision not to repair a unit. **Ceplecha v. Pine Knoll Townes Phase II Ass'n, 566.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Custodial nature of confession not clear—remanded—The question of the sufficiency of the State's evidence of injury to real property was remanded where the evidence consisted of a can of spray paint that should have been suppressed as the fruit of an unreasonable stop, and the juvenile's confession in ambiguous circumstances. There is no question that the juvenile was thirteen years old and that there was no parent, guardian, custodian, or attorney at the questioning as required by N.C.G.S. § 7B-2101(b), and the issue is whether the admission was obtained during a custodial interrogation. There was no testimony and the trial court made no findings or conclusions on the issue. **In re J.L.B.M., 613.**

CONSPIRACY

First-degree burglary—robbery with dangerous weapon—separate conspiracies—The trial court did not err by concluding that the evidence was sufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant committed two separate conspiracies to commit first-degree burglary and robbery with a dangerous weapon, because: (1) the State presented evidence showing the first conspiracy was formed on the evening of 15 December 2002 when defendant agreed with two others to rob someone, and there was no evidence that this agreement consisted of more than that of robbing someone on that night; and (2) the mere fact that defendant was involved in a similar crime the next night does not indicate the two crimes were committed as part of the agreement made on 15 December 2002. **State v. Roberts, 159.**

First-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charges of conspiracy to commit first-degree murder, because: (1) defendant and his copar-

CONSPIRACY—Continued

ticipants had a clear motive for killing the victims; and (2) the events leading to the shooting sufficiently establish that the shooters were in agreement to kill the victims. **State v. Shelly, 575.**

First-degree murder—number of conspiracies—The trial court erred by concluding that there was adequate evidence of two conspiracies to commit first-degree murder, and judgment is arrested as to the second conspiracy charge because multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies. **State v. Shelly, 575.**

CONSTITUTIONAL LAW

Change in inmate's good time credits—argument general rather than specific—no due process violation—There was no due process violation in the application of new rules for an inmate's loss of good time credits. Petitioner's argument referred to a blanket statement that the new rules violated his due process rights and he did not argue that he was deprived of due process on any individual infraction. **Smith v. Beck, 757.**

Effective assistance of counsel—defense strategy—The trial court did not err by denying a first-degree murder defendant's motion for a new trial based on ineffective assistance of counsel. Trial counsel's decision to pursue a particular defense strategy cannot be second-guessed on appeal. **State v. Scanlon, 410.**

Effective assistance of counsel—dismissal of claim without prejudice—Defendant's claim of ineffective assistance of counsel based on counsel's failure to object to certain evidence is dismissed without prejudice to his filing a motion for appropriate relief asserting this claim because the Court of Appeals has no way of knowing without further investigation whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. **State v. Jones, 678.**

Effective assistance of counsel—issue not raised on appeal—Defendant received effective assistance of appellate counsel even though his counsel did not challenge his sentence for error under *Apprendi v. New Jersey*, 530 U.S. 466 and *Ring v. Arizona*, 536 U.S. 584 because, at the time, the prevailing law in North Carolina and many jurisdictions was that there was no applicability to noncapital cases. Moreover, a criminal defendant has no right to counsel past the initial appeal; defendant's argument that counsel should have pursued the case through the state and federal Supreme Courts is without merit. **State v. Simpson, 719.**

Right against self-incrimination—no standing to assert rights of third party—Although defendant contends the trial court committed plain error in a prosecution for possession of stolen property and other crimes by allowing the State to cross-examine defendant's girlfriend regarding her failure to give a statement to a detective, this assignment of error is dismissed because defendant does not have standing to assert the constitutional right against self-incrimination of a third party. **State v. Weakley, 642.**

Right of confrontation—expert testimony based on report—The introduction of an autopsy report by a nontestifying pathologist did not violate defendant's confrontation rights under *Crawford v. Washington*, 541 U.S. 36, and was

CONSTITUTIONAL LAW—Continued

not plain error. The pathologist who testified was accepted as an expert, had observed the autopsy, and relied on the report of the pathologist who performed the autopsy (who has since taken employment outside North Carolina). The report was tendered as evidence of the basis of the expert witness's opinion, and defendant was given the opportunity to cross-examine the expert. **State v. Durham, 239.**

Right of confrontation—gunshot residue—expert testimony—tests and report by nontestifying expert—harmless error—The admission of an SBI forensic chemist's expert testimony as to the opinions he formed from his review of gunshot residue tests performed on the friend of two murder victims by a nontestifying SBI forensic chemist, including his review of the report prepared by the other chemist, did not violate defendant's Sixth Amendment right of confrontation pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). Moreover, any error under *Crawford* in the admission of the nontestifying chemist's report and testimony by the SBI chemist stating the opinion of the nontestifying chemist as contained in that report was harmless beyond a reasonable doubt. **State v. Shelly, 575.**

Right of confrontation—hearsay—plain error analysis—The trial court did not commit plain error in a robbery of a convenience store with a dangerous weapon case by permitting a police officer to testify as to statements of the convenience store clerk even though defendant contends the testimony violated his Sixth Amendment right to confrontation and constituted inadmissible hearsay, because: (1) in regard to defendant's Sixth Amendment argument, defendant failed to preserve this constitutional issue for appellate review since he did not raise it at trial; and (2) in regard to defendant's hearsay contention, assuming arguendo that the trial court erred by admitting these statements, defendant nonetheless failed to establish that their admission tilted the scales so as to cause the jury to render a guilty verdict. **State v. Jones, 678.**

Separation of powers—orders of augmented Tax Review Board—Separation of powers was not violated by orders of the augmented Tax Review Board which the taxpayer contended allowed the Board to "encroach" upon the powers of the General Assembly. Moreover, the taxpayer could not challenge the constitutionality of the orders after benefitting from them. **Philip Morris USA, Inc. v. Tolson, 509.**

Unequal application of immunity waiver—no adequate remedy in negligence action—There was no adequate state remedy in a negligence action for a claim involving the alleged arbitrary and unequal application of a school board's immunity, and plaintiffs could proceed directly under the State Constitution. **Ripellino v. N.C. School Bds. Ass'n, 443.**

CONTEMPT

Failure to pay child support—attorney fees—The trial court acted within its authority in awarding reasonable attorney fees to plaintiff after finding defendant in contempt for not complying with a child support order. **Ugochukwu v. Ugochukwu, 741.**

CONTRACTS

Agreement on enforcement—arbitration or litigation—An agreement which provided for enforcement by arbitration or litigation was not ambiguous or unreasonable for lack of mutuality, and did not limit plaintiff to arbitration. **Strategic Outsourcing, Inc. v. Stacks, 247.**

Breach—no certain and definite price—no mutual assent—The trial court did not err in a breach of contract to sell property case by granting summary judgment to defendants because each plaintiff admitted by deposition that price was to be determined among the parties at a future date and defendants in their depositions agreed, and there was thus no mutual assent between the parties as to the value of defendants' property and the purchase price to be paid. **Connor v. Harless, 402.**

Representations and warranties—contractual limitations period—Defendant's counterclaim for breach of the representations and warranties section of a stock purchase agreement based upon alleged inaccurate financial information was barred by a two-year limitation in the agreement for representations and warranties where defendant did not allege that he gave notice to plaintiff within the two-year limitation period of any breach or nonconformity of any representation or warranty. **Bob Timberlake Collection, Inc. v. Edwards, 33.**

Storage of sweet potatoes—oral agreement—directed verdict—The trial court did not err by denying defendant's motion for a directed verdict on a breach of contract claim arising from the defendant's storage and disposal of plaintiff's sweet potatoes where the evidence created an issue of fact concerning the terms of the contract and the marketability of plaintiff's crop. **Wilson v. Burch Farms, Inc., 629.**

Unilateral offer—absence of acceptance and consideration—The purchaser of corporate shares did not have a contract with the seller to delay indefinitely the third payment due pursuant to the stock purchase agreement where the seller wrote a letter to the purchaser proposing to delay the third payment if the buyer made the second payment due under the agreement, the purchaser never responded to the letter or made the second payment, the purchaser thus never accepted the terms of the seller's unilateral offer, and there was no consideration to support a valid agreement. **Bob Timberlake Collection, Inc. v. Edwards, 33.**

CORPORATIONS

Fiduciary relationship—majority shareholder to minority shareholder—recapitalization—breach of fiduciary duty—burden of proof—The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim of breach of fiduciary duties owed by majority shareholders to minority shareholders where defendants' liability is not based on a finding that a stock issuance was a per se breach of fiduciary duty, but instead their liability is based on the jury's finding that defendants improperly took advantage of their majority status and that the stock issuance was not done in good faith. **Farndale Co. v. Gibellini, 60.**

Fiduciary relationship—majority shareholder to minority shareholder—recapitalization—good faith—The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim of breach of fiduciary duties

CORPORATIONS—Continued

owed by majority shareholders to minority shareholders on the issue of defendants' good faith in issuing the block of shares in August 1999, because there was sufficient evidence of circumstances and context that would allow the jury to find that it was unlikely plaintiffs would choose to invest further in the company, and defendants knew that, assuming plaintiffs did not exercise their preemptive rights, the issuance of $6,000,000 worth of stock at the depressed price per share would give them almost total ownership of the company. **Farndale Co. v. Gibellini, 60.**

Fiduciary relationship—majority shareholder to minority shareholder—responsibility for issuance of stock—The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim of breach of fiduciary duties owed by majority shareholders to minority shareholders even though defendants contend plaintiffs did not produce sufficient evidence that defendants were responsible for an August 1999 issuance of stock, because: (1) there was evidence presented at trial that a shareholder meeting was held in August 1999 for the purpose of voting to amend the pertinent company's articles of incorporation to allow the stock issuance, and that plaintiffs did not vote in favor of this amendment; and (2) there was sufficient evidence that defendants, as majority shareholders in a closely held corporation, voted to approve the amendment allowing issuance of the stock, and were generally responsible for the company's recapitalization. **Farndale Co. v. Gibellini, 60.**

Piercing the corporate veil—choice of law—reverse piercing—The question of whether to apply North Carolina or Arkansas law on corporate veil-piercing was not reached because plaintiff's allegations were sufficient to confer jurisdiction under the law of either state. As to reverse veil piercing, used here to obtain jurisdiction over a corporation where there was jurisdiction by agreement over the individual, the corporate veil may be pierced to treat two entities as the same where one is the alter ego of the other. **Strategic Outsourcing, Inc. v. Stacks, 247.**

CRIMINAL LAW

Discussions with jury—mistrial denied—The trial court did not err in a first-degree murder prosecution by denying defendant's motion for a mistrial based on improper jury discussions where there was testimony of two jurors discussing the case outside the courtroom and some evidence that a juror was laughing and talking with a family member of the victim. The court found no substantial or irreparable prejudice to defendant's case. **State v. Scanlon, 410.**

False evidence—not intentionally misleading—new trial denied—There was no error in denying a first-degree murder defendant's motion for a new trial based on a family member's alleged misrepresentation of the victim's disability status. There was competent evidence to support the trial court's finding that the testimony was not intentionally misleading. **State v. Scanlon, 410.**

Instructions—conversations with jury—The trial court did not err in a first-degree murder prosecution by not giving the jury written instructions about talking to witnesses or talking among themselves before deliberations. The court gave oral instructions; there is no requirement that they be in writing. N.C.G.S. § 15A-1236. **State v. Scanlon, 410.**

CRIMINAL LAW—Continued

Lost witness statements—mistrial denied—The denial of a mistrial was not an abuse of discretion in a prosecution for armed robbery and breaking and entering where the State lost one or two pretrial witness statements. Defendant had the opportunity to cross-examine both witnesses, one of whom was not present during the robbery; that witness testified that she had never before seen defendant and the other did not identify defendant as a participant in the robbery during a pretrial photographic line-up or in court; and the State presented substantial evidence of defendant's guilt from other witnesses. **State v. Jaaber, 752.**

Motion for appropriate relief—prosecutor's misrepresentation of the evidence—defense failure to correct—There was no error in denying a first-degree murder defendant's motion for appropriate relief based on the State's misrepresentation of the evidence and minimization of the life-threatening nature of the victim's medical condition. Defense counsel testified that he had access to the same evidence as the prosecution, but failed to use the information to correct the alleged misrepresentations made by prosecuting witnesses and by the prosecutor. **State v. Scanlon, 410.**

Motion to remove district attorney's office—removal of evidence—no misconduct—The trial court in a first-degree murder prosecution did not abuse its discretion by denying defendant's motion to disqualify the district attorney's office as a result of the alleged removal of evidence from the police department property room and placement of the evidence in a locked closet in the prosecutor's office. **State v. Scanlon, 410.**

Motion to suppress evidence for prosecutorial misconduct—denied—The trial court did not err by denying a first-degree murder defendant's motion to suppress evidence based upon allegations of professional misconduct by prosecutors. **State v. Scanlon, 410.**

Prosecutor's argument—alleged misrepresentations of evidence—not prejudicial—There was no prejudicial error in a first-degree murder prosecution as a result of the prosecutor's alleged misrepresentations of the significance of defendant's pubic hair found in the victim's bed. **State v. Scanlon, 410.**

Prosecutor's argument—characterization of evidence and witnesses—The bounds of permissible prosecutorial argument were not exceeded by an argument that the defense expert's testimony was "from another planet" and "actually cracks me up." Nor were the prosecutor's complementary remarks about the State's witnesses, specifically the victim's family, so improper as to require ex mero motu intervention. **State v. Scanlon, 410.**

Prosecutor's argument—entry into victim's house—The prosecution in a first-degree murder prosecution properly argued its theory of a duplicate key used to gain entry of the victim's house where evidence was presented that there were no signs of forced entry and that defendant had entered the victim's house. **State v. Scanlon, 410.**

Prosecutor's argument—not too inflammatory—A prosecutor's closing argument in a first-degree murder prosecution was not so inflammatory as to require the trial court to intervene ex mero motu where the prosecutor argued that defendant had attempted to sexually assault the victim's dead or dying body

CRIMINAL LAW—Continued

where evidence was presented that rape kit tests performed on the victim were negative for semen or recent sexual activity. **State v. Scanlon, 410.**

Prosecutor's argument—tampering with evidence—response to defense argument—The trial court did not abuse its discretion by not intervening ex mero motu in the prosecutor's closing arguments about tampering with the evidence. The State's argument was in response to a defense argument, defense counsel did not object or respond, and defendant failed to show prejudice. **State v. Scanlon, 410.**

Question from jury—written ex parte response—The trial court did not err in an armed robbery prosecution by answering a question from the jury with a written response delivered by a bailiff. Defendant explicitly approved the procedure and defense counsel approved of the substance of the communication. **State v. Corum, 150.**

Reinstruction—abbreviated statement of elements—no error in context—There was no prejudicial error in a prosecution for first-degree murder where the jury asked for written copies of the elements of the offense, the court gave the jury a simplified element sheet for first-degree murder which excluded proximate causation, neither party objected when given the opportunity to do so, and the court instructed the jury to put the simplified elements in the context of the charge. Assuming the instruction was improper, isolated erroneous portions of a charge will not alone afford grounds for reversal if the charge as a whole presents the law fairly and clearly. **State v. Scanlon, 410.**

Verdict—stealing credit cards—consistency with indictment—There was no error where defendant contended the State failed to prove that he stole credit cards listed in the indictment but not specified in the verdict form or jury instructions. A verdict is deemed sufficient if it can be properly understood by reference to the indictment, evidence, and jury instructions, and a comparison of the indictment and jury instructions here reveals that they are consistent. **State v. Scanlon, 410.**

DAMAGES AND REMEDIES

Punitive damages—motion for directed verdict—unwashed sperm specimen in insemination procedure—The trial court did not err in a suit seeking damages as a result of injuries resulting from an unwashed sperm specimen in an insemination procedure by denying defendant-appellants' directed verdict motion at the close of all evidence on the issue of punitive damages because appellant nurse admitted that though she was aware of the safety protocol in place at appellant health center, she violated that protocol in several ways including failing to examine the sperm specimen under a microscope prior to insemination, which evidence alone constituted more than a scintilla of evidence regarding whether to submit the question of punitive damages to the jury. **Chambliss v. Health Sciences Found., Inc., 388.**

Punitive damages—motion for judgment notwithstanding verdict—unwashed sperm specimen in insemination procedure—The trial court did not err in a suit seeking damages as a result of injuries resulting from an unwashed sperm specimen in an insemination procedure by denying defendant-appellants' motion for judgment notwithstanding the verdict on the issue of puni-

DAMAGES AND REMEDIES—Continued

tive damages because there was sufficient evidence for the jury to determine that appellant nurse acted willfully and wantonly with reckless indifference to the safety of her patient when she knowingly, consciously, and deliberately used an unlabeled syringe containing an unknown substance in plaintiff's insemination procedure knowing that to do so would expose plaintiff to a risk of harm. **Chambliss v. Health Sciences Found., Inc., 388.**

Punitive damages—motion for new trial—The trial court did not err in a suit seeking damages as a result of injuries resulting from an unwashed sperm specimen in an insemination procedure by denying defendant-appellants' motion for a new trial because the trial court acted within its discretion. **Chambliss v. Health Sciences Found., Inc., 388.**

Punitive damages—motion to reduce or set aside award—The trial court did not err in a suit seeking damages as a result of injuries resulting from an unwashed sperm specimen in an insemination procedure by denying defendant-appellants' request under N.C.G.S. § 1D-50 to set aside or reduce the punitive damages award. **Chambliss v. Health Sciences Found., Inc., 388.**

Sweet potato storage and disposal—USDA payments and verdict for negligence—collateral source rule—not applicable—The trial court erred in an action arising from defendant's storage and disposal of plaintiff's sweet potatoes by granting a set-off for amounts plaintiff received from the USDA Quality Assurance Program. The USDA payments and the jury's verdict were for different losses, and the collateral source rule does not apply. **Wilson v. Burch Farms, Inc., 629.**

Unfair trade practices—loss of privacy—emotional distress—not pled—A new trial was awarded on damages in an action for unfair and deceptive trade practices arising from a parent's purchase of a mobile home for his daughter where the court allowed the jury to consider loss of privacy and mental and emotional distress even though neither the claims nor the supporting facts were pled, there was no attempt to amend the complaint to include these claims, and defendant objected to the trial court's jury instruction on emotional distress. **Walker v. Fleetwood Homes of N.C., Inc., 668.**

DRUGS

Conspiracy to traffic—instructions—underlying crime named—There was no plain error in a prosecution for conspiracy to traffic in heroin where a review of the trial court's instructions reveals that the court specifically named the crime alleged to be the object of the conspiracy, contrary to defendant Sanchez's contention on appeal. **State v. Lopez, 538.**

Conspiracy to traffic—sufficiency of evidence—There was sufficient evidence for charges of trafficking in heroin and conspiracy to traffic where neither defendant had exclusive control of the premises to which a refrigerator containing heroin was shipped, but sufficient other incriminating circumstances were shown to provide evidence of knowledge and constructive possession. **State v. Lopez, 538.**

Possession of Valium—possession of marijuana—possession of drug paraphernalia—possession of methamphetamine—motion to dismiss—suffi-

DRUGS—Continued

ciency of evidence—The trial court did not err by denying defendant's motion to dismiss the charges of possession of Valium, possession of marijuana, possession of drug paraphernalia, and possession of methamphetamine where defendant leased and resided in the house where the controlled substances and drug paraphernalia were found, and the State presented sufficient evidence placing defendant within such close juxtaposition to the narcotic drugs to justify the jury in concluding that they were in his possession. **State v. Weakley, 642.**

Trafficking—awareness of illicit substance—testimony presented—instruction erroneously denied—There was plain error and a defendant convicted of trafficking in heroin was entitled to a new trial where he testified that he was not aware of the heroin in a refrigerator a third party had paid him to receive, he properly requested an instruction that he was guilty only if he knew the refrigerator contained an illicit substance, and he did not receive that instruction. **State v. Lopez, 538.**

Trafficking—no awareness of illicit substance—evidence not presented—issue not raised at trial—A heroin trafficking defendant who did not present evidence that he was unaware of the contents of a package and did not raise the issue at trial did not receive the benefit of plain error in the trial court's failure to instruct on knowledge of an illicit substance. **State v. Lopez, 538.**

ENVIRONMENTAL LAW

Sedimentation and erosion—forestry exemption—The forestry exemption in the Sedimentation Pollution Control Act applies, on its face, to activities specifically undertaken for the production and harvesting of timber and timber products, not to drainage activities for other purposes. A superior court conclusion that activities to generally improve drainage do not qualify for the exemption was not error. **Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 594.**

EVIDENCE

Chain of custody—computers—There was no need for testimony setting forth a detailed chain of custody for defendant's computers, and the child pornography within, in a prosecution for statutory rape, burglary, and other offenses. Once the computers were admitted, any doubts were to be resolved by the jury. Defendant did not identify on appeal any reason to believe that the computers' may have been altered. **State v. Brown, 72.**

Child pornography—admission not prejudicial—There was no prejudice in a prosecution for statutory rape, burglary, and other offenses in the admission of sexual photographs of children from defendant's computers. Defendant twice confessed to engaging in sex with the child, his e-mail and appearance at her school left no doubt that he knew her age, he took great efforts to conceal himself from her parents, and he told the child that he could spend 20 years in jail if he was caught with her. **State v. Brown, 72.**

Cross-examination—expert witness—impeachment—opening the door—The trial court did not abuse its discretion in a negligence case arising out of plaintiff's exposure to asbestos at work by denying defendant the opportunity to cross-examine plaintiff's pathology expert regarding tests he ordered and re-

EVIDENCE—Continued

viewed, by allowing plaintiff to cross-examine and impeach defendant's expert, by admitting testimony about photographs of a steam era locomotive, and by allowing plaintiff to cross-examine his own witness by playing the cross-examination of a doctor's videotaped deposition which was initially taken by defendant. **Williams v. CSX Transp., Inc., 330.**

Denial of motion to prevent expert witness from testifying—probable blood alcohol content prior to breathalyzer—The trial court did not abuse its discretion in a driving while impaired case by denying defendant's motion to prevent the State from calling its expert witness to give extrapolation testimony regarding defendant's probable blood alcohol content at times prior to a breathalyzer test. **State v. Fuller, 104.**

Exhibit—exclusion—two dimensional—The exclusion of a defense exhibit showing the trajectory of the bullets that hit the victim was not an abuse of discretion where the trial court stated that the exhibit was two dimensional, and possibly misleading, as opposed to the pathologist's three dimensional testimony. **State v. Durham, 239.**

Exhibit—still photograph—The trial court did not err in an airport nuisance case by admitting plaintiffs' exhibit of a still photograph of an airplane flying over plaintiffs' property, even though defendants contend it does not fairly and accurately depict what it purports to show, because a jury is able to comprehend that when one object in a photograph is small relative to another object, the relatively smaller object is farther away. **Broadbent v. Allison, 359.**

Expert calculation document—publication to jury—relevant time—The trial court did not err in a driving while impaired case by allowing the State to publish its expert's calculation document to the jury regarding defendant's blood alcohol concentration at the time she was first contacted by the officers, over defendant's objection, based on the same reasoning the Court of Appeals has already used in this case regarding the definition of relevant time. **State v. Fuller, 104.**

Expert opinion—blood alcohol concentration at relevant time—The trial court did not err in a driving while impaired case by allowing over defendant's objection the State's expert to offer his opinion as to defendant's blood alcohol concentration at the time she was first contacted by the officers, because: (1) for purposes of N.C.G.S. § 20-4.01(33a), the term relevant time after the driving refers to any time after the driving in which the driver still has in his body alcohol consumed before or during the driving; and (2) there was no evidence that defendant consumed any alcoholic beverages between the time of the accident and the arrival of the officers, and consequently, the officers' arrival time meets the statutory definition of a relevant time after the driving. **State v. Fuller, 104.**

Hearsay—victim's statements about defendant—residual exception—sufficiency of findings—The trial court in a prosecution for first-degree murder made sufficient findings to support its admission of statements about defendant made by the victim to a probation officer and to law officers under the residual hearsay exception set forth in N.C.G.S. § 8C-1, Rule 804(b)(5). **State v. Scanlon, 410.**

EVIDENCE—Continued

Hearsay—victim's statements about defendant—residual exception—sufficiency of findings—The trial court in a prosecution for first-degree murder made sufficient findings to support its admission of testimony by the victim's sister relating statements the victim made to her about defendant under the residual hearsay exception set forth in N.C.G.S. § 8C-1, Rule 804(b)(5). Although the trial court made insufficient findings for the admission of testimony by the sister about a statement made to the victim by a third party because the court made no findings as to the third party's unavailability and the reliability of her statement, the admission of such statement was not prejudicial error in light of the overwhelming evidence of defendant's guilt. **State v. Scanlon, 410.**

Hearsay—victim's statements admitted through testimony of others—state of mind exception—The trial court did not err in a first-degree murder prosecution by admitting statements of the victim through other witnesses. They were admissible, at the least, to show state of mind. **State v. Scanlon, 410.**

Prior crimes or bad acts—common plan or scheme—The trial court did not err in an armed robbery prosecution by admitting evidence of a prior robbery where the two robberies occurred in neighboring counties at night within a two-day period, both robberies occurred at convenience stores, and the perpetrator of both wore gloves and a blue hood or mask of similar description. **State v. Corum, 150.**

Prior crimes or bad acts—second robbery—identity—The trial court did not commit plain error in a robbery of a convenience store with a dangerous weapon case by failing to exclude testimony regarding a second robbery involving defendant because the similarities with the second robbery, only two weeks later, were sufficient to identify defendant as the perpetrator of both when it again involved defendant and a coparticipant working together, plus the unusual but basically same scenario of one robber, who knew the victim, distracting the victim while the other robber entered the building to commit the robbery. **State v. Jones, 678.**

Prior crimes or bad acts—stale convictions more than ten years old—actual notice—sufficiency of findings—The trial court did not abuse its discretion in a double first-degree murder and double conspiracy to commit first-degree murder case by allowing the State to impeach defendant on cross-examination with evidence of prior convictions that were more than ten years old, because: (1) although the State failed to give defendant written notice of its intent to introduce evidence of defendant's old convictions as required by N.C.G.S. § 8C-1, Rule 609, there was ample evidence that defendant had actual notice of the State's intent to use his prior convictions since the defense submitted a motion a month before trial to the judge to prohibit the impeachment of defendant by stale convictions; (2) the State provided a copy of defendant's record to the defense as a part of open file discovery with the implication that it would be used at trial and the spirit and stated purpose of Rule 609(b) regarding notice were met; and (3) the trial court's findings are at least marginally sufficient under Rule 609(b) to support the admission of the prior convictions. **State v. Shelly, 575.**

Right to confrontation—hearsay—plain error analysis—The trial court did not commit plain error in a robbery of a convenience store with a dangerous weapon case by permitting a police officer to testify as to statements of the con-

EVIDENCE—Continued

venience store clerk even though defendant contends the testimony violated his Sixth Amendment right to confrontation and constituted inadmissible hearsay, because: (1) in regard to defendant's Sixth Amendment argument, defendant failed to preserve this constitutional issue for appellate review since he did not raise it at trial; and (2) in regard to defendant's hearsay contention, assuming arguendo that the trial court erred by admitting these statements, defendant nonetheless failed to establish that their admission tilted the scales so as to cause the jury to render a guilty verdict. **State v. Jones, 678.**

Testimony—medical literature concerning dangers of asbestos exposure—foreseeability—actual or constructive knowledge—The trial court did not err in a negligence case arising out of plaintiff's exposure to asbestos at work by admitting testimony regarding the medical literature concerning the dangers of asbestos exposure without requiring a showing that defendant had actual or constructive knowledge about the potential harm, because: (1) from the medical literature presented, the jury could infer that defendant had knowledge of the harm from asbestos; and (2) there was testimony that even after OSHA regulations required that workers be protected from asbestos exposure, plaintiff and his coworkers were not informed about ways to protect themselves. **Williams v. CSX Transp., Inc., 330.**

Testimony—medical opinions—qualifications—causation—asbestos exposure—lay witness—The trial court did not abuse its discretion in a negligence case arising out of plaintiff's exposure to asbestos at work by admitting testimony about causation and exposure by permitting nonphysicians including a cell biologist and an epidemiologist to provide expert medical opinions as to causation, and by allowing lay witnesses' testimony regarding asbestos exposure. **Williams v. CSX Transp., Inc., 330.**

Videotape—edited—The trial court did not err in an airport nuisance case by admitting evidence of an edited videotape of planes flying over plaintiffs' property. **Broadbent v. Allison, 359.**

Videotape—failure to lay proper foundation—plain error analysis—The trial court did not commit plain error in a robbery of a convenience store with a dangerous weapon case by admitting into evidence a surveillance videotape of the crime although the State failed to present either evidence regarding the maintenance and operation of the recording equipment or testimony that the videotape accurately portrayed the robbery. **State v. Jones, 678.**

FIDUCIARY RELATIONSHIP

Breach of fiduciary duty—failure to establish existence of fiduciary relationship—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' breach of fiduciary duty claim because a fiduciary relationship will not exist between parties in equal bargaining positions dealing at arm's length, even though they are mutually interdependent businesses. **Strickland v. Lawrence, 656.**

FIREARMS AND OTHER WEAPONS

Concealed box cutter—fruit of illegal seizure—A juvenile's motion to dismiss a charge of carrying a concealed weapon should have been dismissed where

FIREARMS AND OTHER WEAPONS—Continued

the only evidence of a concealed weapon was a box cutter obtained as the fruit of an illegal stop and the officer's testimony about the seizure of the box cutter. **In re J.L.B.M., 613.**

Possession of stolen firearm—motion to dismiss—sufficiency of evidence—The trial court erred by denying defendant's motion to dismiss the charge of possession of a stolen firearm under N.C.G.S. § 14-71.1, and this conviction is reversed, because: (1) the State presented no evidence that the firearms were stolen pursuant to a breaking or entering or that defendant knew or should have known the firearms were stolen; (2) the trial court dismissed defendant's charges of breaking and entering and larceny after breaking and entering; and (3) the State presented no evidence of when the firearms were stolen or how long they had been in defendant's possession. **State v. Weakley, 642.**

FRAUD

Actual—missing sales tickets—failure to show damages—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' actual fraud claim, because: (1) although plaintiffs' forecast of evidence regarding the allegation that defendant Lawrence misrepresented the amount of money he took in from sales of the sandrock and dump truck loads includes evidence that tickets used to record the sales were missing, plaintiffs failed to show that any of the missing tickets actually represented a load of sandrock or a dump truck load for which plaintiffs were not paid; and (2) while a review of the books disclosed a net underpayment of rent due plaintiffs, defendant Lawrence paid plaintiffs the amount due them as disclosed by the review, and thus, plaintiffs have not suffered any damages from the underpayment disclosed. **Strickland v. Lawrence, 656.**

Constructive—failure to show relationship of trust and confidence—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' constructive fraud claim because plaintiffs cannot establish defendant Lawrence owed them a fiduciary duty, and therefore, they cannot establish the element of a relationship of trust and confidence required to maintain a claim for constructive fraud. **Strickland v. Lawrence, 656.**

Failure to allege elements with particularity—Defendant failed to state a counterclaim for fraud in plaintiff's action for breach of a stock purchase agreement because he failed to plead with particularity the elements of fraud where he alleged that representatives of plaintiff gave him false information concerning the corporation, but defendant did not identify which representatives gave him false information or specifically allege where or when he received the information. **Bob Timberlake Collection, Inc. v. Edwards, 33.**

Negligent misrepresentation—insufficient allegations—Defendant failed to state a counterclaim for negligent misrepresentation in plaintiff's action for breach of a stock purchase agreement where defendant failed to allege that plaintiff or its representatives owed any duty to defendant or breached any duty owed, and there was no allegation that information provided to defendant was prepared without reasonable care or that any supposed breach was a proximate cause of injury to defendant. **Bob Timberlake Collection, Inc. v. Edwards, 33.**

HOMICIDE

Felony murder—sufficiency of evidence—acting in concert—trafficking in cocaine while also possessing deadly weapon—There was sufficient evidence to support defendant's conviction of felony murder based on the theory of acting in concert with his cousin and based on the underlying felony of trafficking in cocaine by possession of more than 400 grams while also possessing a deadly weapon where the evidence tended to show that defendant and his cousin planned to rob the victim of his cocaine and money, the cousin shot the victim when he resisted the robbery, and the cousin constructively possessed the cocaine after shooting the victim, even if defendant did not know his cousin had a gun and did not intend to join his cousin in shooting the victim. **Broadbent v. Allison, 359.**

First-degree murder—defendant present at victim's death—evidence sufficient—There was sufficient evidence in a first-degree murder case for a jury to find beyond a reasonable doubt that defendant was present at the time of the victim's death. **State v. Scanlon, 410.**

First-degree murder—failure to instruct on death by accident—no plain error—There was no plain error in a first-degree murder prosecution where the court did not instruct the jury on death by accident. Although a defense expert testified that the victim died of sexual asphyxia, so that the judge should have instructed on accident, the outcome was not affected because defense counsel explained the accident theory in closing argument. **State v. Scanlon, 410.**

First-degree murder—refusal to instruct on involuntary manslaughter—There was no plain error in a first-degree murder prosecution in denying defendant's request to instruct the jurors on the lesser-included offense of involuntary manslaughter. A defendant is not entitled to have the jury consider a lesser offense when his sole defense is one of alibi; this defendant's sole and unequivocal defense was that he was not present at the time of death. **State v. Scanlon, 410.**

First-degree murder—sufficiency of evidence—cause of death—The State's evidence was sufficient to prove first-degree murder, and the trial court properly denied defendant's motion to dismiss, where the State's expert testified the cause of death was asphyxia (the victim was found with a plastic bag tied over her head) and that the manner of death was homicide, based on information from investigating officers about the scene. Neither the victim's past heart problems nor the traces of cocaine in her blood altered his opinion. **State v. Scanlon, 410.**

Lesser included offense—not supported by evidence—The evidence at trial could not have supported a verdict of voluntary manslaughter and the trial court did not err by not instructing the jury on that lesser included offense in a prosecution for second-degree murder. Although defendant contended that the shooting occurred during a struggle after an earlier confrontation, there was evidence that defendant initiated the confrontation, evidence that tended to show an unlawful killing with malice, and the defense was that defendant did not shoot the victim. **State v. Durham, 239.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—agency decision—findings of fact—Although petitioner contends respondent North Carolina Department of Health and Human

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

Services (DHHS) correctly found that petitioner conformed to Criterion 5 for a certificate of need application but certain of the findings of fact were allegedly misleading and failed to include facts shown by petitioner, DHHS stated in its final decision that petitioner was conforming to Criterion 5 and nothing further was required. **Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs., 46.**

Certificate of need—agency decision—MRI scanner—Criterion 3—reasonable projections—The whole record test revealed that respondent North Carolina Department of Health and Human Services did not err by granting respondent-intervenor a certificate of need for an additional MRI scanner based on finding that its application conformed to Criterion 3. **Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs., 46.**

Certificate of need—agency decision—MRI scanner—Criterion 5—funds for capital and operating needs—financial feasibility—The whole record test revealed that respondent North Carolina Department of Health and Human Services (DHHS) did not err by granting respondent-intervenor a certificate of need (CON) for an additional MRI scanner based on finding that its application conformed to N.C.G.S. § 131E-183(a)(5) (Criterion 5), because: (1) although petitioner asserts that respondent-intervenor's revenues to show financial feasibility were based on an overstated procedural volume used for Criterion 3, the Court of Appeals already concluded there was substantial evidence to support DHHS's findings regarding Criterion 3; and (2) the pertinent expired proposed lease agreement for the MRI machine does not go to whether respondent-intervenor can finance the project or the availability of funds, but goes to the projection of costs and charges. **Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs., 46.**

Certificate of need—agency decision—MRI scanner—Criterion 18a—expected effects of proposed services—The whole record test revealed that respondent North Carolina Department of Health and Human Services did not err by granting respondent-intervenor a certificate of need for an additional MRI scanner based on finding that its application conformed to N.C.G.S. § 131E-183(a)(4), (6), and (18a) (Criteria 4, 6, and 18a) where respondent-intervenor demonstrated the cost effectiveness of its project and the positive effect it would have on competition in the area, and it also projected the lowest net revenue per procedure of any applicant. **Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs., 46.**

Certificate of need—agency decision—MRI scanner—reasonable basis to choose one application over another—The whole record test revealed that respondent North Carolina Department of Health and Human Services's (DHHS) preference for respondent-intervenor for a certificate of need over petitioner had a reasonable basis in the record, because: (1) there was evidence in the record that the service area would benefit from having an additional MRI scanner in an outpatient setting and that respondent-intervenor would serve a greater percentage of Medicare patients (underserved groups); (2) evidence in the record demonstrated that an open MRI scanner in the service area was the most effective alternative for the service area, and respondent-intervenor proposed the use of such a scanner and also proposed the lowest net revenue per procedure; and (3) there were reasons to support both applications and deference must be given

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

to the agency's decision where it chooses between two reasonable alternatives. **Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs., 46.**

Certificate of need—agency decision—MRI scanner—unlawful self-referrals—A de novo review revealed that respondent North Carolina Department of Health and Human Services (DHHS) did not err by failing to find that respondent-intervenor's certificate of need application for MRI services was based on alleged improper self-referrals in violation of N.C.G.S. § 90-406, because: (1) there is no provision in N.C.G.S. § 131E-183, nor Chapter 131E, which permits DHHS to independently assess whether the applicant is conforming to other statutes; and (2) N.C.G.S. § 90-407 states that the authority to enforce unlawful self-referrals is vested with the Attorney General, and subject to disciplinary action from the applicable Board created in Chapter 90 of Article 28 of the General Statutes. **Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs., 46.**

HUSBAND AND WIFE

Invalidation of prenuptial agreement—unconscionability—The trial court did not err by granting summary judgment in favor of defendant in plaintiff wife's declaratory judgment action against decedent's estate seeking to invalidate a prenuptial agreement on the basis that the agreement was void under N.C.G.S. § 52B-7(a)(2) as unconscionable, because: (1) such an agreement between individuals with prior marriages and offspring from those unions, recognizing that both parties had children from previous marriages and possessed separate property obtained through inheritance and other means, is not so oppressive that no reasonable person would make such terms on the one hand, and no honest and fair person would accept them on the other; and (2) as a matter of law, the terms of the agreement are not substantively unconscionable. **Kornegay v. Robinson, 19.**

Invalidation of prenuptial agreement—voluntariness—full disclosure—The trial court erred by granting summary judgment in favor of defendant in plaintiff wife's declaratory judgment action against decedent's estate seeking to invalidate a prenuptial agreement based on the fact that the agreement was void under N.C.G.S. § 52B-7(a)(1) because material issues of fact exist as to whether the execution of the agreement was voluntary. **Kornegay v. Robinson, 19.**

IMMUNITY

Participation in School Board Trust—no waiver of governmental immunity—Binding precedents bar the argument that defendant school board waived governmental immunity by entering into a general trust fund agreement with the North Carolina School Board Trust. **Willet v. Chatham Cty. Bd. of Educ., 268.**

School board—basketball game with charged admission—not a proprietary function—not a waiver—Defendant school board did not waive its governmental immunity by operating a basketball game for which admission was charged. The operation of an athletic program is an authority conferred on the school board by the legislature and did not involve a proprietary operation. **Willet v. Chatham Cty. Bd. of Educ., 268.**

School board—failure to maintain school property—N.C.G.S. § 115C-24 does not implicitly create a private right of action against a local board of educa-

IMMUNITY—Continued

tion for injuries arising from the board's alleged failure to maintain school property in proper condition for use. **Willet v. Chatham Cty. Bd. of Educ., 268.**

Sovereign—building inspection—insurance coverage—Defendant town waived sovereign immunity by its purchase of liability insurance and the trial court did not err by denying the town's motion to dismiss a claim for a negligent building inspection arising from an accident in a restaurant with an "unrestrained" deep-fat fryer. In determining whether plaintiff's injuries were caused by an occurrence under the insurance policy, the focus should be on whether plaintiff's damages were unexpected and unintended rather than on the precedent negligent acts of the building inspector. **Davis v. Dibartolo, 142.**

Unequal protection in immunity waivers—material issue of fact—pleadings sufficient—There was a material issue of fact as to whether a school board applied reasonable criteria in waiving immunity, and judgment on the pleadings was not appropriate. **Ripellino v. N.C. School Bds. Ass'n, 443.**

INJUNCTION

Temporary or permanent—avigation easement—The trial court erred in an airport nuisance case by denying plaintiffs' motion for a permanent injunction and by granting defendants' request for an avigation easement, and the case is remanded for a new trial on damages and a new injunction hearing, because the Court of Appeals is unable to ascertain from the record whether the jury's award constituted temporary or permanent damages, or both. **Broadbent v. Allison, 359.**

INSURANCE

Commercial liability policy—automobile exclusion—applicability to negligent hiring, supervision and retention claims—The automobile exclusion in a commercial general liability insurance policy issued to a construction company for bodily injury or property damage "arising out of" the ownership, maintenance, use or entrustment of any automobile applied to exclude coverage for defendants' claims for negligent hiring supervision and retention of an employee of the insured who drove a company automobile while intoxicated, crossed the median, and struck the vehicle in which defendants were riding. **Builders Mut. Ins. Co. v. North Main Constr., Ltd., 83.**

Synthetic stucco—action against adjustor by third-party—An independent adjuster for a stucco contractor's liability insurers owed no duty to homeowners as third-party claimants and thus could not be held liable to them on a negligence theory for representations made by the adjuster regarding the stucco contractor's ability to do stucco work pursuant to the homeowners' settlement agreement with the insurer. **Koch v. Bell, Lewis & Assocs., Inc., 736.**

JUDGMENTS

Clerical errors—dates of offenses—A judgment was remanded for correction of clerical errors involving the dates of offenses. **State v. Brown, 72.**

Offer of judgment—acceptance required within ten days—The trial court erred in a negligence action arising out of an automobile accident by finding

JUDGMENTS—Continued

plaintiff's acceptance of an offer of judgment to be valid based on the trial court's ex parte extension of time to accept defendants' offer of judgment. **Ennis v. Henderson, 762.**

Preliminary injunction against transfer of assets—prior to execution—The trial court erred by granting a preliminary injunction against the conveyance of land by defendants after plaintiffs had obtained a judgment for unfair and deceptive trade practices. The General Assembly has provided creditors with the means to address problems with the execution of judgments, but only after execution has been returned wholly or partially unsatisfied (N.C.G.S. § 1-352), or the terms of N.C.G.S. § 1-355 are met. **Harris v. Pinewood Dev. Corp., 704.**

JURISDICTION

Minimum contacts—agreement for jurisdiction—Minimum contacts analysis was not necessary where defendant Stacks consented to personal jurisdiction in North Carolina in the agreement in question. **Strategic Outsourcing, Inc. v. Stacks, 247.**

Minimum contacts—alienation of affections—defendant in Georgia—Sufficient contacts existed that defendant's due process rights were not violated by the exercise of in personam jurisdiction in an alienation of affections case in which defendant lived in Georgia and plaintiff in North Carolina. **Fox v. Gibson, 554.**

Personal—minimum contacts—not sufficient—A finding of in personam jurisdiction violated defendants' due process rights where defendants' contacts with the state consisted of telephone calls and a few proposed contracts, although no contract was ever entered into. Defendants performed no act to purposefully avail themselves of the privilege of conducting activities within North Carolina. **A.R. Haire, Inc. v. St. Denis, 255.**

Personal—motion to dismiss denied—conclusion that claim arose from activities in North Carolina—The trial court did not err by denying a motion to dismiss for lack of personal jurisdiction in an alienation of affections action where defendant lived in Georgia and plaintiff in North Carolina. With one exception, there was evidence to support the court's findings and its conclusion that the action arose from activities in North Carolina. **Fox v. Gibson, 554.**

Personal—order determining—standard of review—The standard of review of an order determining personal jurisdiction is whether the findings are supported by competent evidence. **Fox v. Gibson, 554.**

Personal—specific—long-arm statute—minimum contacts—The trial court erred by granting defendants' motion to dismiss based on the erroneous conclusion that it lacked personal jurisdiction in a case where plaintiffs claim they were economically injured by defendant South Carolina law firm's failure to advise them regarding the anti-deficiency statute for a loan restructuring in North Carolina, because: (1) plaintiffs made a prima facie case for personal jurisdiction under the long-arm statute by showing that defendants' activities regarding the loan, including correspondence and phone conversations with the seller's North Carolina counsel, constitute service activities being carried on within North Carolina by or on behalf of defendants; and (2) defendants had sufficient

JURISDICTION—Continued

contacts with North Carolina even though they have never been physically present in North Carolina. **Summit Lodging, LLC v. Jones, Spitz, Moorhead, Baird & Albergotti, P.A., 697.**

JURY

Juror misconduct—motion for appropriate relief—improper consideration of dictionary definitions—extraneous information under Rule 606(b)—right to confrontation—The trial court did not err in a second-degree murder and assault with a deadly weapon inflicting serious injury case by denying defendant's motion for appropriate relief seeking a new trial based on juror misconduct arising from the fact that jurors considered dictionary definitions during deliberations, even though defendant contends the juror affidavits contain extraneous information and that his Sixth Amendment right to confrontation was violated, because: (1) although the jury's conduct was improper, the jury's use of the dictionary did not prejudice defendant when there was no reasonable possibility that the verdict would have been different absent the jury consulting the dictionary; (2) definitions in standard dictionaries are not within our Supreme Court's contemplation of extraneous information under N.C.G.S. § 8C-1, Rule 606(b); and (3) the reading of the dictionary definitions did not violate defendant's right to confrontation when the information considered by the jury did not discredit defendant's testimony or witnesses, and it concerned legal terminology rather than evidence developed at trial. **State v. Bauberger, 465.**

JUVENILES

Commitment order—maximum term omitted from written order—A juvenile commitment order was remanded for correction of a clerical error where the court orally found that the commitment could not exceed the juvenile's eighteenth birthday, but omitted the finding from the written order. **In re J.L.B.M., 613.**

Release pending appeal denied—compelling reason not stated—remanded—An order denying the release of a juvenile pending appeal which did not state compelling reasons was remanded for appropriate findings. **In re J.L.B.M., 613.**

KIDNAPPING

Second-degree—sufficiency of evidence—The trial court did not err by concluding that the evidence was sufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant committed two counts of second-degree kidnapping where the evidence at trial was sufficient to establish that: (1) the removal of one of the victims to the bathroom and the binding of his hands were not acts necessarily inherent in the commission of the other felonies of robbery, sexual offense, and burglary; and (2) after defendant sexually assaulted another victim, her hands were bound and she was left tied up. **State v. Roberts, 159.**

LARCENY

Credit cards—duplicative judgments—The trial court erred by duplicating judgments for both larceny and possession of credit cards and an automobile.

LARCENY—Continued

While a defendant may be charged with larceny, receiving, and possession of the same property, a defendant may be convicted for only one of those offenses. **State v. Scanlon, 410.**

Evidence sufficient—possession of credit cards—There was sufficient evidence for the trial court to deny defendant's motion to dismiss charges of felonious larceny and possession of victim's credit cards. **State v. Scanlon, 410.**

Sufficiency of evidence—inference that deceased victim did not consent to use of vehicle—The trial court properly denied defendant's motion to dismiss charges of felonious larceny and possession of the victim's automobile where defendant admitted abandoning the victim's car in New Orleans and the jury could infer from the evidence that the victim did not consent to his use of the vehicle. **State v. Scanlon, 410.**

MARRIAGE

Annulment—judicial estoppel—The trial court correctly concluded that judicial estoppel applies and correctly refused to annul a marriage performed by a Cherokee shaman who was also ordained minister in the Universal Life Church, even though the marriage was not properly solemnized pursuant to statute. The court had accepted plaintiff's assertion that he was married to defendant when he adopted defendant's daughter, and plaintiff's inconsistent position would impose an unfair detriment on defendant. **Pickard v. Pickard, 193.**

MEDICAL MALPRACTICE

Statute of limitations—continuous course of treatment doctrine—The trial court erred in a medical malpractice case by granting defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) based on the expiration of the statute of limitations because, taking plaintiff's allegations as true and reviewing them in the light most favorable to plaintiff, it does not appear to a certainty that plaintiff is not entitled to the benefit of the continuing course of treatment doctrine to overcome defendants' statute of limitations defense. **Locklear v. Lanuti, 380.**

MOTOR VEHICLES

Crossing center line and striking pedestrian—directed verdict denied—A directed verdict for defendants was correctly denied in a negligence action arising from a pedestrian being struck at night by an automobile. The evidence permits an inference that defendant driver was negligent in crossing the center line and completely leaving the road to avoid a roaming black dog. **Ligon v. Strickland, 132.**

Driving while impaired—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired at the close of all evidence, because the opinion of the State's expert that defendant's blood alcohol concentration at the time the officers first made contact with her was .08 is, alone, sufficient to withstand dismissal. **State v. Fuller, 104.**

MOTOR VEHICLES—Continued

Driving while impaired—motion for mistrial—mentioning Alco-Sensor test—The trial court did not abuse its discretion in a driving while impaired case by denying defendant's motion for a mistrial after an officer referred to an Alco-Sensor test during his testimony. **State v. Fuller, 104.**

Instructions—sudden emergency—swerving to avoid black dog—In a case remanded on other grounds, the trial court's modification of the pattern jury instruction on sudden emergency was unlikely to have confused the jury in a negligence action where defendant allegedly swerved his automobile to miss an animal and hit plaintiff, who was walking on the opposite side of the road. However, on remand the court was urged to take care that the sudden emergency instruction focuses on whether the driver was suddenly and unexpectedly confronted with imminent danger to himself or others. **Ligon v. Strickland, 132.**

Pedestrian struck by automobile—contributory negligence—The trial court erred by not submitting contributory negligence to the jury where there was evidence that plaintiff was walking along a road at night, intoxicated, and in dark clothes, and that he was struck in the road. **Ligon v. Strickland, 132.**

NEGLIGENCE

Failure to instruct—contributory negligence—specific contentions—The trial court did not err in a negligence case arising out of plaintiff's exposure to asbestos at work by failing to instruct the jury on contributory negligence and defendant's specific contentions, because: (1) although defendant contends plaintiff's history of smoking was a factor meriting a contributory negligence instruction, it is well established that smoking and mesothelioma are not related; and (2) considering the instructions as a whole, defendant's contentions were adequately given to the jury in substance. **Williams v. CSX Transp., Inc., 330.**

Motion for new trial—motion for directed verdict—motion for judgment notwithstanding verdict—The trial court did not err in a negligence case arising out of plaintiff's exposure to asbestos at work by denying defendant's post-trial motions for a new trial, directed verdict, and judgment notwithstanding the verdict. **Williams v. CSX Transp., Inc., 330.**

NUISANCE

Airport—failure to instruct on mitigation of damages—no evidence of resulting benefit—The trial court did not err in an airport nuisance case by refusing to instruct the jury on mitigation of damages, because there was no evidence that plaintiffs' property was enhanced in value due to its proximity to defendants' airport. **Broadbent v. Allison, 359.**

Airport—special instruction—The trial court's special airport nuisance instruction was not erroneous because, when read as a whole, it accurately instructed the jury on the relevant law. **Broadbent v. Allison, 359.**

Failure to charge jury and structure issue sheet to consider liability of each defendant individually—The trial court did not err in a nuisance case by failing to charge the jury and structure the issue sheet in such a way that the jury could consider the liability of each defendant individually. **Broadbent v. Allison, 359.**

NUISANCE—Continued

Motion for new trial—sufficiency of evidence—private nuisance—The trial court did not err in an airport nuisance case by denying defendants' motion for a new trial under N.C.G.S. § 1A-1, Rule 59(a)(7) based on alleged insufficient evidence of private nuisance. **Broadbent v. Allison, 359.**

Private—motion to dismiss—sufficiency of complaint—effect of prior judgment—The trial court erred by dismissing plaintiff's claim for private nuisance allegedly arising from noise at defendant's swim and tennis club, because: (1) the complaint is sufficient on its face to provide defendant with sufficient notice of the conduct on which the claim is based to enable defendant to respond and prepare for trial, and it stated enough to satisfy the substantive elements of a private nuisance claim against defendant; and (2) the verdict and award in a 1994 lawsuit was not explicitly for permanent damages, and thus plaintiffs' remedy is to recover in separate and successive actions for damages sustained to the time of the trial. **Evans v. Lochmere Recreation Club, Inc., 724.**

OBSTRUCTING JUSTICE

Giving false name—sufficiency of evidence—There was sufficient evidence that a juvenile resisted, delayed, and obstructed an officer where the juvenile initially gave a false name. Although the stop was unreasonable and invalid, the facts are distinguishable from the cases concerned with resisting illegal arrests. **In re J.L.B.M., 613.**

PLEADINGS

Amendment of answer—res judicata and estoppel added—no prejudice—The trial court did not abuse its discretion by permitting defendant to amend her answer to a marriage annulment action to include the defenses of estoppel, collateral estoppel, and res judicata. Allowance of the amendment did not prejudice plaintiff's ability to present evidence related to the additional defenses. **Pickard v. Pickard, 193.**

Conflict with foreign law—not raised—not considered—Defendant failed to raise properly the issue of whether English law should be applied in a child support case by not raising the issue in the pleadings or giving any other reasonable notice that an issue regarding foreign law existed. The mere fact that a foreign order was attached to one of defendant's motions does not provide written notice of a conflict between the laws of this state and those of a foreign jurisdiction, and the court did not err by failing to apply English law. **Ugochukwu v. Ugochukwu, 741.**

Counterclaims—denial of motion for leave to amend—The trial court did not abuse its discretion by denying defendant's motion for leave to amend his counterclaims because it was only after having been served plaintiff's responsive pleading and having notice of plaintiff's motion to dismiss that defendant moved orally to amend his pleadings at the hearing, and such an undue delay of time in making a motion to amend is a valid reason for denying such motion. **Bob Timberlake Collection, Inc. v. Edwards, 33.**

Denial of motion for leave to file amended complaint—failure to provide evidence to support motion—The trial court did not abuse its discretion in a breach of fiduciary duty, constructive fraud, actual fraud, unfair and deceptive

PLEADINGS—Continued

trade practices, negligent misrepresentation, and conversion/quantum meruit case by partially denying plaintiffs' motion for leave to file an amended complaint to add a claim for civil conspiracy, because: (1) plaintiffs' motion was filed seven months after the institution of their action and nine depositions had already been taken including those of the named individual defendants; and (2) plaintiffs sought to add the claim for civil conspiracy based on information that had been obtained in discovery, yet at the hearing on plaintiffs' motion to amend they presented no deposition transcripts or other documentary evidence other than the pleadings to support their motion. **Strickland v. Lawrence, 656.**

Sanctions—appellate rules violations—intent to harass or cause unnecessary delay or needless increase in cost of litigation—attorney fees—Defendant's motion to sanction plaintiff under N.C. R. App. P. 25 and 34 for violations of the rules of appellate procedure and her intent to harass or to cause unnecessary delay or needless increase in the cost of litigation is granted, and the case is remanded to the trial court for a determination of the reasonable amount of attorney fees incurred by defendant in responding to this appeal to be taxed personally to plaintiff along with the costs of this appeal. **Ritter v. Ritter, 181.**

Unequal treatment in immunity waiver decisions—sufficient—Plaintiffs' allegations about unequal treatment in waiver of immunity decisions by a school board amounted to more than conclusory, unwarranted deductions of fact or unreasonable inferences, complied with North Carolina's standard of notice pleading, and stated a claim for violation of their equal protection rights. **Ripellino v. N.C. School Bds. Ass'n, 443.**

POLICE OFFICERS

Negligence—public duty doctrine—special duty exception—The trial court did not err by denying defendants' motion to dismiss based on the public duty doctrine in a negligence case arising out of officers' negligence in failing to enforce domestic violence protective orders after they knew of repeated violations, failing to warn plaintiff and her daughter that they had not arrested the perpetrator, and failing to protect plaintiff and her daughter after officers knew the perpetrator had not been arrested because plaintiff's complaint reveals a special duty was created by virtue of a promise made by the officers to protect plaintiff and her children, the protection was not forthcoming since the officers failed to fulfill their promise to arrest the perpetrator, and plaintiff and her daughter's reliance on the promise of protection was causally related to the injury suffered. **Cockerham-Ellerbee v. Town of Jonesville, 372.**

POSSESSION OF STOLEN PROPERTY

Credit cards—duplicative judgments—The trial court erred by duplicating judgments for both larceny and possession of credit cards and an automobile. While a defendant may be charged with larceny, receiving, and possession of the same property, a defendant may be convicted for only one of those offenses. **State v. Scanlon, 410.**

Motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of possession of stolen property under N.C.G.S. § 14-71.1, because: (1) the evidence tended to show that stolen

POSSESSION OF STOLEN PROPERTY—Continued

goods were found throughout defendant's residence; and (2) the circumstantial evidence tended to show defendant knew or should have known the goods his girlfriend brought into his residence were stolen. **State v. Weakley, 642.**

PRISONS AND PRISONERS

Public duty doctrine—jail inspections—private duty—special relationship—The public duty doctrine did not bar tort claims relating to the deaths of four inmates and serious injury to another inmate in a fire at a county jail allegedly caused by negligent inspection of the jail by an employee of defendant N.C. Department of Health and Human Services (DHHS) and negligent training of the inspector by DHHS. **Multiple Claimants v. N.C. Dep't of Health & Human Servs., 278.**

RAPE

First-degree—short-form indictment—constitutional—The short-form indictment used to charge defendant with first-degree rape was constitutional. **State v. Upshur, 174.**

RELEASE

Insurance companies—summary judgment—The trial court did not err by granting summary judgment in favor of two insurance companies in a synthetic stucco case where the two companies had been discharged by a release. **Koch v. Bell, Lewis & Assocs., Inc., 736.**

ROBBERY

Threat to victim—evidence sufficient—There was sufficient evidence to support a conviction for the armed robbery of a store where an accomplice entered separately and began talking to the clerk, and defendant entered and threatened the accomplice with a knife to get the victim to open the cash drawer. The defendant was just across a counter when he brandished the knife, and the jury could have inferred that defendant posed a danger to the life of the victim. **State v. Corum, 150.**

SCHOOLS

§ 1983 action—school board a person—Eleventh Amendment—In a case of first impression, a local school board was held to be a "person" within the meaning of 42 U.S.C. § 1983. It is well settled that neither the State of North Carolina nor its respective agencies are "persons" within the meaning of § 1983 when the remedy is monetary damages, but whether school boards are local entities or part of the State is not clear from Supreme Court authority, the underlying structure of the school system, the selection of school board members, or the financing system. As for Eleventh Amendment considerations, there is no argument that any recovery would come from the State treasury, and a suit against a local school board that performs important but local functions and is its own corporate body will not hinder the State's integrity within the federal system. **Ripellino v. N.C. School Bds. Ass'n, 443.**

SCHOOLS—Continued

Traffic gate closing on car—automobile exclusion clause in insurance policy—not applicable—immunity waived—The automobile exclusion clause in a school board's insurance policy did not apply to a traffic control gate closing on plaintiffs' car, sovereign immunity was waived, and summary judgment should have been granted for plaintiffs rather than defendants. Although the injured plaintiff was traveling in a car, the gate malfunction would have occurred if she had been walking or riding a bicycle. **Ripellino v. N.C. School Bds. Ass'n, 443.**

SEARCH AND SEIZURE

Motion to suppress evidence—probable cause—plain view exception—The trial court did not err in a prosecution for possession of stolen property and possession of various narcotics by denying defendant's motion to suppress items found pursuant to the search of his residence, because: (1) a detective was lawfully inside defendant's premises to monitor the movements of a suspect who needed to return inside the house to get fully dressed when she observed a shower curtain belonging to a larceny victim; (2) the discovery of the shower curtain was inadvertent; (3) it was immediately apparent to the detective that the shower curtain constituted evidence of a crime when the curtain matched pictures she had seen provided by the victims of items taken from their bathroom; and (4) based on the detective's observation of the shower curtain, she had probable cause to believe defendant's residence contained stolen items entitling her to get a search warrant. **State v. Weakley, 642.**

Stop of juvenile—generalized suspicion—A stop leading to the detention of a juvenile was not justified, and the juvenile's motion to suppress evidence seized as a result of the stop should have been granted, where the officer relied on a report that there was a suspicious person at a gas station, that the juvenile matched the "Hispanic male" description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car. The officer had only a generalized suspicion of criminal behavior. **In re J.L.B.M., 613.**

SECURITIES

Fraud—insufficient allegations—Defendant failed to state a counterclaim for fraud under the North Carolina Securities Act in plaintiff's action for breach of a stock purchase agreement where defendant did not allege that the shares he purchased were securities under the Act, did not allege that plaintiff sold such a security by means of any untrue statement of a material fact or any omission to state a material fact other than a conclusory allegation that representatives of plaintiff provided him with false information, and did not allege that he did not know and in the exercise of reasonable care could not have known of any untruth or omission. **Bob Timberlake Collection, Inc. v. Edwards, 33.**

SENTENCING

Aggravating factor—not submitted to jury—no stipulation—Finding an aggravating factor (using a weapon hazardous to more than one person) without submitting it to the jury or a stipulation from defendant resulted in the remand of sentences for second-degree murder and discharging a weapon into occupied property. **State v. Durham, 239.**

SENTENCING—Continued

Aggravating factors—*Blakely* error—The trial court did not err in a double armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury case by increasing defendant's sentences beyond the prescribed statutory maximum based upon its own finding of aggravating factors that were not alleged in the indictments or found by the jury beyond a reasonable doubt, because: (1) in North Carolina there is no requirement that aggravating factors be alleged in an indictment; (2) the situations contemplated by *State v. Allen*, 359 N.C. 425 (2005), are not present in the instant case since defendant was indicted as of the certification date of the *Allen* opinion, his appeal is not now pending direct review, and his case was final; and (3) defendant did not appeal the trial court's acceptance of his *Alford* plea agreement, the finding of aggravating and mitigating factors by the trial court, nor his sentence of twenty-five years for each armed robbery case and five years for assault. **State v. Pender, 688.**

Aggravating factors—*Blakely* error—case final before effective date of rule—The trial court's imposition of an aggravated sentence upon defendant based upon an aggravating factor found by the trial court and not submitted to the jury did not entitle defendant to appropriate relief where his case was final as of 23 December 2003; *Blakely* errors are limited to cases that were not final as of 21 July 2005. **State v. Simpson, 719.**

Aggravating factors—*Blakely* error—crimes especially heinous, atrocious, or cruel—The trial court erred by sentencing defendant in the aggravated range for the assault with a deadly weapon inflicting serious injury charge based upon a finding that the crime was especially heinous, atrocious, or cruel, and defendant is entitled to a new sentencing hearing on this charge, because defendant did not stipulate to the factor nor was it found by a jury beyond a reasonable doubt. **State v. Upshur, 174.**

Aggravating factors—taking property of great monetary value—The trial court erred in a double armed robbery and felonious assault case by finding the aggravating factor that the offense involved the actual taking of property of great monetary value because the amounts of $1,300 and $700 in this case do not constitute great or extraordinary amounts. **State v. Pender, 688.**

Change in good time credits—disciplinary infractions—definition of sentence—There was no violation of state law in new rules for an inmate's loss of good time credits after disciplinary violations where the change in rules does not affect the sentence unless the prisoner chooses to commit disciplinary infractions. As used in the session laws, "sentence" refers to the time an inmate must serve as a result of his conviction. **Smith v. Beck, 757.**

Change in good time credits—loss for disciplinary reasons—not ex post facto—The application of new rules regarding the loss of good time credits by an inmate sentenced under the Fair Sentencing Act did not violate the ex post facto clauses of the United States and North Carolina constitutions. The amount of good time petitioner could earn did not change and was still governed under the old rules; the alteration was only to the amount of time which could be lost for various infractions. **Smith v. Beck, 757.**

Nonstatutory aggravating factor—great monetary loss—medical expenses—The trial court did not err in a double armed robbery and felonious assault case by finding the nonstatutory aggravating factor that the offense involved

SENTENCING—Continued

monetary loss of $29,837.29, because: (1) the victim's medical expenses were excessive and surpassed those normally incurred from an assault of this type; and (2) defense counsel stipulated to the amount of the victim's medical expenses when he did not object to the State's recitation of the $29,837.29 figure as the amount of the victim's medical bills. **State v. Pender, 688.**

Prior record level—prior driving while impaired convictions—The trial court did not err in a second-degree murder and assault with a deadly weapon inflicting serious injury case by using defendant's prior driving while impaired convictions in determining his prior record level and sentencing him as a Level II offender, because: (1) although defendant contends his sentence as a Level II offender violates the prohibition against double jeopardy, he failed to cite any supporting case authority; (2) defendant's prior convictions were not aggravating factors, but instead the trial court added points to defendant's prior record level under N.C.G.S. § 15A-1340.14; and (3) the parties do not cite any provisions of the Structured Sentencing Act, nor did the Court of Appeals find any, that prohibited a trial court from using the same prior convictions introduced by the State as evidence of malice during trial to increase defendant's prior record level at sentencing. **State v. Bauberger, 465.**

Within presumptive range—no statutory right to appeal—no findings of mitigating factors—A defendant sentenced within the presumptive range has no statutory right to appeal the sentence and this defendant did not file a petition for certiorari. Moreover, the principle that the court must find mitigating factors if a preponderance of the evidence supports them applies only when the trial court imposes a sentence outside the presumptive range. **State v. Brown, 72.**

SEXUAL OFFENSES

First-degree—failure to instruct on acting in concert or aiding and abetting—failure to show defendant personally employed or displayed dangerous or deadly weapon—The trial court erred by concluding that the evidence was sufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant committed first-degree sexual offense, and the case is remanded for entry of judgment against defendant for second-degree sexual offense, because: (1) the jury was instructed it could find defendant guilty of first-degree sexual offense only if he employed or displayed a dangerous or deadly weapon; (2) without an instruction on acting in concert or the theory of aiding and abetting, the evidence must support a finding that defendant personally employed or displayed a dangerous or deadly weapon in the commission of the sexual offense; (3) there was no evidence at trial that defendant ever, personally, employed or displayed a dangerous weapon during the time he was in the victim's apartment; (4) all the testimony at trial established that another man held the shotgun throughout the incident; and (5) the jury's verdict is recognized as a verdict of guilty of second-degree sexual offense. **State v. Roberts, 159.**

STATUTES OF LIMITATION AND REPOSE

Roofing work—statute of repose—warranty—pleading for monetary damages only—Plaintiff's action for monetary damages from a roofing job was barred by the statute of repose of N.C.G.S. § 1-50(a)(5)a because it was brought outside the six-year statutory period. Although plaintiff contended that work-

STATUTES OF LIMITATION AND REPOSE—Continued

manship on the job was under warranty, his complaint was for monetary damages only and was not for breach of warranty. **Whittaker v. Todd, 185.**

Statute of repose not an affirmative defense—pleading not required—The statute of repose in this case, N.C.G.S. § 1-50(a)(5)a, is not an affirmative defense. Defendant was not required to specially plead it and did not waive it by not raising it until the day of trial. **Whittaker v. Todd, 185.**

TAXATION

Allocation of multi-state corporate income—alternative calculation—Where the statute setting out the statutory formula for allocating multi-state corporate income to North Carolina was amended, the trial court did not err by finding that existing orders of the augmented Tax Review Board setting out an alternative calculation were independent of the amended statutory formula. **Philip Morris USA, Inc. v. Tolson, 509.**

Allocation of multi-state corporate income—multiple orders from augmented Tax Review Board—In an action involving the allocation of income to North Carolina from a multi-state corporation, there was no merit to the taxpayer's contentions that orders of the augmented Tax Review Board did not conflict and should both be effective. **Philip Morris USA, Inc. v. Tolson, 509.**

Allocation of multi-state corporate income—prior orders—subsequent statutory amendments—The trial court did not err by not reading prior orders of the augmented Taxpayer Review Board concerning the allocation of multi-state income to North Carolina in para material with subsequent statutory amendments. **Philip Morris USA, Inc. v. Tolson, 509.**

Installment notes with liens on North Carolina property—due process—Plaintiff has the substantial connections necessary for the State to legitimately levy taxes upon its business and the application of N.C.G.S. § 105-83 did not violate the Due Process Clause of the Fourteenth Amendment. The activity being taxed is not the transfer of promissory notes, but the business of dealing in installment paper for which liens are reserved upon personal property located in North Carolina. **Navistar Fin. Corp. v. Tolson, 217.**

Wholesale and retail financing—Commerce Clause—no violation—N.C.G.S. § 105-83 does not violate the Commerce Clause of the United States Constitution. A state tax will be sustained as constitutional so long as the tax is applied to an activity with a substantial nexus within the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. This statute meets those criteria. **Navistar Fin. Corp. v. Tolson, 217.**

Wholesale and retail financing—liens on property in North Carolina—There is no distinction in the statute imposing a tax on installment paper dealers, N.C.G.S. § 105-83, as to whether a business is of the wholesale, retail or hybrid variety, and the statute was applicable to a wholesale and retail business which engaged in the business of buying installment paper reserving liens on property located in North Carolina. **Navistar Fin. Corp. v. Tolson, 217.**

TERMINATION OF PARENTAL RIGHTS

Conclusion of law—best interests of child—The trial court did not err in a termination of parental rights case by its finding of fact sixteen (more properly viewed as a conclusion of law) that it was in the best interest of the child that respondent father's parental rights be terminated, because: (1) the court considered the minor child's tender age of six years, the fact the child had been placed in foster care for a year and a half, the child's adjustment to her placement, and the foster family's commitment to the child; and (2) the findings concerning the minor child combined with the court's findings concerning respondent's failure to complete the court ordered tasks of obtaining psychological evaluation and substance abuse assessment and completing anger management classes, respondent's failure to visit with the minor child on a consistent basis until approximately three weeks prior to the termination hearing, and respondent's homelessness and hungry status within two months of the termination hearing constitute findings sufficient to support the conclusion that it was in the child's best interest to terminate respondent's parental rights. **In re M.N.C., 114.**

Findings of fact—judicial notice of previous orders—The trial court did not err in a termination of parental rights case by taking judicial notice of earlier proceedings in the same cause, and it was not necessary for either party to offer the file into evidence. **In re M.N.C., 114.**

Incarcerated father—deposition denied—no prejudice—There was no prejudice in the denial of respondent's motion to be deposed in a termination of parental rights proceeding where respondent was incarcerated in Tennessee. The findings of fact from a prior child custody and equitable distribution proceeding were binding by collateral estoppel and respondent would thus be precluded from challenging the factual allegations made by the mother in this proceeding. The father's interest is outweighed by the absence of any indication that his deposition would have led to a different result. **In re K.D.L., 261.**

"Left" in outside care more than 12 months after "removal"—triggered only by court order—The legislature did not intend that any separation between a parent and child trigger the ground for termination of parental rights set forth in N.C.G.S. § 7B-1111(a)(2) (the child is "left" in placement outside the home for more than 12 months without progress toward correcting the condition which led to "the removal"). The statute refers only to circumstances where a court has entered an order requiring that a child be in foster care or other placement outside the home. **In re A.C.F., 520.**

More than 12 months in foster care—initial separation voluntary—The trial court's findings in a termination of parental rights proceeding did not support the conclusion that the child had been left in foster care or placement outside the home for twelve months as defined in N.C.G.S. § 7B-1111(2). The fact that there was a voluntary placement agreement in cooperation with a social services agency is not the equivalent of placing the child in foster care or placement outside the home by a court order. Prior uses of "remove" in other proceedings did not have the import associated with the legal ground set forth in N.C.G.S. § 7B-1111(a)(2). **In re A.C.F., 520.**

More than 12 months in foster care—measuring of time—A termination of parental rights on the basis of more than 12 months in foster care or other outside placement cannot be sustained where the "more than twelve months" threshold requirement did not expire before the motion or petition was filed. This is in

TERMINATION OF PARENTAL RIGHTS—Continued

contrast to the parent's reasonable progress, which is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights. **In re A.C.F., 520.**

Neglect—clear, cogent, and convincing evidence—The trial court did not abuse its discretion by terminating respondent father's parental rights, because: (1) the trial court's findings are supported by clear, cogent, and convincing evidence; and (2) the findings support the conclusion that neglect existed as a ground for termination. **In re M.N.C., 114.**

Order not timely reduced to writing—no prejudice—There was no prejudice in a termination of parental rights from the court's failure to reduce its order to writing within the statutory thirty-day time frame. **In re K.D.L., 261.**

TORT CLAIMS ACT

Appeal—standard of review—The standard of review for an appeal from the full Industrial Commission's decision under the Tort Claims Act is for errors of law under the same terms and conditions as in ordinary civil actions, and the findings are conclusive if there is any competent evidence to support them. **Pate v. N.C. Dep't of Transp., 530.**

Civil action not alleging negligence—no res judicata—The dismissal of a civil complaint which did not allege negligence did not bar a claim pursuant to the Tort Claims Act under res judicata. **Pate v. N.C. Dep't of Transp., 530.**

Interlocutory oral ruling—subject to change during hearing—no stay after appeal—An appeal from an interlocutory oral ruling that an Industrial Commission deputy commissioner could modify or reverse during the hearing did not stay further proceedings. **Pate v. N.C. Dep't of Transp., 530.**

Preservation of issues—assignment of error—distinction from condemnation—Defendant's failure to assign error meant that it did not preserve for appellate review the question of whether N.C.G.S. § 136-111 provides the sole remedy in an action arising from flooding caused by an undersized drainage pipe. Furthermore, N.C.G.S. § 136-111 addresses actions seeking damages for condemnation, while the Tort Claims Act governs negligence claims. **Pate v. N.C. Dep't of Transp., 530.**

Public duty doctrine—jail inspections—private duty—special relationship—The public duty doctrine did not bar tort claims relating to the deaths of four inmates and serious injury to another inmate in a fire at a county jail allegedly caused by negligent inspection of the jail by an employee of defendant N.C. Department of Health and Human Services (DHHS) and negligent training of the inspector by DHHS. **Multiple Claimants v. N.C. Dep't of Health & Human Servs., 278.**

TRUSTS

Breach of fiduciary duty—negligent management—mental incompetency—The trial court did not err by granting summary judgment in favor of defendant bank on plaintiff's claims for breach of fiduciary duty and negligent management of 1977 and 1981 trust accounts, because: (1) when properly requested, no

TRUSTS—Continued

provisions in the 1977 trust agreement afford defendant any discretion on withholding distributions from the 1977 trust to the trust beneficiary's checking account regardless of the beneficiary's alleged mental incompetency at the time of the request; (2) requests for money from the 1977 trust came from the beneficiary or from someone representing him; and (3) in distributing the funds from the 1977 trust to the beneficiary's account at his request, defendant performed the duties expressly required by the 1977 trust agreement. **Union v. Branch Banking & Tr. Co., 711.**

UNFAIR TRADE PRACTICES

Bare allegations—failure to forecast evidence of fraud—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' unfair and deceptive trade practices claim, because: (1) plaintiffs have not forecast any evidence other than the bare allegations in their complaint regarding their claim for actual fraud and cannot establish the required relationship of trust and confidence for their claim for constructive fraud; and (2) the claim for unfair and deceptive trade practices rests on the same forecast of evidence for their claims of fraud which have not been adequately supported. **Strickland v. Lawrence, 656.**

Insufficient allegations—Defendant failed to state a counterclaim for an unfair or deceptive trade practice in plaintiff's action for breach of a stock purchase agreement where defendant did not allege what conduct of plaintiff constituted an unfair and deceptive trade practice or that any specific conduct by plaintiff caused injury to defendant. If this counterclaim relates to plaintiff's alleged breach of the stock purchase agreement or alleged breach of a subsequent agreement that plaintiff would defer payment of the final installment due under the stock purchase agreement, defendant made no allegation of any substantial aggravating circumstances attending the breach of contract. **Bob Timberlake Collection, Inc. v. Edwards, 33.**

Manufactured housing—failure to perform repairs and other work—failure to respond to complaints—The trial court properly decided that defendant's violations of the regulations of the N.C. Manufactured Housing Board were sufficient to support a claim under N.C.G.S. § 75-1.1. The jury found that defendant failed to perform repairs, alterations, and/or additions completely and in a workmanlike manner, and repeatedly failed to respond promptly to consumer complaints and inquiries. **Walker v. Fleetwood Homes of N.C., Inc., 668.**

Purchase of mobile home by parent for child—claim by child—The trial court did not err by ruling that plaintiff Staten may maintain a claim for recovery pursuant to N.C.G.S. § 75-16 arising from her father's purchase of a mobile home for her. The conclusion that "any person" in the statute does not include Staten would leave her with no remedy, as she would not be able to recover as a buyer under Chapter 75 or under the bond required by N.C.G.S. § 143-143.12(c). **Walker v. Fleetwood Homes of N.C., Inc., 668.**

Third-party claim against insurance company—not recognized—North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices, and the trial court correctly dismissed plaintiffs' claims. **Koch v. Bell, Lewis & Assocs., Inc., 736.**

UNJUST ENRICHMENT

Mining permit—failure to make any reservation of rent or of any other interest in property in conveyance—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim for unjust enrichment even though plaintiffs contend the sale of the Groome property did not include the sale of plaintiffs' mining permit and that the Griffin defendants have used the permit reaping a substantial benefit for which plaintiffs have not been compensated, because: (1) while the sale of the property did not include the sale of the mining permit, plaintiffs did not make any reservation of rent or of any other interest in the property in their conveyance but instead expressly assigned their rights under the mining lease to defendant Viewmont Road Properties (Viewmont); (2) under the mining lease, only defendant Lawrence Sand and Gravel (LSG) had the right to conduct mining activities on the property to the exclusion of all others; and (3) following the sale of the property and plaintiffs' assignment of the mining lease, Viewmont enjoyed the exclusive right to receive compensation for mining activities conducted on the property by LSG even though plaintiffs retained ownership of the mining permit. **Strickland v. Lawrence, 656.**

WILLS

Caveat proceeding—failure to prosecute—The trial court erred by dismissing under N.C.G.S. § 1A-1, Rule 41(b) a caveat proceeding on the basis of failure to prosecute, because: (1) the caveator's failure to provide the notice to interested parties required by N.C.G.S. § 31-33 within the three-year limitations period was an insufficient basis to support the dismissal; and (2) nothing in the record indicates caveator attempted to thwart progress or implemented a delay tactic that would otherwise justify the trial court's dismissal under Rule 41(b). **In re Will of Kersey, 748.**

Caveat proceeding—statute of limitations—notice—Where, as here, a caveator enters a caveat to the probate of a will within three years after the application for the probate of such will and complies with the bond requirements of N.C.G.S. § 31-33, the proceeding has been properly filed within the limitations period of N.C.G.S. § 31-32. **In re Will of Kersey, 748.**

WITNESSES

Testimony—medical opinions—qualifications—causation—asbestos exposure—lay witness—The trial court did not abuse its discretion in a negligence case arising out of plaintiff's exposure to asbestos at work by admitting testimony about causation and exposure by permitting nonphysicians including a cell biologist and an epidemiologist to provide expert medical opinions as to causation, and by allowing lay witnesses' testimony regarding asbestos exposure. **Williams v. CSX Transp., Inc., 330.**

WORKERS' COMPENSATION

Additional medical expenses—unauthorized medical treatment—notice—reasonable time—The Industrial Commission did not err in a workers' compensation case by ordering defendant employer to pay plaintiff employee's additional medical expenses for alleged unauthorized medical treatment because plaintiff's filing of a claim form which referred to the statute authorizing the Com-

WORKERS' COMPENSATION—Continued

mission to approve an employee's request for medical treatment of her own choosing constituted a request for approval of unauthorized medical treatment; plaintiff's request for approval of treatment by physicians of her own choosing was filed within a reasonable time after plaintiff received such treatment; and a form filed by plaintiff constituted a written request for additional medical treatment within two years after defendant employer's last payment of medical compensation even though the correct form was not used. **Fontenot v. Ammons Springmoor Assocs., 93.**

Disability—burden of proof—carried—The Industrial Commission did not err by finding and concluding that an EMT captain injured at a morale building event had met her burden of proving disability. There was testimony to a reasonable degree of medical certainty that plaintiff's pain was related to her accident and that her inability to work as a waitress (a second job) was related to her accident. **Frost v. Salter Path Fire & Rescue, 482.**

Disability—constructive refusal of employment—not found—Although termination of employment for misconduct may constitute constructive refusal of employment, there was no error here in the opposite conclusion. The Commission, as sole judge of credibility, did not find defendant's explanation of the termination credible and did find that plaintiff's termination was related to his work restrictions. **Silva v. Lowe's Home Improvement, 229.**

Disability—continuation—insufficient proof—The Industrial Commission did not err by concluding that plaintiff's entitlement to temporary total disability ended on 1 July 2002. The *Watkins* presumption of continuing disability did not apply and plaintiff did not prove the extent to which she was unable to work after she was released by her doctor for restricted sedentary work. **Frost v. Salter Path Fire & Rescue, 482.**

Disability—findings not sufficient for review—There was insufficient evidence to allow judicial review of Industrial Commission findings about whether plaintiff had suffered a disability where there were no findings about medical evidence, evidence of reasonable efforts to find employment, or evidence of futility in seeking employment. Defendant's admission of compensability did not relieve plaintiff of his burden of proving the existence and extent of his disability, nor did it relieve the Commission of its duty to make specific findings. **Silva v. Lowe's Home Improvement, 229.**

Disability—reason for termination—There was evidence in a workers' compensation case that plaintiff sought a meeting with his manager to discuss his work restrictions, a meeting which became heated and was followed by his termination. The Commission weighed the reasons for the termination and did not err by finding that plaintiff was terminated for the stated reason of being insubordinate without acknowledging evidence that plaintiff told his manager to "shut up." **Silva v. Lowe's Home Improvement, 229.**

Disability—termination—purpose of meeting—There was no error in a workers' compensation case in the Industrial Commission finding that plaintiff's manager planned to discipline plaintiff at a meeting at which she had requested a witness, although there was testimony that the additional person was requested because plaintiff was agitated. Evidence tending to support a plaintiff's claim is to be viewed in the light most favorable to plaintiff. **Silva v. Lowe's Home Improvement, 229.**

WORKERS' COMPENSATION—Continued

Disability—termination—work restrictions—findings—The findings supported the Industrial Commission's determination in a workers' compensation case that plaintiff's termination was directly related to his work restrictions rather than insubordination for which any nondisabled employee would have been terminated. The Commission found testimony by defendant's witnesses to be less credible than plaintiff's testimony; moreover, defendants did not present evidence from the district manager who told plaintiff the reason for his termination. **Silva v. Lowe's Home Improvement, 229.**

Disc herniation—causation—accident at work—medical expert—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee's disc herniation was causally related to her 29 March 1999 accident at work because four doctors provided competent medical evidence that tended to link plaintiff's herniated disc to her 29 March 1999 accident at work. **Fontenot v. Ammons Springmoor Assocs., 93.**

Expert testimony—causation—The Industrial Commission did not err in a workers' compensation case by concluding that the medical evidence established a causal connection between plaintiff's shoulder injury on 3 January 1996 and his cervical spine condition based on a doctor's testimony stating he believed it was likely, because: (1) our Supreme Court has found expert testimony that an accident likely caused a subsequent injury to be competent evidence to support a finding of causation; (2) although other medical experts testified plaintiff's injury could or might have been the result of his workplace accident, where the evidence is conflicting, the Commission's findings of fact are conclusive on appeal; and (3) the evidence tending to support plaintiff's claim is viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence. **Avery v. Phelps Chevrolet, 347.**

Expert testimony—findings of fact—consideration—credibility—relevancy—The Industrial Commission did not err in a workers' compensation case by allegedly failing to make any findings of fact with regard to the consideration, credibility, and relevancy of the testimony of a board certified orthopedist, because: (1) the extensive findings of fact regarding the orthopedist's evaluations of plaintiff show the Commission did consider and evaluate the evidence presented by the orthopedist; and (2) as long as it is clear from the record that the Commission did consider conflicting expert testimony, the Court of Appeals will not question its acceptance of one theory over another. **Avery v. Phelps Chevrolet, 347.**

Failure to incorporate statute of limitations into award—Standing alone, the failure of the Industrial Commission in a workers' compensation case to state that its award is subject to the statute of limitations under N.C.G.S. § 97-25.1 does not warrant remanding the case to the Commission. However, given that the case is already being remanded for a different issue, the Court of Appeals also remands this case to the Commission to incorporate the statutory limitations into its award. **Silva v. Lowe's Home Improvement, 229.**

Findings of fact—failure to inform initial treating physicians of injury—The Industrial Commission did not err in a workers' compensation case by failing to make any findings of fact with regard to the consideration, credibility and relevancy of plaintiff's failure to inform his initial treating physicians of his alleged cervical spine injury, because: (1) although plaintiff failed to complain of

WORKERS' COMPENSATION—Continued

neck pain between 3 January 1996 and 20 March 1996, plaintiff did make continuous complaints of severe and persistent shoulder pain; (2) two doctors testified that pain medication and the rotator cuff tear in plaintiff's shoulder might have masked the symptoms of plaintiff's neck injury during that period of time, and another doctor testified that shoulder and neck symptoms overlap quite a bit; (3) all of plaintiff's treating physicians testified plaintiff's neck pain could have been or was likely caused by his 3 January 1996 accident; and (4) the Commission did consider plaintiff's failure to complain specifically of neck pain between January and March 1996, yet still determined the January accident likely caused plaintiff's neck injury. **Avery v. Phelps Chevrolet, 347.**

Injury at morale boosting event—compensable—There was competent evidence to support the conclusion that a morale boosting event was paid for by the Town (although not from its operating budget), and the Industrial Commission did not err by finding that an EMT captain sustained a compensable injury arising from her employment where she was injured at the event. **Frost v. Salter Path Fire & Rescue, 482.**

Lifting restrictions—accommodations—Although there was conflicting evidence in a workers' compensation case about defendant's accommodation of plaintiff's lifting restrictions, there was competent evidence to support the Industrial Commission's finding that the restrictions were not accommodated. The Commission is the sole judge of the weight and credibility of the evidence. **Silva v. Lowe's Home Improvement, 229.**

Morale boosting event—benefit to employer—employee urged to attend—In a workers' compensation case brought by an EMT captain injured at a morale boosting event, there was competent evidence supporting the finding that the Town received a benefit and that EMT volunteers were urged to attend, including plaintiff's undisputed testimony that her Chief wanted her to attend. **Frost v. Salter Path Fire & Rescue, 482.**

Morale boosting event—*Chilton* factors—In a workers' compensation case brought by an EMT captain injured at a morale boosting event, there were findings supporting the presence of at least four, if not all six, of the factors to be considered in awarding workers' compensation from a recreational event. There is no requirement that all six questions be answered affirmatively. **Frost v. Salter Path Fire & Rescue, 482.**

Potential future disability—diminished earning capacity—The Industrial Commission erred in a workers' compensation case by awarding compensation for potential future disability, and this portion of the Commission's award is vacated and remanded for entry of a corrected order where plaintiff was working with a new employer and was earning significantly higher wages than she had earned while working for defendant employer. **Fontenot v. Ammons Springmoor Assocs., 93.**

ZONING

Development within floodway—permit not improperly allowed—Plaintiffs did not show that the Board of Adjustment acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law by concluding that defendant's street and utility development within a FEMA floodway did not constitute an impermissible encroachment. **Woodlief v. Mecklenburg Cty., 205.**

ZONING—Continued

Floodway development—application to proper entity—Defendants applied to the proper entity to obtain a development permit in an area subject to flooding when it applied to the Floodplain Administrator for Storm Water rather than directly to the Board of Adjustment. The Board of Adjustment did in fact conclude that the development was in accord with the applicable ordinance and approved the issuance of the permit. **Woodlief v. Mecklenburg Cty., 205.**

Moratorium and later permanent ban on asphalt plants—summary judgment—genuine issues of material fact—public purpose—equal protection—arbitrary and capricious standard—The trial court erred in a zoning case by granting summary judgment in favor of defendant town after the town repeatedly failed to act on plaintiff's application for site plan approval to construct an asphalt plant within the town limits, and defendant issued a moratorium and later a permanent ban on asphalt plants within the town and its extraterritorial zoning jurisdiction, because genuine issues of material fact existed as to: (1) whether the public purpose defendant town sought to accomplish by a total ban on asphalt plants is legitimate; and (2) whether defendant's decision to place a total permanent ban on manufacturing and processing facilities involving petroleum products within all areas located in the city limits and its extraterritorial zoning jurisdiction denied equal protection and was arbitrary and capricious. **Robins v. Town of Hillsborough, 1.**

Moratorium and subsequent amendment to ordinance—site application pending—asphalt plant—The trial court erred by granting summary judgment in favor of defendant town based on the town's moratorium and subsequent amendment to the pertinent zoning ordinance while plaintiff's application for site plan approval with defendant to construct an asphalt plant within the town limits was pending, and the case is reversed and remanded, because: (1) plaintiff was entitled to rely upon the language of, and have his application considered under, the zoning ordinance in effect at the time he applied for the permit; and (2) to hold otherwise would allow compliance with regulations and permitting to become a moving target to ever changing revisions or amendments. **Robins v. Town of Hillsborough, 1.**

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